FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

July 14, 2003

TWENTYMILE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
v.	:	Docket No. WEST 2000-480-R
	:	Order No. 7618153; 6/16/00
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Foidel Creek Mine
ADMINISTRATION (MSHA),	:	Mine ID 05-0386
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-131
Petitioner	:	A. C. No. 05-03835-03691
v.	:	
	:	Foidel Creek Mine
TWENTYMINE COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: R. Henry Moore, Esq., Buchanan Ingersoll, Pittsburgh, Pennsylvania, for Contestant/Respondent;
Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Barbour

These contest and civil penalty proceedings arise under Sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815, 820 ("Mine Act" or "Act"). They involve the validity of a June 16, 2000, order of withdrawal issued to Twentymile Coal Company ("Twentymile") and the existence of an alleged violation of a mandatory training standard cited in the order. The order was issued under section 104(g)(1) of the Act (30 U.S.C. § 814(g)(1)) in conjunction with an investigation by the Secretary's Federal Mine Safety and Health Administration ("MSHA") of an accident that seriously injured one of Twentymile's miners.[1] The miner fell from a ladder providing access to an underground rock chute and was

[1] The inspector wrote: "The [r]ock [c]hute [is] new to . . . [the] mine and the . . . miners . . . had little, if any, training pertaining to . . . the . . . chute" (Order No. 7618153).

struck by falling rocks escaping the chute. As a result of the investigation, an MSHA inspector found that miners working on the rock chute had not received proper training. The inspector found the miners' lack of training was a violation of 30 C.F.R. § 48.7(c), a mandatory standard requiring miners assigned certain new tasks to be trained in the safety aspects and procedures of the tasks before beginning work.[2] The inspector also found the violation was a significant and substantial contribution to a mine safety hazard ("S&S").

Twentymine contested the order's validity, the alleged violation and the inspector's S&S finding, asserting, among other things, that the order did not conform to the requirements of the Act, that no violation of section 48.7(c) occurred, or alternatively, that the violation was not reasonably likely to contribute to an injury.

On November 9, 2001, the Secretary issued a proposal to assess the company a $6,000.00 penalty for the violation. Twentymile contested the proposal, and in January 2002, the Secretary

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Fn. 1 (continued)

Section 104(g)(1) states in pertinent part:

> If upon an inspection or investigation pursuant to section 103 of this Act . . . [an inspector] . . . find[s] employed at a coal . . . mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the . . . [inspector] shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal . . . mine, and prohibited from entering such mine until an . . . [inspector] determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. §814(g)(1).

Section 103, 30 U.S.C. § 813, requires "frequent inspections and investigations of mines" by inspectors. Section 115, 30 U.S.C. § 825, authorizes the Secretary to promulgate regulations implementing the Act's training requirements.

[2] The standard states:

> Miners assigned a new task not covered in paragraph (a) of this section shall be instructed in the safety and health aspects and safe work procedures of the task, prior to performing such tasks.

30 U.S.C. § 48.7(c).

petitioned the Commission for the assessment of the proposed penalty.[3] The company responded, again denying the existence of a violation and challenging the inspector's S&S finding. The company further contended the penalty petition was invalid because it was late-filed.

The proceedings were assigned to Commission Administrative Law Judge August Cetti. Following extensive pretrial submissions, the matters were heard by the judge in Steamboat Springs, Colorado. After the hearing, the parties filed post hearing briefs. Prior to rendering a decision, Judge Cetti retired from federal service. The matter was reassigned to me, and the parties agreed that I should issue a decision based upon the existing record.

THE ISSUES

The issues are whether the order is valid, whether the company violated section 48.7(c), whether the violation was S&S, the proper amount of any civil penalty that must be assessed, and whether the Secretary's delay in filing the penalty petition warrants dismissal of the penalty proceeding.

THE FACTS

The Foidel Creek Mine is a large, underground bituminous coal mine located in Routt County, Colorado. The mine consists of two developing sections and one retreat longwall section. Approximately 300 employees work at the mine, which produces approximately 8.6 million tons of coal per year (Tr. 18, 81; Gov. Ex. 5 at 3). The mine has a low, nonfatal, lost time accident rate (Tr. 81).

The accident that lead to the proceedings occurred after a newly installed rock chute jammed and miners were assigned to unplug it. The chute connects upper and lower levels of the mine. Edwin Brady, the mine's conveyance manager who is responsible for the design, installation, operation and maintenance of the conveyor system, explained that due to the mine's geology, there are times when rock is mined along with coal. The company does not want to mingle the coal extracted elsewhere in the mine with the coal and rock mixture. The company, therefore, diverts the mixed material to the chute, which channels the mixture from an upper level of the mine to a lower level. The material falls through the rock chute and passes onto a separate conveyor system at the bottom of the chute. From there it is transported out of the mine and dumped in a separate pile. Before the rock chute was installed, the mixed material was transferred out of the mine on a series of four conveyor belts. Installation of the rock chute allows a much more efficient transfer of the material.

[3] The certificate of service states that the petition for assessment was served on Twentymile on January 18, 2001. The year date clearly is a typographical error.

The rock chute is square in shape, measuring approximately 5 feet by 5 feet. It is located inside a circular vertical shaft. There is a belt at the top of the chute that dumps material into a hopper. The conveyor belt has a gate positioned over the chute. When the gate is engaged, the material is diverted into the hopper and then into the chute. Once in the chute, the material falls about 45 or 50 feet to the lower level (Tr. 20). At the bottom of the chute there is a slanted chute (the "rock box") that directs the fallen material to the receiving conveyor belt (Tr. 20, 159–162).

Inside the chute are two devices that activate signals if the chute becomes plugged. One device is at the top and one is at the bottom. Also inside are internal baffles that slow the material's fall so that it does not damage the rock box and/or the receiving belt (Tr. 160). The chute can transfer up to 5,500 tons of material per hour and as much as 20,000 tons per shift (Tr. 196).

A ladder extends vertically along the side of the chute from the top to the bottom of the shaft. Four landings accessed by the ladder are spaced at equal intervals along the side of the chute.[4] At each landing there is an observation door that can be opened to observe or gain entrance to the rock chute's interior (Tr. 21).

According to Brady, the doors are "[m]ainly for inspection" and for getting into the chute when its wear liner is replaced (Tr. 163). The doors are secured by external latches (Tr. 164; see Twentymile Exs. 4 and 5).[5] The latches are held in place with eye bolts, which must be loosened to free the latches.

The chute was first used on May 26, 2000, and was operated without incident for several days thereafter (Tr. 169). However, on June 6, toward the end of the afternoon shift, as a rock mixture was being transferred from the upper to the lower level, the chute clogged and the conveyor belt feeding the chute stopped (Tr. 43, 70). The conveyor is designed to stop automatically if materials no longer can move through the chute.

Brady thought the shut down was due to an overloaded conveyor motor. Brady walked toward the motor. As he approached, he met two electricians who told him the motor was fine, but that the chute was clogged. (Tr. 166, 186). Brady traveled to the top of the chute. He climbed onto the ladder and proceeded down to the landing closest to the top. He loosened the eye bolt on the latch, lifted the latch and opened the access door. He saw jammed rock. He described the rock as "pretty much tight up against" the door (Tr. 168).[6] He closed the door. He secured the latch by tightening the eye bolt (Tr. 167). He climbed down to the next landing.

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[4] The ladder also allows quick transit from one mine level to another (Tr. 185-186).

[5] After the accident, the company added chains to the doors to further secure them (Tr. 164).

[6] Brady stated that when a door to the chute is opened, the door swings outward toward the person opening it. When this happens material can spill onto the platform. To avoid the spilling material, a person must stand back and behind the door (Tr. 187-188).

He loosened the eye bolt, lifted the latch and opened the access door. There was more rock. He closed the door and secured the latch. As he moved down to the other two landings he found that the jam extended all the way to the bottom of the chute. Brady described the jammed rock as "mostly bigger stuff . . . [with] smaller stuff mixed in" (Tr. 168).

When Brady reached the bottom of the chute he met beltmen Craig Bricker and Rick Fadely. Both men were members of the production crew. Brady instructed Fadely to go up on the lowest landing, to open the access door and to try loosening the material by prying it with a steel bar (Tr. 169-171). Brady, who had unplugged other chutes at the mine, explained that to loosen a plug "[y]ou have to start at the lowest point" (Tr. 171).[7]

Fadely did as instructed but could not free the material (Tr. 172). Brady then suggested the men use water. He explained that some material can only be unstuck after it becomes "soupy" (Tr. 172). Bricker and Brady went to get a hose.

In the meantime, around 4:10 p.m., Kevin Olson the acting shift supervisor, also became aware the chute was clogged. Olson assigned Matthew Winey, the production crew foreman, to go to the bottom of the chute to get it unplugged, since mining could not take place until the problem was fixed (Tr. 26, 43, 213-214, 224). Olsen did not tell Winey how to do the job (Tr. 224).

Winey passed on the order to his crew, and the men traveled to the bottom of the chute where they arrived at different times. When Winey got there, Bricher and Fadely were there helping Brady connect the hose, which was in sections (Tr. 173). Once the hose was connected, Fadely and Winey climbed up on the lowest landing (Tr. 173-174, 215). The hose was handed to Fadely, but Winey took it from him and started to spray the stuck material. Fadely took the hose back and showed Winey how to apply the water so it did not splash back on the men (Tr. 216). Meanwhile, Brady began to hit at the bottom of the chute with a hammer (Tr. 82-83). After about 5 minutes of applying water and hitting the bottom of the chute, the material started to move.

Kyle Webb was a member of Winey's crew. At the time of the accident, he was 26 years old, and he had more than four years of mining experience. Webb arrived at the bottom of the rock chute with some of the other members of Winey's crew. At some point, either before or after Winey started to spray the material, Webb climbed the ladder past the men (Tr. 220). Winey did not ask Webb where he was going. Winey stated that he "[j]ust figured . . . [Webb]

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[7] Brady testified that he had previously unplugged many surface chutes. He stated that clogged chutes are a "recurring problem" at the mine because when a fault is driven through, wet, sticky material is mined and transported, and the wet material has a tendency to stick in the chutes (Tr. 190). Brady could not recall any company standard procedure for unclogging stuck chutes, even though they became clogged every four, five or six months (Tr. 190-191).

was . . . looking around" (Id.). Neither Winey nor Fadely tried to stop Webb, and Webb continued up the ladder (Tr. 226).

It is not clear why Webb chose to climb (Tr. 49, 85). No one instructed him to do so (See, e.g., Tr. 201). In fact, in Brady's opinion, there was no need for anyone to go up the ladder, since there was nothing to do above the access door where the men were working (Tr. 203).[8]

At almost the same time as the rock started to move in the chute, Webb fell from above. In addition to Webb falling, rock started to fall around the ladder, between the chute and the shaft (Tr. 175). Later it was learned that the top access door had opened.[9] The material spilled out of the open door and off the platform. The rock tumbled down the chute after Webb (Tr. 49). Webb hit the bottom landing, and rock fell on top of him.

Brady heard miners yelling. He looked around and saw Webb lying injured (Tr. 176). At first Brady thought the injured person was either Fadely or Winey. However, both men had taken cover under the landing and were safe (Tr. 192). An electrician who was working at the top of the chute also heard the yelling. He climbed down the ladder and closed the open access door. The material stopped falling, and efforts to aid Webb commenced (Tr. 176).

R. Lincoln Derick, the mine's technical safety manager, was called at home and told of the accident. He immediately contacted MSHA Inspector Philip Gibson to report it (Tr. 259). Then, Derek went to the mine where he made sure that Webb was air-lifted to a hospital (Tr. 160).[10]

Gibson also went to the mine. He arrived around 6:30 p.m. He met with Michael Ludlow, the mine manager, Diana Ponikvar from the mine's safety department and Gary Sigman, of the Routt County Sheriff's office (Tr. 19). Sigman already had collected written statements from those with first-hand knowledge of the accident and of the conditions surrounding it. Gibson acquired copies of the statements (Tr. 19-20).

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[8] Robert Breland, MSHA's Western Regional Manager for Educational Field Services, who assisted in the accident investigation, was of the opinion that Webb "probably [didn't] know himself" what he was doing (Tr. 140).

[9] Winey speculated that Brady might not have sufficiently secured the latch after closing the door or that the door might have opened on its own due to a design flaw (Tr. 234-236). There also was speculation that Webb might have opened it, but no one knew for sure (Tr. 140, 49).

[10] Webb suffered significant head injuries (Tr. 83, 115; Gov. Ex. 11). First, Webb was treated in an intensive care unit. Later, he was taken to a rehabilitation hospital in Denver where he required extensive rehabilitation therapy (Tr. 260-261).

Gibson proceeded underground with Ludow, Ponikvar, Sigman, and others (Tr. 20). They went to the top of the chute (Tr. 51). Gibson noticed rocks extending along the belt near the hopper. The rocks ranged in size from one inch to eight inches in diameter (Tr. 23). Gibson and the others then traveled to the bottom of the chute. At the lower conveyor belt, Gibson noticed more loose rock and dirt (Tr. 23). Gibson and Sigman proceeded up the ladder to look more closely at the chute and the landings. Gibson could not recall if he and Sigman went all the way to the top (Tr. 23, 51). As a result of what he found, Gibson issued an order to Twentymile requiring it to obtain MSHA's approval before resuming normal operations. Shortly thereafter, Gibson left the mine.

Gibson returned the next morning and met with Derick and other company officials. Officer Sigman again was present (Tr. 25). According to Gibson the group "talked about the chute being plugged [,] . . . where various folks were and how many were there[,] . . . where . . . [Webb] may have been [, and] . . . the debris that had come from the open . . . door" (Tr. 25-26).

In the meantime, Twentymile, in compliance with Part 50 of the Secretary's regulations, which requires an operator to notify MSHA of an accident and to investigate it (30 C.F.R.§ 50.1), completed and filed an investigation report form with MSHA (Gov. Ex. 11; Tr. 116). Although, the form stated that the "task being [p]erformed at [the] time of [the i]ncident" was "cleaning plugged chute" Twentymile did not complete the line where it was asked to state whether the person involved in the accident was experienced in the task and whether the person had been task trained (Gov. Ex. 11; Tr. 115).

On June 8, the day after Twentymile sent the form to MSHA, Gibson returned with other MSHA officials (Tr. 26-27). The MSHA party and company personnel measured the accident site and company officials photographed it (Tr. 27, 48).[11] On June 9, Gibson and other MSHA officials were back at the mine (Tr. 28). They and company personnel discussed what could be done to lessen the hazards that the accident evidenced.

On June 13, Gibson returned, accompanied by MSHA Inspector Ed Vetter. Gibson and Vetter drew up a list of mine personnel to interview. On June 14, they interviewed Brady (Tr. 31). On June 15, they interviewed Fadely, Winey and two other miners on Brady's crew (Tr. 32). The inspectors also reviewed the company's training records. As a result of the investigation, the interviews, and the review, Gibson concluded the company had violated section 48.7(c), and he issued Order No. 7618153 (Tr.39).

Gibson "did not believe . . . the miners who . . . participated in the unclogging or the attempt to unclog the chute had received the task training . . . they . . . required" (Tr. 39). In Gibson's view the miners who needed training were Brady, as well as Winey, Fadely, Webb,

[11] Seven of the photographs were entered into evidence (Gov. Ex. 3).

Bricker, and another member of Winey's crew, Eric Hough. In fact, Gibson believed that all of Winey's crew who were sent to help unplug the rock chute should have been trained (Tr. 59-65).

Gibson noted that there were other chutes (transfer chutes) that were a part of the conveyor belt system and that the other chutes previously had clogged. Indeed, Winey testified that the other chutes clogged "pretty regularly" (Tr. 222-223). Miners, including members of Winey's crew, had been assigned to unplug the other chutes (Tr. 67, 222-223). Gibson acknowledged, however, that the transfer chutes were much smaller (three to four feet high and two to three feet across) and most of them were located on the surface. Therefore, while the skills acquired in unplugging transfer chutes would to some extent be useful in unplugging the rock chute, the miners unplugging the rock chute still needed task training for the job (Tr. 67).

Gibson found the alleged violation to be S&S because "if . . . [persons] were struck by that rock material [, they] could . . . be injured [seriously,]" and "it was reasonably likely that a person could be injured and that [the] injury would be severe" (Tr. 42). He also was concerned that miners could be injured by falling off of the ladder (Id.). In his opinion, miners on the ladder and landings "[c]hecking out the doors" are exposed to falls and slips if they are not trained (Tr. 43, 44).[12]

One month after the accident, Gibson and three other MSHA employees finished an accident report which they submitted to William Denning. Denny is the staff assistant to the MSHA district manager. He also is the MSHA district accident investigation coordinator (Tr. 75). After reviewing the report, Denning agreed with Gibson that there had been a violation of section 48.7(c). Denning believed that crew members sent to unplug the chute should have received task training because, "[t]hey could be expected to work on this rock chute any time it would plug up or . . . need maintenance" (Tr. 86) . Denning added, "It's pretty obvious they put the four doors in there so they would have access to that chute in order to keep it maintained and keep the material flowing properly through that chute" (Tr. 86).

Denning acknowledged that Webb went up the ladder on his own, but Webb "was assigned to help unplug the chute because he worked for . . . Winey" and Webb, like the other members of Winey's crew, should have been trained (Tr. 94).[13]

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[12] After the issuance of the order, the company took several steps to remedy Gibson's concerns. The landings were reconfigured by offsetting them. This limited the length any material or person could fall (Tr. 37; See Gov. Ex. 3 at 6). The company also put gratings over the doors and, as previously noted, installed chains on the doors to better secure them from opening all the way (Tr. 55-56). Finally, the company adopted safe work procedures for work on and around the chute and instructed miners in the procedures (Tr. 45; Gov. Ex. 4).

[13] Not surprisingly, Denning's opinion was disputed by Winey, who maintained that unplugging the rock chute is not a part of his crew's regularly assigned duties, and noted that he and his crew had not unplugged the chute prior to or since the accident (Tr. 219, 242).

Breland also reviewed the report (Tr. 105). He agreed with Gibson that the company violated section 48.7(c). The individuals assigned the task of unplugging the chute were not given "any kind of training relating to . . .[the] . . . chute" (Tr. 106).[14] To Breland, it was "inconceivable that . . . [the company] would allow people in the area [of the chute] without giving them some instructions" (Tr. 132-133; See also Tr. 146-147).

Brady, on the other hand, believed that the purpose of task training was to "familiarize people with routine jobs" and that unplugging the rock chute on June 6 was not "routine" (Tr. 194). Derick, who was responsible for the supervision of all Part 48 training at the mine, agreed with Brady (Tr. 246). Derick stated, "the definition of [']task['] in [P]art 48 is very clear[,] . . . it is a job that is done on a routine basis as part of the normal job duty" (Tr.272-271). Unplugging the chute was not thought to come within the definition, because there was nothing routine or normal about the job (Tr. 272-273). The company had "no anticipation [the] chute would plug" because the chute was "designed to avoid" clogging (Tr. 271-272). Derick also explained that the plug was caused by the fact that a large amount of rock from the roof was taken down and the material sat "quite a bit longer than it normally would." The only place to store the material was the mine floor, where the material became damp and sticky (Tr. 277).

THE VALIDITY OF ORDER NO. 761853

Twentymile challenged the validity of the Section 104(g)(1) order by arguing it was impermissibly vague in identifying those who needed training and in describing the task for which training was needed (Tr. 13-14). At the hearing, counsel for the Secretary amended the order to include the names of six persons who lacked the required training (Tr. 71). Counsel for Twentymile did not object to the amendment but reserved his right to continue to challenge the validity of the order, maintaining that it still was not sufficiently specific in identifying the task requiring training (Tr. 71; Twentymile Br. at 16, n.10). The Secretary countered that the order was valid as written and amended (Sec. Br. at 6-8).

The requirement for specificity in a section 104(g) order is in general the same as that for a section 104(a) citation. 30 U.S.C. § 814(a). The order must allow the operator to ascertain the conditions that require correction and prepare adequately for a hearing. See, Cyprus Tonopah Mining Corp., 15 FMSHRC 367, 379 (March 1993). Section 104(g) states that if an inspector "find[s] employed at a mine a miner who has not received the requisite safety training . . .the . . . [inspector] shall issue an order . . . which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal . . . mine."

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[14] The Secretary offered into evidence the available Forms 5000-23 of Kyle Webb and other miners who were involved in unplugging the chute (Gov. Ex. 8). The forms are the training records MSHA requires an operator to fill out upon completion of miners' training (See, 30 C.F.R. § 48.9). Breland noted that training for unplugging the rock chute was not mentioned on the forms (Tr. 125, 128).

30 U.S.C. § 814(g). As initially written, the order applied to "[p]ersonnel . . . who had reason to work from or travel on the ladders and landings of the 'Rock Chute'. " Twentymile, not the inspector, controlled work assignments at the mine. Presumably, the company knew whom it would assign "to work from or travel on the ladders and landings." Of course, listing specific names of such persons would have been permissible, and might even have been preferable, but a class description also was permissible because of the operator's presumed knowledge. Therefore, I conclude the order as originally written was not deficient in identifying those to whom it applied.

Even had it lacked sufficient specificity, the flaw was corrected when the order was amended without objection, to include the names of those who were not given the requisite task training. While Twentymile questioned inclusion of supervisors Winey and Brady in the group, the Secretary's Program Policy Manual ("PPM") makes clear that "if non-supervisory work is performed [by supervisors], the appropriate training must have been completed" (III PPM 48.2(a)(1)/48.22(a)(1) at 13 (1990)). Both Brady and Winey worked to unplug the chute.

Regarding the task for which training was required, it should be remembered that the order was issued in the context of the accident investigation. Everyone at the mine knew the accident occurred during Twentymile's attempts to unplug the rock chute. The order described the subject task by describing what the subject miners were doing: "These persons entered the area to work at unplugging the chute before they had received safety training." There was no doubt as to the task for which training was required.

Finally, the record is devoid of evidence that the wording of the order in any way hindered Twentymile in its ability to present a cogent case.

For these reasons, I conclude that the order is valid as written, and as amended.

THE VIOLATION OF SECTION 48.7(c)

Twentymile challenges the alleged violation of section 48.7(c) by asserting that the work of unplugging the rock chute is not a "task" as the word is used in section 48.7(c) and, therefore, that task training pursuant to regulation was not required (Tr. 11-12; Twentymile Br. at 7-8). Twentymile points out that the word "task" is defined in part as "a work assignment that involves duties of the job that occur on a regular basis", and it argues that "[b]y definition, an activity that is not a part of a miner's regular duties, but that the miner may be called upon to do on an occasional or episodic basis, if that often, is not a 'new task' for which the miner must be task trained"(30 C.F.R. §48.2(f); Twentymile Br. at 9). According to Twentymile, because the chute had not previously clogged, unplugging it was not a duty to which miners regularly were assigned (Twentymile Br. at 9).[15]

[15] Twentymile cites Bridger Coal Co., 23 FMSHRC 887 (August 2001) (ALJ Weisberger), in which Judge Weisberger held that a miner who operated an overhead crane by

Twentymile further points out that the Secretary, in revising the wording of the regulation requiring task training for miners working in sand and gravel mines (30 U.S.C. § 46.2(n)), eliminated the phrase "duties of a job that occur on a regular basis" from the definition of "task" because, "[A] literal reading . . . suggest[ed] that task training would not be required" in instances "where a miner [was] assigned to perform a task on a one-time basis" (Twentymile Br. at 11, quoting 64 Fed. Reg. 53097 (September 30, 1999)). However, the phrase was retained in the definition of "task" that applies to underground miners. Therefore, in Twentymile's view, the definition can (and should) be read as not requiring task training for one-time jobs.

The Secretary responds that unplugging the rock chute was a part of the larger overall task of maintaining the mine's conveyor belt transport system. Because the chute was an integral part of the conveyor belt system, and because maintenance of the system, including the chute, occurred on a regular basis, the men assigned to unplug the chute should have been trained how to do the job safely before they went to work on the chute. Or, as the Secretary put it, "Conveyor system maintenance, is appropriately categorized as a 'task'. Unplugging the chute would be a task within this larger category" (Sec. Br. at 11, See also, Sec. Br. at 12-13). The Secretary also states that she is entitled to "great deference" in her interpretation on the regulation (Sec. Br. at 16-18).

It is clear that none of the miners who was assigned to unplug the chute was trained in the job prior to being sent to do it (Tr. 32, 39, 125, 128; Gov. Ex. 8). Section 48.7(c) applies to "[m]iners assigned a new task not covered in [section 48.7(a)]." 30 C.F.R. § 48.7(c). Section 48.7(a) sets out the training requirements for "[m]iners assigned to new work tasks as mobile equipment operators, drilling machine operators, haulage and conveyor system operators, and those in blasting operations." The miners who were sent to unplug the rock chute were not operating mobile equipment, drilling machines, or the haulage and conveyor system. Nor were they blasting. If they were required to be trained at all, it was under section 48.7(c), and then only if sending them to unplug the rock chute was a "new task, " that is a "work assignment that includes duties of a job that occur on a regular basis and which requires physical abilities and job knowledge." 30 C.F.R. § 48.2(f).

Because the question of when a job occurs on a "regular basis" may depend on the conditions and work practices existing at the particular mine involved, it must be resolved by application of the "reasonable prudent person" test. Would a reasonably prudent operator

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fn. 15 (continued)
removing slack from the crane's rigging cables was found not to need task training because the Secretary did not prove the miner was assigned to do the job "on a regular basis" (23 FMSHRC at 890; see also Tr. 15). The case is inapposite. Here, the Secretary offered proof that was missing in Bridger.

familiar with the mining industry and the protective purposes of the standard, have recognized that unplugging the rock chute would occur on a regular basis and, therefore, that training was required prior to sending miners to unplug it?

I conclude that the answer is, yes. While the chute was newly installed and had not previously clogged, it was reasonable for Twentymile management to anticipate that the chute would clog as mining continued. Indeed, there is evidence the company actually foresaw the event. As Denning persuasively testified, the fact that the chute was provided with four observation doors which, inter alia, allowed access to the interior of the chute when it malfunctioned, is inferrentially indicative that management not only anticipated routine maintenance would be needed, but also that the chute would malfunction (Tr. 86). These, of course, are the very doors that allowed Brady to assess the extent of the jam. Further, the fact that Twentymile installed two internal devices to indicate when material stopped flowing in the chute, is another indication that Twentymile anticipated the kind of problem that led to the alleged violation (Tr. 163).

Moreover, although the rock chute had not clogged previous to June 6, the phenomenon of clogged and blocked chutes was not new to the mine. There were other chutes, transfer chutes, that served as part of the conveyor belt system. Inspector Gibson testified, and Twentymile did not dispute, that these chutes had clogged in the past and that miners had been assigned to unplug them (Tr. 67-68). Although the transfer chutes were far shorter and of a much smaller capacity than the rock chute, like it, their function was to serve as a conduit in transferring material, and it was reasonable to expect the rock chute also to jam. This was especially true because both kinds of chutes at times handled the same type of wet, sticky material, that had a known propensity to jam chutes. It was, as Brady testified, a "recurring problem" (Tr. 190).

Was it also reasonable for Twentymile to anticipate that the rock chute would clogg on a regular basis? Again, I conclude the answer is, yes. Brady testified that the transfer chutes became plugged every "four months, five months, six months" (Tr. 190). Given the fact the rock chute was used to transfer similar material, it was reasonable to expect the rock chute would clog at least as frequently.

"Regular" is defined as "recurring . . . at stated, fixed or uniform intervals." Webster's Third New International Dictionary (2002) at 1913. The phrase "regular basis" connotes repetition and recurrence. While there may be a point at which a recurrence is so distant as to render it outside the standard, a job that recurs as much as two or three times a year is of the kind that I find contemplated within its meaning. Training required by the standard is intended to protect miners from repetative hazards. Miners are not likely to forget safety procedures and precautions they are taught for jobs that recur every four, five or six months. For example, refresher training is required annually. See, 30 C.F.R. § 48.8. Therefore, I find it was reasonable for Twentymile to conclude the task of unclogging the rock chute was one that would occur on a "regular basis" and that in failing to train the miners assigned to unplug the rock chute prior to sending them to do the work, Twentymile violated section 48.7(c).

S&S AND GRAVITY

A violation is properly designated as "significant and substantial" if, based on 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 (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 safety 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 hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also, Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g., 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria).

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). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. 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, 916-17 (June 1991).

I have no difficulty concluding that the violation was a significant and substantial contribution to a mine safety hazard. The purpose of section 48.7(c) is to ensure that miners assigned a repetitive job with which they have had no previous experience understand the hazards associated with the job and the safety measures necessary to guard against the hazards. The miners must learn these lessons before they embark on the job. Twentymile's failure to provide the required training made it reasonably likely the miners assigned to unplug the rock chute would not have sufficient knowledge of available techniques and procedures to protect themselves from the hazards associated with the job. Rather than being trained in hazard avoidance as the standard contemplates, Winey's crew was sent to face the unknown.

Several dangers were inherent in unplugging the chute. The landings and the ladder presented the potential that the miners could slip and fall. Moreover, as the accident showed, if an access door opened, clogged material could spill out of the chute and present a tripping and stumbling hazard, or could fall and hit miners working below. The miners' lack of training made it reasonably likely an accident would occur. Moreover, given the heights at which miners could be traveling or working and the heavy material that could spill from the chute, any such accident was reasonably likely to cause a serious injury.

In addition to being S&S, the violation was serious. While I am not holding that the accident was caused by a lack of task training – the record does not permit conclusions regarding what Webb was doing, what caused him to fall, or why the material escaped from the chute – it is clear to me that the lack of training in applicable safety procedures created conditions under which a miner could have fallen from the chute's ladder or landing or could have stumbled on or been struck by escaping material and, as I have found, the resulting injury could have been serious. Moreover, the lack of training endangered not only Webb, but all who were sent to unplug the chute, a fact that augmented the violation's gravity.

NEGLIGENCE

The company was negligent in causing the violation. Twentymile was aware that as mining continued its mining process was likely to yield wet, sticky material. It also knew that this material would tend to clog the mine's chutes (Tr. 190). Even though previous clogs happened in chutes of decidedly less length and volume, I have found that the company's installation of doors to access the chute and two clogging signal devices are inferential evidence that Twentymine anticipated the clog. Despite this, the company failed to provide the necessary task training to miners who were assigned to free the chute. Had it exercised reasonable care, it would have done so.

OTHER CIVIL PENALTY CRITERIA

There is no indication in the record that the size of any civil penalty assessed will affect Twentymile's ability to continue in business, and I find that it will not.

The mine is very large with 331 employees and coal production of approximately 8.6 million tons per year (Tr. 81).

The company abated the violation in good faith by issuing written instructions in safe work procedures and by instructing the miners who work at the rock chute in those procedures (Tr. 45; Gov. Ex. 4).

In proposing a civil penalty for the violation, the Secretary indicated that there were a total of seven violations that were applicable to Twentymile's history of previous violations (Petition for Assessment of Penalty at Ex. A). This is a minimal history of prior violations. In addition, while not necessarily indicative of the company's history of previous violations, the company's very low nonfatal, lost time accident rate is instructive (See Tr. 81).

VALIDITY OF THE PENALTY PETITION

The section 103(k) order in which the violation was alleged was issued on June 16, 2000. Twentymile contested the order and alleged violation on July 11, 2000. The penalty assessment for the alleged violation was issued on November 9, 2001, almost 17 months after the order was issued. Twentymile asserts the Secretary's delay in proposing a civil penalty for the violation

should invalidate the civil penalty proceeding (Tr. 13). The Secretary counters that the penalty was proposed within a "reasonable time" and that Twentymile was not prejudiced (Sec.'s Closing Arg. at 20-25).

I conclude the delay does not warrant dismissal of the petition. Section 105(a) of the Act requires the Secretary to notify an operator of a proposed civil penalty "within a reasonable time after the termination of . . . [an] inspection or investigation." 30 U.S.C. § 815(c). The Act gives no guidance regarding the duration of a "reasonable time," but MSHA provides some direction in its PPM, there defining "reasonable time" as "normally . . . within 18 months of the issuance of a citation or order" (III PPM, Part 100.6(f) at 49 (July 3, 2001). The Secretary met this definition.

In addition, the Senate Committee, when drafting the Mine Act, commented on the concept of "reasonable time." It stated, "[T]here may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does *not* expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding" S. Rep. No. 181, 95th Cong., 1st Sess. 34 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978) (emphasis added). In light of the Senate Committee's reluctance to nullify a penalty proceeding when the Secretary has delayed notifying the operator of a proposed penalty, the Commission has stated that if a proposal is delayed, the judge must consider: (1) the reason for the delay and, (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary's delay in filing the penalty petition. Steele Branch Mining, 18 FMSHRC 6, 14 (January 1996).

The testimony reveals that the primary reason for the delay in proposing a penalty to Twentymile was a changed in MSHA personnel and a failure by the new employee to understand his duties. MSHA would not propose a penalty until its accident report was issued and until information based on the report was sent to MSHA's Assessment Office. The accident report would not be issued until it was reviewed by its author's supervisor.

Denning, who was the primary author of the report, explained:

> [P]robably it took [me] until October to get started working on . . . [the report] . . . because of other items that I had to do. I remember in November contacting Mr. Derick to get some additional information. He faxed me some sketches sometime in November.
>
> So I think it was near the end of November when I . . . had the investigation report fairly completed and then . . . it . . . [went through] a review process . . . . [T]here are two assistant district managers [that] have to review it[,] plus the district manager.

> [O]nce I get their feedback on the report I finalize it and it goes to the district manager for his signature.

(Tr. 75-76).

Because the district manager, Mr. Kuzar was away from the office, the report was reviewed and signed by Gary Worth who was the acting assistant district manager for technical programs (75. 89). The report was issued on January 4, 2001 (Tr. 46, 89; Gov. Ex. 5).

Almost seven months, then, elapsed before the report and the violation alleged in the subject order were forwarded to MSHA's Assessment Office on July 31, 2001 (Tr. 91-92). According to Denning, this delay was due to a personnel change in the office which put a new person into the job of completing the special assessment form that accompanied the report. The person did not realize he was supposed to complete the form, and it was not until much later that Denning and others realized the form had not been completed (Tr. 77, 91). Denning stated: "[The] special assessment review form got waylaid" (Tr. 92). After the report and form reached the Assessment Office, it took the Assessment Office approximately three and one half months to issue the proposed penalty.

It is understandable that MSHA did not propose penalties while the report and the special assessment form remained unfinished. Findings regarding the validity of the alleged violation, its gravity and Twentymile's negligence could have been impacted by the report and the form.

It also is understandable that there was a delay in sending the report and form to the Assessment Office. The delay was caused by a shift in personnel and by the failure of the person who should have completed the form to understand that it was one of his duties. Personnel shifts and the instruction of employees in their new duties are ongoing facts of the life in the agency and, although infrequent, instances in which new employees fail to comprehend the full extent of their duties occur.

In addition, the lapse in time between the citation of the violation and the proposal of the penalty was not prejudicial to Twentymile. The company presented a complete and cogent defense to the Secretary's allegations, and at no time during the proceedings did it show that its defense was hindered by the delay.[16]

For these reasons, I decline to dismiss the petition.

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[16] Twentymile's assertion that the witnesses' faded recall may have prejudiced it is not persuasive (Twentymile Br. at 26-27). The only specific witness singled out by the company is Inspector Gibson, whose lack of recall is asserted to have "raised the potential for prejudice, if not actual prejudice" (Twentymile Reply at Br. 21). Gibson was the Secretary's witness not Twentymile's, and it is by no means clear to me how his testimony or lack thereof was detrimental to Twentymile.

CIVIL PENALTY

The violation was serious, the operator is large, and the size of the penalty will not affect Twentymile's ability to continue in business, all of which warrant a large penalty. However, these criteria are countered, in part, by Twentymile's minimal history of previous violations.

Considering all of the civil penalty criteria, I find that the Secretary's proposed civil penalty of $6,000.00 is excessive, and I conclude that a penalty of $1,500.00 is warranted.

ORDER

Within 30 days of the date of this decision, Twentymile **SHALL** pay to the Secretary a civil penalty of $1,500.00 for the violation of section 48.7(c) and upon payment of the penalty, Docket No. WEST 2000-131 is **DISMISSED**.[17] In addition, because I have found Order No. 7618153 is valid, Twentymile's contest of the order is **DENIED** and Docket No. WEST 2000-480-R is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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[17] Payment may be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 360250M, Pittsburgh, Pennsylvania 15251.