FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 4, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2001-61-M A.C. No. 04-01299-05541
v.	:	
ORIGINAL SIXTEEN TO ONE MINE, INCORPORATED Respondent	:	Original Sixteen to One

DECISION

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of Petitioner.
Michael M. Miller, President and Chief Operating Officer, Original Sixteen to One Mine, Inc., Alleghany, California, on behalf of Respondent.

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) alleging violations by Original Sixteen to One Mine, Inc. of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice a hearing was held in Nevada City, California. The parties filed post-hearing briefs.

Jurisdiction

Preliminarily, Respondent filed a motion for dismissal of this matter on grounds Petitioner did not have jurisdiction. Respondent states that the Securities and Exchange Commission (SEC) determined that its mining operation had insufficient reserves to hold itself out as a mine to shareholders. The respondent argues that if its operation isn't a mine for SEC purposes, this operation also cannot be considered a mine under the Federal Mine Safety and Health Act (Mine Act), 30 U.S.C. §801. The SEC does not purport to regulate the health and safety of miners, and whatever purpose a definition of the term "mine" has in the SEC's regulatory scheme, that definition is there for a purpose other than the protection of the health and safety of miners. Since the facility at issue herein was actively engaged in the extraction of ore from the ground, with approximately nine miners actively engaged in extraction-related

activities, the mine is subject to the Mine Act. Respondent's facility certainly comes within the definition of a mine set forth in Section 3(h)(1) of the Mine Act.

> "Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such areas, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Respondent's request for dismissal for lack of jurisdiction is DENIED.

Citations at Issue At the Hearing

There are eight citations in this docket of which only five were at issue at the hearing. At the commencement of the hearing, the Respondent advised that it withdraws its notice of contest of the following three citations: Citation No. 7987874, Citation No. 7987879 and Citation No. 7987880. At issue at the hearing were Citation No. 798785, Citation No. 7987876, Citation No. 7987977, Citation No. 7987878 and Citation No. 7987883. These citations were issued by MSHA Inspector James Weisbeck who inspected the mine in August of 2000.

For reasons discussed below, I modify two of the citations at issue and as modified I affirm all eight citations and assess a total civil penalty of $651.00.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 7987875

Citation No. 7987875 states as follows:

> An area of restricted clearance at the ore chute on the 800 level behind 49 Winze, which created a hazard to persons who

> operate rail equipment, did not have warning devices or signs on either approach nor was the restricted clearance clearly marked. The metal chute gate and bang-board were measured at fifty-five inches above the rail. The motorman's head was measured at sixty inches while seated in the locomotive. The motorman could receive serious injuries if his head were to strike the chute parts. The locomotive travels under the chute on a regular basis.

The cited regulation provides as follows:

> §56.9306 Where restricted clearance creates a hazard to persons on mobile equipment, warning devices shall be installed in advance of the restricted area and the restricted area shall be conspicuously marked.

Inspector Weisbeck testified that at the 800 foot level of the mine, he observed a "center of track" ore chute through which locomotives traveled on a regular basis. The inspector observed a restricted opening through the chute. He observed no warning devices in advance of the restricted area. He took measurements. The clearance measured 55 inches above the rail and the motor man's head measured 60 inches above the rail while he sat in the locomotive. The restricted area was not "conspicuously marked."

The locomotive had lights. The motor man was aware of the overhead restrictions and ducked his head down to the side to avoid injury. The inspector was concerned that someday there would be a time when the motor operator would be distracted and inadvertently not duck in time to avoid a very serious injury. The violation was abated by painting a bright red "low head room" sign and by hanging conspicuous streamers in the appropriate area TR-25, Res. Ex. 12.

Respondent contends that there was light in the area and sufficient marking to comply with the cited standard. That flagging that existed before abatement was dirty and on the side of the ore chute.

I credit the testimony of Inspector Weisbeck that the restriction was not conspicuously marked. and find the evidence established a violation of 30 CFR §56.9306.

Citation No. 7987876

Citation No. 7987876 reads as follows:

> An area of unsupported rock beside the slusher at 848 Stope had not been tested by a supervisor or designated person prior to work commencing in the area. The rock had several large cracks which started about ten feet from and propagated towards the slusher operators station. The supervisor and miner both stated

> that they knew about the cracks and that neither one had done any testing to determine how loose the rock was. The ground was partially supported at the operators station by the stalls which held the slusher down. A fall of ground could cause fatal injuries to the slusher operator who works in the area on a regular basis.

Respondent's response to the citation is as follows:

> As required by 30 CFR 57.3401 persons experienced in examining and testing for loose ground are designated by the mine operator. Appropriate persons examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways are examined weekly or more often if changing ground conditions warrant.
>
> The lead miner has extensive underground experience, including rock mechanics and the specific nature of this mine. His statements were taken out of context or misinterpreted by the MSHA agent. The miner was aware of the crack and determined that alleged hazard posed no risk of an unsafe situation. Furthermore, the crack itself does not constitute a hazard.

The cited standard provides as follows:

> §57.3401 Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

Inspector Weisbeck testified to the facts set forth in Citation No. 7987876. He was of the opinion that the horizontal crack in the rock depicted in P. Exs. 13 and 14 should have been tested because of vibration of the slusher being used in the area. The crack propagated toward the slusher operator's station and the ground was only partially supported by the operator's station. The fall of loose ground that could result from the crack and its vibration from the slusher motor could cause fatalities. A fall of the rock could cause serious and fatal injuries.

Respondent's lead man was aware of the crack but on visual examination alone was of the opinion the alleged hazard presented no risk. No testing was done.

I credit the testimony of Inspector Weisbeck and find the cited standard was violated. I affirm the Solicitor's findings in the citation and based on the statutory criteria in Section 110(i) of the Act, I agree with the MSHA's assessment of the $55 proposed penalty for this violation of the standard and accordingly assess a penalty of $55.00.

Citation No. 7987877

Citation No. 7987877 alleges a significant and substantial (S&S) violation of 30 CFR §57.3360. The citation reads as follows:

> Ground support was not installed in the area of 848 Stope which was being slushed out. A bowed and split timber, and two badly cracked pillars indicated that the hanging wall was taking weight. A large area beyond the two pillars had caved in at some time in the past. One of the pillars had several large vertical cracks. The other was badly cracked and appeared loose. The grain shift across a diagonal crack indicated that about one third of the pillar had subsided about three inches. An old timber near the pillar was partially rotten and had bowed out about one foot in the middle. Many old timbers in other areas of the stope had rotted out or showed signs of crushing. Mine management stated that the stope had been mined for about three weeks at this time and was last mined in 1994. A fall of ground could cause fatal injuries to the two miners.

The cited standard, 30 CFR §57.3360 provides as follows:

> Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

I find the Secretary established an S&S violation of the cited standard. Inspector Weisbeck inspected the work area of the 848 Stope and found inadequate ground support. He testified as to his observations as set forth in the citation quoted above. He took photographs showing the bowed and cracked vertical ground support timbers. Petitioner's Exhibits P-15, P-16 and P-17. Respondent's response to the facts alleged in the citation was that "[T]he timber

cited was cracked from weight of itself and was not utilized as current ground support. Had there been rock weight on the timber the timber would not of [sic] held and rock would have fallen."

Respondents contention was not persuasive in view of the photographs and the inspector's testimony. Two of the damaged timbers in the immediate working area of the slusher and the portable lighting were replaced with new timber in order to abate the violation.

A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathis Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), the Commission explained:

> In order to establish that a violation of a mandatary 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.

See also, Buck Creek Coal, Inc. v. MSHA, 53 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g, Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

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

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

The contribution of the violation to the cause and effect of a hazard is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.,* 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.,* 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.,* 9 FMSHRC 1007 (Dec. 1987).

The inspector properly made findings noted in the citation "reasonably likely," "fatal," and S&S. If the roof were to collapse and strike a miner working in the area the injury to the miner would most likely be fatal.

Citation No. 7987878.

This citation charges a 104(a) violation of 30 CFR §57.16005. The citation reads as follows:

> At the electrical shop of the lower shop area there was a unsecured acetylene cylinder setting on the floor in the work area. Exposing persons who enter area to the hazards of the cylinder falling creating potential injuries. Persons enter on a as needed basis.

In the lower shop area the Inspector saw an upright acetylene cylinder sitting on the floor. The cylinder was not secured in any way. The Inspector testified that there was not a lot of exposure. The cylinder was sitting back toward a wall, so it was not out in the center of the work area. The Inspector testified that, even though empty, it weighed 40 pounds and if it fell it could result in severe bruising and possibly break a bone in a person's foot.

The facts clearly establish a violation of the cited standard 30 CFR §57.16005 which provides that "compressed and liquid gas cylinders shall be secured in a safe manner." The gravity was somewhat less than if the cylinder had been taller and full of gas and left in an area where there was greater exposure. Everything considered, I find the "negligence" factor in this citation is "low" rather than "moderate" and the citation is so modified. In view of the small size of the operator and the very limited exposure and all the other statutory criteria in Section 110(i) of the Act, I assess a penalty of $25.00.

Citation No. 7987883

This citation charges a 104(a) violation of 30 CFR §57.12032 and reads as follows:

> The cover plate on the 240 volt electric hot water heater in the store room between the office and the dry was not in place. The top screw was missing and the cover was turned to the side exposing the bare energized components to possible contact by persons who use the cleaning equipment stored in the room. An electrocution could result.

The cited safety standard 30 CFR §57.12032 provides as follows:

> §57.12032 **Inspection and cover plates.**
> Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs.

Inspector Weisbeck testified that the cover plate of the 240 volt electric hot water heater had its top screw missing and the cover plate was turned to one side exposing the bare energized components to inadvertent contact.

Respondent asserts:

> The top screw had worked itself loose. This was a very recent occurrence and no one had been in that area to detect it. It is certain that at the time a miner entered this area and upon inspection of the workplace, the plate would have been notice [sic] and the screw put in place.

The Inspector testified that inadvertent contact with an energized part could potentially cause defibrillation of the heart causing death.

The hot water heater was in a storeroom at the office dry area where people do not work constantly. There was exposure to persons who go in and out to remove cleaning products and tools. In Petitioner's Exhibit P-11, the Inspector notes "persons enter only as needed."

Respondent contends that it was unaware that one of the screws holding the cover plate in place was missing or that any energized component was exposed. Respondent contends the loss of the screw and exposure of energized parts occurred very recently before management had an opportunity to see the problem and make the needed correction. TR 321-22.

On review of the evidence, I find the negligence of Respondent was "low" rather than "moderate" and I would accordingly modify the citation to reflect "low" negligence. In view of the potential gravity of the violation, I would not reduce the proposed $55.00 penalty.

Appropriate Civil Penalties

Under section 110(i) of the Act the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business 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 rapid compliance after notification of a violation.

Respondent demonstrated good faith with respect to all the cited violations in the timely abatement of each citation by compliance with the proper standard after notification of the violation. The penalties assessed below are modest penalties and appropriate for this small operator. I find these penalties will not affect the operator's ability to continue in business. The Secretary has submitted the Assessed Violation History Report for the relevant period prior to the inspection that resulted in the citations. The report indicates the number of paid citations is 16 and the number of assessed violations is 71 for the period beginning August 16, 1998 to August 15, 2000. I affirm all the citations including the inspector's finding except for the negligence factor in Citation Nos. 7987878 and 7987883 where I find the negligence on the basis of the evidence presented to be "low." The negligence in all the other citations is properly charged by the Inspector as "moderate." Citations 7987877 was properly charged as significant and substantial as set forth above in my discussion of that citation.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 USC §830(i), particularly the small size of the operator and the good faith prompt abatement, I assess the following civil penalties:

Citation No.	30 CFR §	Penalty
7987875	56.9306	$55.00
7987876	57.3401	55.00
7987877	57.3360	131.00
7987878	57.16005	25.00
7987883	57.12032	55.00
7987874	57.12025	55.00
7987879	57.20003(a)	55.00
7987880	57.12019	55.00
7987874	57.12025	55.00
7987879	57.20003(a)	55.00
7987880	57.12019	55.00
	TOTAL	$651.00

Accordingly, the citations in this docket are AFFIRMED, Citation Nos. 7987878 and798783 were modified to reduce the negligence from "moderate" to "low" and as so modified were affirmed.

Respondent is Ordered to PAY the sum of $651.00 within 40 days of the date of the decision unless the parties agree upon a different payment schedule. Upon payment of this penalty, the proceedings is DISMISSED.

August F. Cetti
Administrative Law Judge

Distribution:

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