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

January 5, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-224-M(A)
Petitioner	:	A. C. No. 04-01299-05542
v.	:	
	:	Docket No. WEST 2002-226-M
ORIGINAL SIXTEEN TO ONE MINE,	:	A. C. No. 04-01299-05544
INCORPORATED,	:	
Respondent	:	Sixteen To One Mine

DECISION

Appearances: Christopher B. Wilkinson, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Petitioner;
Michael M. Miller, President, Original Sixteen to One Mine, Incorporated, Alleghany, California, on behalf of the Respondent.

Before: Judge Melick

These cases are before me upon Petitions for Civil Penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994) the "Act," charging Original Sixteen to One Mine, Incorporated (Sixteen to One) with violations of mandatory standards and proposing civil penalties for the violations. The general issue before me is whether Sixteen to One violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act. Additional specific issues are addressed as noted.

During hearings, the Secretary vacated Citation No. 7982709 and the parties agreed to settle Citation Nos. 7982708 and 7982710. (Tr. 248-249). With respect to the latter citations the Respondent agreed to pay the proposed penalties in full. The proposed settlement is acceptable considering the criteria under Section 110(i) of the Act and a corresponding order directing payment will be incorporated herein.

Citation No. 7995404

Citation No. 7995404, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.9306 and charges as follows:

> A miner was fatally injured at this mine on November 6, 2000, while operating a Mancha locomotive on the 1700 level when his head struck a

> protruding ore chute causing it to become wedged between the battery compartment of the locomotive and the chute. The chute extended into the drift to the mid point of the train rails at approximately the same height as the locomotive operator's head. Warning devices had not been installed in advance of the ore chute to indicate restricted clearance nor had the chute been conspicuously marked, nor marked at all, to warn and remind miners of the restricted clearance.

The cited standard provides that "[w]here 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."

The allegations in the citation are undisputed and clearly support the violation as charged. Indeed, Michael Miller, Sixteen to One's President and CEO, acknowledged that there was no warning device and that "it was a tremendous hazard" (Tr. 284). In addition, whether or not the particular violation herein was a causative factor in the cited fatal injuries, the violation was also clearly "significant and substantial" and of high gravity.

A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a 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).

The undisputed evidence shows that Mark Fussell, the deceased, was operating the cited locomotive on the 1700 level of the mine when his head struck a protruding ore chute and became wedged between the battery compartment of the locomotive and the chute. The chute extended into the drift to the midpoint of the train rails at approximately the same height as the locomotive operator's head. There was only a two-inch clearance between the top of the locomotive and the bottom of the ore chute. From the position in which Fussell was seated on the locomotive there was therefore insufficient clearance for his head to pass beneath the extended chute. The failure under these circumstances to have provided any advance warning or any marking on the chute itself, to warn of the deadly consequences presented by the protruding chute was clearly a "significant and substantial" violation warranting a finding of high gravity. As previously noted, Miller himself acknowledged that "it was a tremendous hazard" (Tr. 284).

The Respondent argues that it was not negligent in committing the violation because the accident was caused entirely by the negligent conduct of the deceased, Mr. Fussell, a rank-and-file miner. While the Secretary agrees that Fussell was highly negligent in failing to ensure that appropriate warnings had been in place, the Secretary argues that Fussell was, under the unique facts of this case, an agent of the operator whose negligence is imputable to the operator. Under Commission precedent, the negligence of a rank-and-file miner is not ordinarily imputable to the operator for purposes of penalty assessment. *Secretary v. Martin Marietta Aggregates,* 22 FMSHRC 633 (May 2000); *Whayne Supply Company,* 19 FMSHRC 447 (March 1997); *Southern Ohio Coal Company,* 4 FMSHRC 1459 (August 1982). The Secretary argues in her post-hearing brief, however, that Fussell was an agent because he was designated as a "Lead Miner" ultimately responsible for the safety and operations of his work group.[1]

In deciding whether a miner is an agent of an operator, the Commission has focused on the miner's functions and not his job title. *REB Enterprises Inc., et al.* 20 FMSHRC 203, 211 (March 1998); *Ambrosia Coal and Construction Co.,* 18 FMSHRC 1552, 1560 (September 1996). In this regard, Michael Miller, President and CEO of Sixteen to One, described Fussell's functions in his opening statement at hearings:[2]

> Mr. Miller: Okay, Mark Fussell was a certified Lead Miner familiar with and trained for his position ... Mark Fussell's heading was to slush loose rocks in an old stope above the 1700 foot level. He chose to prepare the track in the event the use of an electric train would facilitate his job.

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[1] Section 3(e) of the Act defines "agent" as "[a]ny person charged with the responsibility for the operation of all or a part of a coal or other mine or the supervisor of the miners in a coal or other mine."

[2] While these admissions were made in Miller's opening statement, admissions by an attorney or other agent of a party in a formal opening statement are conclusive in the case, unless allowed to be withdrawn. M. Graham, *Federal Practice and Procedure*: Evidence § 7023 (Interim Edition); *McCormick on Evidence*, Fifth Edition, Admissions § 259.

A Lead Miner is the one responsible to identify and fix any safety issues in his heading. Anyone in the mining business will testify that as a Lead miner it was his job to identify and correct any defects in regulations. Mark Fussell was aware of this.

* * * *

Mr. Miller: A Lead Miner is a miner who has been task trained for all of the various jobs required in our particular operation. A Lead miner does not have to have any management or foreman capabilities. He basically would be. In our situation, the person in charge over a Miner II, which we have. And we have a Miner I as well.

The Court: You mean other persons - -

Mr. Miller: Yeah. We started with raw people that have no background in mining at all and have trained them to become Lead miners at the Sixteen to One. So he was in the highest capacity that you could have as a miner at the Sixteen to One.

The Court: He was paid more than regular miners?

Mr. Miller: Yeah. We started with raw people that have no background in mining at all and have trained them to become Lead miners at the Sixteen to One. So he was in the highest capacity that you could have as a miner at the Sixteen to One.

The Court: He was paid more than regular miners?

Mr. Miller: We have a scale, a pay scale. He was paid at the pay scale of a Lead Miner versus a Miner II or Miner I. But we also have experience Levels for Lead miners and others. He was not our highest paid miner. We have miners that are Lead miners that make more money.

The Court: But over the persons he had charge of he was paid higher.

Mr. Miller: Yes.

The Court: He was in charge of other miners?

Mr. Miller: If he was in a heading where he had a Miner I or II under him he would be paid more.

The Court: I see. But at this time he did not have anyone under him?

Mr. Miller: He was the Lead miner, and Vince Kautz was what we call in our business partners. So he was the partner to Mark. I don't know exactly if Vince was paid more or less than Mark.

The Court: But Vince Kautz was above Mr. Fussell?

Mr. Miller: No.

The Court: Who gave the orders to these persons; they would not give orders to each other.

Mr. Miller: They would give orders to each other, because we encourage everyone at the mine to have an opinion. But, however, if there were an ultimate responsibility it would be Mark.

(Tr. 11-13).

Miller further described Fussell's functions in his testimony:

Q. [By Mr. Wilkinson] Was [Fussell] considered a Lead Miner?

A. Yes.

Q. There seems to be some question that I don't quite understand yet about a Lead Miner and management. What was the policies - - what is your understanding of the policies of the Sixteen to One with relationship to Lead Miners I and Miners II as far as responsibilities go?

A. Well, I kind of got to paint the picture a little bit. I'm sticking to the subject here, but you have to understand that the mine is extensive, the workings are in excess of 27 miles. So it's reduced, or it's necessary that you have individuals that are capable of - - multitask oriented individuals who can handle the job that is put before them. No one person can be in all places at all times. Individuals are trained and brought up to have the background, training and ability to maintain a safe working environment while they're training less experienced individuals and making progress in a work area.

When you become a Lead Miner your work area is your responsibility. It doesn't stop there, but on a day-to-day basis the overall responsibility and decision-making is that of the Lead Miner. I think that basically probably could be stipulated as a reality of mining throughout the industry.

Q. Okay. Did the - -

The Court: Do they usually work alone?

The Witness: No, you always work in pairs. Somebody had to be in charge because there's always difference of opinion in how to do things. And so ultimately the responsibility has to ride on one person within each group so that progress can be made.

The Court: So the Lead Miner is the person who would be in charge of that particular work group?

The Witness: That's right. He could have more than one helper, he could have several helpers, but it's still his responsibility. And he reports directly to the underground foreman, if there's one: or if not, the miner manager. In this case I was acting as both. I had both responsibilities.

(Tr. 365-366)

* * * *

There's been testimony that Mr. Fussell was the supervisor or Lead man for Vince Kautz on the day of the accident: Is that correct?

A. No. He is a Lead Miner. Mr. Wilkinson.

Q. He is a Lead Miner?

A. No. He is a Lead Miner, Mr. Wilkinson.

Q. He is a Lead Miner?

A. He is a Lead Miner.

Q. Right. You also have two other miner positions. Mine I and Miner II: right?

A. I believe that right now all of our people are Lead Miners. I don't believe that - - I believe at the time of the accident the individuals that signed the safety sheet would all have been - - there were only like 12 or 14 of them, and I don't think we had any Miner I's or II's. I think they would all fit the requirements of being a Lead Miner.

Q. Didn't you testify - - didn't you in your opening state that, in response to the Judge's questions, that Mr. Fussell would have been - - there were three positions, Miner I, Miner II, and then Lead Miner; wasn't that what you said?

A. That's how we rate our employees.

Q. Right.

A. It's like GS5, 5 and 10.

Q. Right. And you said that Mr. Fussell was a supervisor of the Miner I and Miner II people.

A. I said he was a Lead Miner. I said he was a Lead Miner, and I'll say he is a Lead Miner today. And part of the duties of a Lead Miner are to take authority over your heading and take the responsibility of that heading. It's just like Mr. Cain taking responsibility to Mr. Montoya's work. Someone has to take responsibility.

Q. And that was Mr. Fussell's job at the time?

A. That fell under his job description, sure. I mean under his capabilities. He was a Lead Miner.

Q. Responsible for the area, responsible for safety in that area?

A. Well, yeah.

Q. Responsible for the men working in that area?

A. He's not only responsible, he's required by MSHA Law that only people that can go into headings are the ones that - - it says right in the manuals, is the only people that can go in to clean our abandoned areas or areas that have been barricaded are people that are either designated by the company, the operator, or people that have the talents and capabilities to do that. And Mr. Fussell fully met that criteria.

Mr. Wilkinson: Would you read back my question.
[Whereupon the reporter read back the last question]

Q. Would you answer my question? Was Mr. Fussell responsible for that area?

A. Yes.

Q. Was he responsible for the safety in that area?

A. Yes.

Q. Was he responsible for the men in that area?

A. He would be, yes. (Tr. 459-461).

While Fussell, like the Lead Man in *REB Enterprises,* apparently had no independent authority to hire, fire or discipline other miners, it is generally true that many foremen do not have that authority and those foreman are nevertheless generally considered to be agents of the operator.

In any event, I find this case to be distinguishable from *REB Enterprises.* Fussell in this case had the ultimate responsibility on a "day-to-day" basis over Miners I and II and over other Lead Miners (Tr. 11-13, 365-366). He also had the authority and responsibility for the work group in his heading, including safety and compliance with the law and was responsible for signing the "safety sheets" (Tr. 459-461). It may therefore reasonably be inferred that Fussell was responsible for the on-shift safety examinations and for the recordation of such examinations under 30 C.F.R. § 57.1800(2). These delegated responsibilities are comparable to those of the rank-and-file miner in *Rochester and Pittsburgh*, 13 FMSHRC at 194-196, who had been delegated the responsibility to conduct the weekly shift examinations. Fussell in this case was similarly responsible and I therefore find that he was an agent of the Respondent. Thus, Fussell's admittedly negligent conduct in this case may be imputed to the Respondent for civil penalty purposes.

Citation No. 7995405

Citation No. 7995405 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.14100 and charges as follows:

> A miner was fatally injured at this mine on November 6, 2000, when he struck his head on an ore chute protruding into the drift at approximately head level, after he engaged the speed controller of the Mancha locomotive he was operating. The locomotive had a clearly evident mechanical defect which had not been corrected in a timely manner to prevent a hazard to the miner. Alternatively, the locomotive was not taken out of service and placed in a designated area posted for that purpose, nor was the vehicle tagged or other effective method of marking the defective items used to prohibit further use of the vehicle until the noticeable defect was corrected.
>
> This defect was easily detectable during a pre-operational or other similar inspection. It made continued operation hazardous to persons by causing the locomotive to be difficult to control at slow speeds or when power starting from a stopped position. The machine's speed controller first point of power (slow speed) to the drive motor was not functioning as designed; thus, the locomotive would not move until the second point of power was contacted, when it would then jump or lurch forward.

The cited standard provides as follows:

> (a) Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.
>
> (b) Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.
>
> (c) When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.
>
> (d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to, and recorded by, the mine operator. The records shall be kept at the mine of nearest mine office from the date the defects are recorded, until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.

The Secretary maintains that the evidence supports separate violations of all four subsections of the cited standard. According to the Secretary, the cited locomotive was defective in that before the accident, a resistor had burned out thereby disabling the first point (first gear) of the locomotive. According to the Secretary this necessitated that the deceased start the locomotive in the second point (second gear), and, by doing so, caused the locomotive to lurch forward and place the decedent's head in position to strike the protruding ore chute.

In support of this scenario, the Secretary called MSHA Electrical Engineer Arlie Massey, as an expert witness. Massey is a graduate electrical engineer and has been employed by MSHA as an electrical engineer since 1975. In this capacity he conducts accident investigations. He is familiar with electric locomotives. In stating his opinion, Massey assumed the following undisputed facts concerning the cited locomotive: (1) that the locomotive's controller itself had no malfunction; (2) that the power connector to the battery was functioning before the accident; and (3) the locomotive had no other broken parts. Massey also examined and considered the electrical schematic diagram for the subject locomotive (Secretary's Exhibit L). Massey further assumed as fact that the power connector had become separated during the accident and it was at that point unable to power the locomotive. This latter assumption is supported by the out-of-court statement of Respondent's employee, Vincent Kautz, as provided to MSHA investigator Steven Cain. Kautz told Cain that he was nearby when the accident occurred and in his attempt to rescue Fussell, was unable to get the controller to work. He therefore physically pushed the locomotive away from the chute to free Fussell. Cain, who was the MSHA supervisory mine inspector in charge of the investigation, had arrived at the mine the day after the accident, and, after inspecting the locomotive, found that the battery connector was bent and broken and had to

be held down to make a connection. The locomotive also "lurched" in both directions because it would not move in the first point but only in the second and third points. Upon further testing it was discovered that the resistor was burned out thereby disabling the first point.

It is noted that Kautz also told Cain that he manually pushed the locomotive a few feet to free Fussell. Kautz also told Cain that when Stephen Shappert (who did not testify at the hearing) showed up they were able to get the locomotive started. Steven Cain also testified that Shappert told him in an interview that there was trouble with the connector after the accident. Kautz also testified that he manually pushed the locomotive in an attempt to rescue Fussell and acknowledged that the battery connector had broken free from its mount. While Kautz believed that the resistor burned out after the accident when the locomotive became jammed under the ore chute thereby stopping its movement, he did not hear wheel spinning on the locomotive.

Under all the circumstances it is more reasonable to believe, and I find credible, that the power connector had in fact been damaged in the accident sufficient to make the locomotive inoperative. Accordingly, Massey's assumption that the power connector had been separated during the accident and that it was at that point unable to power the locomotive, is the more credible and the appropriate assumption to make. I therefore accept Massey's conclusion that the resistor was defective before the accident and was the defect causing the locomotive to lurch forward when it was put in the second point.

Within this framework of evidence, I find that the burned out resistor constituted a defect which made continuing operation of the locomotive hazardous. Since the locomotive was not taken out of service there was a violation of the cited standard as charged.

The violation was also clearly "significant and substantial" and of high gravity. It is reasonably likely that the lurching of the locomotive caused by the necessity to start the locomotive in second point (gear) could have caused a whip-lashing of the operator's head or the striking of persons in front of the locomotive. It may also reasonably been inferred that the accident here at issue was caused by the lurching motion of the locomotive thereby preventing Mr. Fussell from ducking beneath the exposed and protruding ore chute.

For the reasons already stated with respect to the prior violation, I also find that Fussell's negligence in failing to take the locomotive out of service was negligence imputable to the operator.

Citation No. 7992100

Citation No. 7992100, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 48.5 and charges as follows:

> Bob Hale, a "newly employed inexperienced miner" hired on or around 12/28/99 was working underground. Joe Barquilla, a "newly employed

> inexperienced miner" hired on or around 3/31/00 was working underground. They had not received all of the MSHA required forty hour new miner training prior to assuming the underground work duties. The mine operator was aware of the Part 48 requirements. Mr. Hale and Mr. Barquilla had no previous mining experience. The operator is hereby ordered to withdraw Bob Hale and Joe Barquilla from the mine until they have received the required training. The Federal Mine Safety and Health Act of 1977 declares that an untrained miner is a hazard to himself and to others.

The citation accordingly charges two violations of the cited standard in that two miners, Bob Hale and Joe Barquilla, were alleged to not have had completed the required forty-hour new miner training. The cited standard, 30 C.F.R. § 48.5, provides in part that "each new miner shall receive no less than forty hours of training as prescribed in this section before such miner is assigned to work duties." That standard also sets forth the specific courses of training.

I find that the Secretary has indeed proven the violations as charged. Curtis Petty was, on September 21, 2000, a mine inspector for the Department of Labor's Mine Safety and Health Administration. According to the undisputed testimony of Petty, the training forms required to be maintained by the mine operator, *i.e.,* MSHA Form 5000-3, that were produced on September 21, 2000, for his examination showed that the training for the two-cited miners had not covered all of the subjects required by the cited standard. Indeed, mine manager Farrell, in effect, admitted to the violation when he told Inspector Petty that he thought that he was permitted under the cited regulation to complete the required training over a period of time and after the miners actually commenced work

I also find that the violations were "significant and substantial" and of high gravity. It is noted that the violation was cited on September 21, 2000, and that Hale had been working in the Sixteen to One Mine since December 1999, without having completed the required training. In addition, the evidence shows that Barquilla had been working at the mine since March 2000, without having completed the required training. In reaching these conclusions I have not disregarded the operator's testimony that the miners at issue had, in effect, actually been fully trained. In the face of its own contradictory records however, I can give such testimony but little weight.

I also find that the violation was the result of high operator negligence. I find from his own statement to Inspector Petty that Mine Manager Jonathan Farrell knew miner training had to be completed before these miners commenced work and that he knew that the cited miners had not completed their training by September 21, 2000, at the time the citation was issued.

In evaluating operator negligence I have not disregarded the inspector's testimony that he found only "moderate" negligence, accepting as mitigation mine manager Farrell's statement that he believed that new miner training could be provided gradually over a period of time. This statement by Farrell constitutes an admission that he knew these miners had not completed their

training. I also find that the cited regulation is unambiguous in requiring that such training must be received "before such miner is assigned to work duties."

I also note in this connection that Farrell himself testified at hearings that he received all of his own new miner training before he started working. Moreover, it is noted that one of the new miners, Bob Hale, had not completed his training even after nine months on the job and that the other miner, Joe Barquilla, had not completed his training even after six months on the job. Even a lay person would understand that the failure to train the new miners regarding the serious hazards inherent in underground mining for six months or more would be extremely dangerous.

Citation No. 7987759

Citation No. 7987759 alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 57.15004 and charges as follows:

> The mine manager failed to wear safety glasses, goggles, or face shields, or other suitable protective devices while driving nails into timbers with the back of a pipe wrench. This occurred in the south end of the 1700 level. Flying steel chips could easily cause permanently disabling eye injuries. Discussions had been held with the mine manager on previous inspections about the requirements for the use of eye protection.

The cited standard, 30 C.F.R. § 57.15004, provides that "all persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or a plant where a hazard exists which could cause injury to unprotected eyes."

There is no dispute that on September 21, 2000, mine manager Farrell, in the presence of MSHA Inspector Bruce Allard, drove a nail or screw into a piece of wood with a wrench without wearing eye protection. The issue is whether this was a hazard within the meaning of the cited standard. I find that it was a hazard based on the credible testimony of Inspector Allard. In this regard Allard testified that striking a rusty nail with a pipe wrench could result in a piece of the nail breaking off and injuring one's eye.

I do not however find that the violation was "significant and substantial" or of high gravity, nor do I find that the mine manager was seriously negligent in his failure to use eye protection on this occasion.

In reaching these conclusions I have not disregarded Respondent's argument that the "nail" inspector Allard referenced in his citation was actually a "screw." I find no legal significance to the distinction inasmuch as the so-called "screw" was being hammered as if it were a nail. It is not therefore a crucial allegation in the citation. I accept however the testimony of mine manger Farrell that the screw was not rusty and that it was hammered into soft rotten wood and that he merely gave the screw a "slight tap." Farrell was in the best position to know

the condition of the screw and wood. Farrell also testified that in his judgement and based on his many years of mining experience there was no hazard to his eyes in the procedure he was following. I note that mine president Miller also confirmed that the wood into which the roofing screw was being nailed was "rotten."

Civil Penalty Analysis

In assessing a civil penalty under Section 110(i) of the Act, the Commission and its judges must consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the affect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve compliance after notification of the violation. Sixteen to One does not have a serious history of violations. It is a small size business and achieved rapid compliance after notice of the violations herein. Gravity and negligence have been previously discussed. Sixteen to One President, Miller, testified and presented documentary evidence with respect to the effect of the proposed penalties on Sixteen to One's ability to continue in business.

Evidence of an operator's financial condition is relevant to the ability to continue in business criterion. *Unique Electric*, 20 FMSHRC 1119, 1122-23 (October 1998). In this regard Miller testified that Sixteen to One was "technically insolvent" (Tr. 440). He acknowledges, however, that the company is unable to provide an independent audit of its financial condition (Tr. 441). In-house financial statements were provided instead (Respondent's Exh. T). Such unaudited statements do not, of course, have the assurance that they are consistent with fact or presented in accordance with sound accounting principles. The record also shows that the operator has continued to do business and has contracted with five miners to do so. The operator also retains significant assets, including a gold nugget worth about $44,000 and a gold collection worth about $1.5 million (Tr. 458-459).[3]

I have considered the evidence of the Respondent's financial condition along with the other statutory factors and conclude that the civil penalties ordered herein are appropriate. The reduced penalties take into consideration the Respondent's financial condition but also the significant gravity and negligence associated with Citation No. 7995404 and 7995405.

[3] The affidavit of Allen Watson, submitted by the Secretary post hearing was not admitted as evidence and therefore is not considered as evidence herein.

ORDER

Citation No. 7982709 is vacated. Citation Nos. 7982708, 7982710, 7995404, 7995405, 7992100 and 7987759 are affirmed and Original Sixteen to One Mine Incorporated, is hereby directed to pay civil penalties of $55.00, $55.00, $12,000.00, $7,500.00, $50.00 and $100.00, respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

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