FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 10, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-332
Petitioner	:	A.C. No. 42-02263-03503
	:	
	:	Bear Canyon No. 3 Mine
v.	:	
	:	Docket No. WEST 2004-148
	:	A.C. No. 42-01697-14546
C. W. MINING COMPANY,	:	
Respondent	:	Bear Canyon No. 1 Mine

DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Carl F. Kingston, Esq., Salt Lake City, Utah, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against C. W. Mining Company ("CW"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve 18 citations issued at the Bear Canyon Nos. 1 and 3 Mines in Emery County, Utah. The Secretary proposes a total penalty of $21,150.00 in these cases. An evidentiary hearing was held in Salt Lake City, Utah. The parties introduced testimony and documentary evidence.

I. WEST 2003-332

In August 2002, CW was in the process of developing the Bear Canyon No. 3 Mine as an underground coal mine. This mine is very close to the Bear Canyon No. 1 Mine, which was an operating underground coal mine. Both mines used the same surface structures, including the office and bathhouse. Miners working for CW had driven entries about 200 feet into the mountain. As the crew mined into the mountain, they installed a canopy along the roof for about 20 feet inby the portal. (Tr. 82). This canopy consisted of H beams installed along the ribs and across the roof with steel plating between the beams. CW miners had been in the No. 3 portal on August 28, 2002, working on this project. Prior to the beginning of that shift, a preshift examination had been conducted and the date, time, and initials of the person who conducted the exam were written on a board near the entrance of the portal (the "D, T & I board").

On August 29, 2002, Donald E. Durrant, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") was at the Bear Canyon No. 1 Mine conducting an inspection. He had been inspecting this mine for several weeks. At about 10:00 a.m., he decided to go look at the Bear Canyon No. 3 Mine. When he arrived, he observed about eight individuals working in the vicinity of the portal. He believed that some of these individuals were working inside the portal, including Mr. Felix Ramirez who was arc-welding metal. Inspector Durrant noticed that the yellow plastic tape warning people to keep out of the mine was on the ground but that the D, T & I board did not show that a preshift examination had been performed.

The eight individuals working at the portal were employees of Advance Technical Research and Engineering ("Advance"), an independent contractor of CW. According to Charles Reynolds, an engineer with CW who was responsible for supervising the contract, Advance was hired to construct a number of items at the portal including a canopy that would extend out from the portal to protect people and equipment from any rocks that might fall down the side of the mountain. Advance's employees were not miners and were not certified to conduct preshift examinations. Kenneth Defa, the mine superintendent, testified that a specific CW employee had been designated to perform any required examinations and tests at this mine.

A. Citation No. 7612553

Inspector Durrant issued Citation No. 7612553 under section 104(d)(1) of the Mine Act alleging a violation of section 75.360(a)(1) of the Secretary's safety standards. The body of the citation states as follows:

> Eight contract miners were working in the #3 portal area doing construction work without the mine being preshifted. The miners entered the portal at around 9:00 AM. The miners were sent there by Mr. Robert Putnam, but C.W. Mining Co. personnel have been conducting the preshifts as the contractor has no certified employees to perform the examinations. The mine operator did not insure that the preshift was conducted prior to work being performed in the mine.

The inspector determined that the gravity was serious, that the violation was of a significant and substantial nature ("S&S"), and that the negligence was high. The safety standard provides, in part, that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of an 8-hour interval during which any person is scheduled to work or travel underground." The Secretary proposes a penalty of $1,200.00 for this citation.

Inspector Durrant testified that several of the eight contract workers were inside the mine when he arrived at the portal. Mr. Ramirez was using an arc welder to fabricate supports for the canopy. It was obvious to the inspector that no preshift examination had been performed. CW

does not dispute that fact, but argues that the men were not inside the mine. Mr. Defa testified that all of the work that day was being performed under the canopy that was being constructed outby the mine portal and that the contract employees were not scheduled to work or travel underground that day. As a consequence, CW contends that a preshift examination was not required.

I conclude that CW violated the safety standard. Inspector Durrant credibly testified that he observed miners working inby the underground portal. He observed that the plastic warning tape had been torn down. In addition, whether these contract employees were underground at the exact time the inspection party arrived is largely irrelevant. The portal was open and it is foreseeable that the contract employees would enter the mine at some point while performing their work. There was no demarcation under the canopy as to where the underground mine began and the surface canopy ended. Consequently, a preshift examination was required.

I find that CW's negligence was low, however. The inspection party consisted of Durrant and Defa. Durrant credibly testified that Defa was genuinely surprised to see contract employees at the No. 3 Mine. Defa testified that he had no idea they were at the mine that day. Defa subsequently checked at the mine office and discovered that the contract employees had not checked in when they arrived at the site that day, as required by CW. Advance had been working at the No. 3 mine off and on for about a week. In the past, CW assigned one of its own employees to perform a preshift examination when contract employees arrived. Since Defa did not know that Advance employees were there, no preshift examination had been performed.

Charles Reynolds, an engineer with CW, was responsible for managing the work Advance was performing. He credibly testified that Advance was instructed to check in at the mine office each day prior to commencing any work. He testified that Advance failed to check in on August 29. In addition, Reynolds credibly testified that Advance was hired to perform work on the surface and was not engaged in work underground. Reynolds stated that Advance was constructing a canopy outside the mine portal and a housing for a fan outby the portal. As a consequence, the Secretary did not establish that the violation was the result of CW's unwarrantable failure to comply with the safety standard. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991). I find that CW's conduct does not reach that level of negligence. Indeed, I find that CW's negligence can most accurately be characterized as less than ordinary negligence. It had procedures in place to ensure that preshift examinations were performed whenever anyone worked in or around the No. 3 mine. Advance failed to follow these procedures on August 29. This citation is modified to a section 104(a) citation with low negligence.

Whether the violation was S&S is a closer issue. Inspector Durrant determined that the violation was S&S because the area had not been tested for oxygen or methane, the roof and ribs

had not been examined, and the mine fan was not operating. He believed that because the contract workers had limited underground experience it was reasonably likely that someone would suffer a serious injury as a result of the violation.

Mr. Defa testified that the contract employees were not working underground but were working under a canopy outby the mine portal. He also testified that, even if they ventured inby the portal, they would have been protected by the steel plates that were installed between the H beams inby the portal.

A violation is classified as S&S "if based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established that the violation was S&S. The Advance employees were not experienced miners. Because Advance employees are not familiar with the hazards present in a mine environment, they might easily overlook potential hazards. For example, the CW preshift examiner would have turned on the mine fan before allowing people to work in or around the portal to ensure that air quality met MSHA standards. The Advance employees did not turn on the fan. A preshift examination is especially critical in this circumstance because the qualified CW examiner would have made sure that the area was free of hazards. It is reasonably likely that, with continued normal mining operations, one of the Advance employees would be injured and that such injury would have been contributed to by the violation. The contract employees could have been injured by falling rock and they could have encountered excess methane or an oxygen deficiency. Such injuries or events would not have been likely if a CW mining employee had performed the required preshift examination. A penalty of $200.00 is appropriate.

B. <u>Order No. 7612554</u>

The inspector also issued Order No. 7612554 under section 104(d)(1) of the Mine Act alleging a violation of section 75.1106 of the Secretary's safety standards. The body of the citation states as follows:

> Contract miners were performing arc welding on the tunnel liner in the #3 portal without a means to detect methane. One miner testified that they had entered the mine between 9:00 and 9:30 AM and began the welding operations. The miner stated that they had been welding on and off until the authorized representative arrived. That would be between 45 and 75 minutes. They had been assigned to work in this area by Robert Putman, their supervisor. Mine management failed to insure that a certified individual was present with an approved device to test for methane.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in part, that "[w]elding, cutting, or soldering with an arc or flame in other than a fireproof enclosure shall be done under the supervision of a qualified person who shall . . . , immediately before and during such operations, continuously test for methane . . . ." The Secretary proposes a penalty of $1,600.00 for this order.

Inspector Durrant testified that he observed one Advance employee, Mr. Ramirez, performing arc-welding in the portal and he determined that no tests had been conducted to determine if a dangerous level of methane was present. He believes that Ramirez was about 15 to 20 feet inby the portal, at the third or fourth H beam. (Tr. 54). Durrant stated that the welding was not occurring inside the steel canopy that was being constructed outby the portal, but was occurring inside the mine. (Tr. 55). He testified that the standard has been interpreted to require a methane test prior to welding and a methane test at least every 20 minutes thereafter. (Tr. 44).

Mr. Defa testified that Ramirez was welding the steel structure that was being constructed outby the portal. He states that the steel being welded at that time was part of this structure. He testified that CW's own miners constructed the canopy that was underground inby the portal as they developed the entries. (Tr. 76). Advance was only contracted to construct that part of the canopy that was outby the portal. Defa testified that Ramirez was welding just outby the portal under the steel canopy. (Tr. 78).

Defa's testimony that Ramirez was welding on the canopy that was being constructed outside the mine is credible because it is consistent with the work that Advance was retained to do. Advance was not working on the steel structure underground so it is highly unlikely that Ramirez was welding on the steel structure that was already in place underground. Ramirez was welding two beams together on the outer canopy. The first sentence of section 75.1106 makes clear that the standard only applies underground. It states "[a]ll welding . . . with arc or flame in all underground areas of a coal mine shall, whenever practicable, be conducted in fireproof enclosures." The second sentence of this standard, set forth above, modified the first sentence, and its requirements are also limited to the underground areas of coal mines.

Inspector Durrant was very vague about where this welding was occurring in relation to the portal. It was his belief that Ramirez was underground, but his testimony was rather weak in

this regard. It appears that he estimated distances from where he entered the outby canopy, yet he did not know the length of the outby canopy. (Tr. 54-55). I find that the Secretary failed to establish that the arc-welding that the inspector observed was occurring in the underground portion of the mine. Consequently, I vacate this citation.

II. WEST 2004-148

The Bear Canyon No. 1 Mine is an underground coal mine located near the No. 3 Mine. On July 9, 2002, Fred Marietti, an electrical inspector with MSHA, was inspecting the underground shop at the mine. He was accompanied by Cyril Jackson, the assistant mine foreman. Chris Grundvig, a mechanic and electrician, was in the shop at the time of the inspection. As the inspector was looking over the shop, he became concerned that a portable heater was not protected in the event of a ground fault because fuses rather than a circuit breaker were present. (Tr. 97, 130). Inspector Marietti's examination of the heater led him to inspect the electrical system in the shop. As a result of this inspection, he issued numerous citations under section 104(a) of the Mine Act for alleged electrical violations in the shop. The Secretary proposed the penalties for these citations under her special assessment regulations at 30 C.F.R. § 100.5. The underground shop has a concrete floor and the walls and ceiling are covered with fire-retardant material. (Tr. 371, 428).

Power enters the mine at 12,470 volts. It is stepped down to 480 volts at the section power center (the "transformer"or "power center"). The power center is underground and is about 300 feet from the shop. (Tr. 357). A shielded power cable enters the shop from the transformer through a rigid metal conduit that runs down the wall of the shop to the 100 amp fused disconnect (the "fused disconnect"). This shielded cable contains five conductors as follows: three power wires, two ground wires, and a pilot wire. The pilot wire is part of the ground check system that will open the circuit breaker at the transformer in the event the circuit loses ground protection. Because the cable could not fit into the ridged metal conduit with the outer jacket, this outer jacket was removed when the circuit was installed. On the load side of the fused disconnect, eight branch circuits split off through a cable tray. Two of these branch circuits are spare circuits which were not in use and not at issue in this case. A transformer is attached to one of the branch circuits that steps down the voltage to 110 volts and 220 volts so that hand-operated equipment, such as drills, can be used in the shop. (Tr. 179-80). The remaining five branch circuits are used for the following equipment: a 460 volt welder, a 460 volt grinder, a 460 volt air compressor, and two rubber-wheeled 460 volt wheel-mounted heaters. These circuits are diagramed at Exhibit G-1, pages 2 and 3. (Tr. 105-117, 119-122).

During his inspection, Inspector Marietti opened the fused disconnect box and discovered that the two ground wires that entered the shop through the rigid metal conduit were not attached to the grounding lug inside the box. Instead, they were taped up with electrical tape. (Tr. 117-18). He testified that he noticed this condition as soon as he opened the box. (Tr. 132). The pilot wire for the ground monitor system was properly connected at the fused disconnect box.

A. Citation No. 7612350

Based on the condition he observed in the box for the fused disconnect, the inspector issued Citation No. 7612350 under section 104(a) of the Mine Act alleging a violation of section 75.701 of MSHA's safety standards. The body of the citation states:

> The 480 VAC, three phase, 100 amp fused Main Disconnect metal enclosure that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by the authorized representative of the Secretary. The enclosure was not grounded by a solid connection to the resistance ground conductors provided by the energized power cable supplying power to the enclosure. The two ground conductors were taped together with insulated tape and laying in the enclosure, not connected to a grounding lug. There were ground conductors to six other metal enclosed electric equipment connected in the main enclosure relying on a ground system from these resistance ground conductors. There was some grounding provided due to the metallic shielding on the 2/0 power cable where it had the outer jacket removed and pulled through a rigid conduit and touching the ground conductors through skin effect along the cable to the transformer feeder circuit breaker. Miners touch the enclosure parts when operating fused disconnect.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides that "[m]etalic frames, casings, and other equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by the authorized representative of the Secretary." The Secretary proposes a penalty of $1,400.00 for this citation.

1. <u>Summary of the Evidence</u>

Inspector Marietti testified that the safety standard requires that metal frames of electric equipment, including electrical boxes, must be properly grounded. (Tr. 136-37). He stated that this electrical box could have become energized in the event of a fault in the circuit because the box was not properly grounded. If the circuit were grounded at the box, the circuit breaker at the transformer would trip in the event of a fault and the electrical box would not become energized. The inspector testified that with the grounding wires disconnected, the grounding circuit was open, which would not allow the current to flow back to the transformer in the event of a fault. He stated that a "resistance ground system" is what MSHA requires under this safety standard. (Tr. 138-39). Thus, makeshift grounding, such as through water pipes, is not approved.

The outer jacket for the cable coming into the shop from the transformer had been stripped off when it was inserted into the rigid metal conduit. The individual wires within the cable twist like the strands of a rope. As a consequence, the grounding wires and the metal shielding for the cable were making contact with the rigid metal conduit. Inspector Marietti testified that using the metal conduit and cable shielding is not an approved method of grounding the circuit. The contact between the metal conduit and the cable shielding or the grounding conductors may not be sufficient or effective enough to protect miners from energized equipment if there were to be a fault.

Inspector Marietti testified that Mr. Grundvig, who performed the weekly electrical examinations in the shop, never opened the fused disconnect box during his examinations. Marietti said that he could see that the ground wires were not connected as soon as he opened the box because it was obvious. He also stated that Mr. Defa told him that the condition must have existed since the underground shop was constructed 15 years earlier. (Tr. 148). The inspector testified that he was amazed that nobody had detected this problem in that 15-year period. Inspector Marietti issued Imminent Danger Order No. 7612349, under section 107(a) of the Mine Act, along with the citations at issue in this case. He also issued other citations that were not contested by CW. Inspector Marietti determined that it was highly likely that an accident would occur. (Tr. 149). He determined that the violation should be designated as S&S because, based on the type of work being done in the shop, it was reasonably likely that someone would be seriously injured as a result of the violation. (Tr. 142-49).

During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> There was grounding provided through cable shielding and the rigid conduit. Tests indicated that the system was grounded. However, this is not an acceptable ground because this condition has the potential of failure. The gravity is reduced to reasonably likely.

Cyril Jackson accompanied Inspector Marietti on the inspection of the shop. He testified that when the fused disconnect box was opened, he had to pull the ground wires out from behind other cables to see that the ends were not connected to the grounding lug. (Tr. 329). He states that only then did the inspection party realize that the ends of the ground wires were taped up. Mr. Grundvig testified that the ends of the ground wires were not visible until they were pulled out from behind other components in the box. (Tr. 379). At that point, the inspector wanted to find out why the breaker at the power center had not tripped. Marietti declared that this condition created an imminent danger so they went to the transformer and turned off the power.

According to CW's witnesses when the power was turned back on, the circuit breaker stayed set, in the closed position. Jackson testified that Marietti began to troubleshoot by unplugging the cable coupler at the transformer and examined the plug, which was not shorted.

The inspector then tested the circuit breaker. First, he tested the breaker with the plug out and it would not set. Next, Marietti plugged the cable coupler back in, set the circuit breaker and it remained set. When he pulled the plug out, the circuit breaker tripped. The prong on the plug for the pilot wire is the shortest so that it will disconnect first, and the prong for the ground is the longest. (Tr. 372). The breaker should trip as soon as the prong for the pilot wire disengages.

Jackson testified that they all went to the office, where Kenny Defa asked whether the breaker tripped when the pilot wire was disconnected at the fused disconnect box. The circuit for the shop was equipped with a ground monitoring system which is designed to detect a problem in a circuit's grounding system. Low voltage power travels from the transformer to the fused disconnect box through the pilot wire. Ordinarily, this power would travel back to the transformer via the grounding wires. If the grounding wires are disconnected, the ground monitoring system will detect this break in the grounding circuit and the circuit breaker will trip. The ground monitoring system did not trip the circuit breaker in this instance even though the ground wires were not connected at the grounding lug on the fused disconnect box. The reason why the circuit breaker did not trip is contested by the parties. Inspector Marietti testified that, in this instance, the ground wire and the pilot wire were touching on the cable coupler (plug) at the transformer. (Tr. 153-54). Thus, the ground monitoring circuit was short-circuited where the cable was attached to the transformer at the cable coupler. CW disagrees with this assessment.

After their discussion with Defa, Marietti, Grundvig, and Jackson went back to the shop to test the circuit with a meter to determine if it was grounded. The meter showed that the circuit was grounded. (Tr. 331, 357, 385). They observed that the pilot wire was properly connected at the fused disconnect box. Jackson testified that when the pilot wire was disconnected from the lug on the box, the circuit breaker tripped. (Tr. 333). Jackson testified that he is absolutely certain that when the pilot wire was disconnected at the fused disconnect box, the circuit breaker tripped to an open position. (Tr. 355). Grundvig testified that the power went off in the shop when the pilot wire was lifted from the box. (Tr. 382-83, 393). When Grundvig went to the breaker to try to reset it, it would not set because the pilot wire had been disconnected. (Tr. 383). When the pilot wire was reconnected to the box, the circuit breaker set properly. Mr. Defa testified that he was told that the breaker tripped when the pilot wire was lifted from its bracket on the fused disconnect box. (Tr. 432-33).

Jackson further testified that when the power cable entering the shop was installed, the outer jacket was removed where it passed through the metal conduit. The shielding and the two grounding wires made contact with the metal conduit. (Tr. 336, 385). The cable was very tight inside the metal conduit. (Tr. 356). The metal conduit was screwed into a metal plate which was bolted to the top of the fused disconnect box. (Tr. 337). As a consequence, when Inspector Marietti used a meter to test the ground, the meter showed that the circuit was grounded, even though the grounding wires were not connected at the fused disconnect box in the shop. Jackson concluded that, although this installation did not comply with the safety standard, the circuits in the shop were effectively grounded. Mr. Jackson, who has been certified through the College of Eastern Utah as a mine electrician, testified that the violation did not present a hazard to miners.

(Tr. 340). Mr. Grundvig testified that because the metal conduit was about four feet long with an elbow, good contact had been established between the uninsulated grounding wires and the conduit. (Tr. 392).

Jackson testified that the shop was constructed about 15 years ago and the electrical system had not been changed since that time. He also stated that CW had not experienced any ground faults or electrical injuries in the shop since the shop was constructed. Jackson also stated that MSHA inspectors had inspected the shop in the past and no citations had been issued concerning the manner in which the electrical system was wired or grounded. (Tr. 339).

Mr. Jackson further testified that he met with MSHA officials in Price, Utah, including Inspector Marietti, to discuss the electrical citations. When Marietti mentioned that the pilot wire was shorted at the cable coupler (plug) at the power center for the shop, Jackson "reminded him" that a plug for a different circuit at the power center was shorted out, not the plug that controlled the circuit for the shop. (Tr. 355). Jackson also reminded him that he issued a citation for that condition. Jackson testified that Inspector Marietti replied that it was possible that he was confused about which plug at the power center had a problem. Grundvig and Defa testified similarly. (Tr. 411-12, 435). Jackson testified that he is absolutely certain that the plug at the power center for the shop was correctly wired and was not shorted out in any way. (Tr. 355-56, 362). Grundvig also testified that when the plug was examined by the inspection party, there was nothing wrong with it. (Tr. 384). Grundvig testified that another plug at that same transformer was "messed up pretty bad," but it was not the plug for the shop. (Tr. 412). Jackson further stated that Inspector Marietti would have written a citation for the faulty plug if, in fact, it was not correctly wired. On rebuttal, Inspector Marietti testified that he was not at that meeting in Price and that, although other plugs were also poorly wired at the transformer, he remembers that the shielding for the cable to the shop was touching the pilot wire in the plug for the shop and that he immediately corrected the problem. (Tr. 455-457).

Arnold Pratt, a consulting professional electrical engineer, testified for CW. He testified that, although the cited condition violated the standard, the violation did not create a safety hazard. He reached this conclusion based on the fact that the bare shield on the power conductor entering the shop made a tight connection with the metal conduit through which it passed. (Tr. 245, 248; Ex. R-1). He believes that this condition existed since the shop was built. As a consequence, the cable was adequately grounded. This fact is supported by the grounding test that was performed which showed that there was a "good low resistance connection between the . . . shield on the power conductor and the conduit." *Id.* He believes that the shielding had enough "ampacity" to adequately ground the circuit. (Tr. 299-300, 318-19). He stated that his conclusion is supported by the fact that this condition had existed for at least 15 years without incident. (Tr. 249). Electrical tests would not have revealed the problem because grounding was provided through the conduit. Pratt contends that if, at any time during this 15-year period, grounding through the conduit had failed, the breaker would have tripped and the problem would have been detected during troubleshooting.

2. Analysis

As discussed above, the parties do not dispute that the cited condition violated section 75.701. The ground wires from the power center were not connected to the grounding lug on the fused disconnect box. CW contends that the violation was neither serious nor S&S. The Secretary contends that it was reasonably likely that someone would be seriously injured by the cited condition. For the reasons discussed below, I find that the violation was somewhat serious but that it was not S&S.

Inspector Marietti is a highly qualified and experienced electrical inspector. Witnesses for CW testified that he has been very helpful in suggesting improvements to the electrical systems at the mine. He provided instruction on installing proper electrical installations to abate the citations he issued. Much of the testimony and evidence presented by the Secretary was very technical in nature. I have only briefly summarized the evidence presented and I have not discussed all of the conflicts in the evidence because I do not believe that it is necessary to do so. Whether the pilot wire was shorted out at the plug at the power center is largely irrelevant. I find that Inspector Marietti discovered that the cable shielding was not connected to the plug at the transformer in a proper manner. As a consequence, some of the thin stray wires of the shielding were touching the pilot wire. (Tr. 455-457). Thus, the ground monitoring system was short circuited. I find that Marietti removed the stray shielding wires from the pilot wire before the troubleshooting described by Jackson began. Once the faulty condition in the plug was corrected, the ground monitoring system still did not trip the circuit breaker because the ground wires were connected to the fused disconnect box via the metal conduit. Because this conduit was connected to the fused disconnect box, the power in the ground monitoring circuit could travel back to the transformer through the grounding wires in the cable via the metal conduit. I credit the testimony of Jackson and Grundvig concerning the results of troubleshooting that occurred after Inspector Marietti fixed the plug. When Marietti tested the ground, his meter showed the fused disconnect box was grounded.

I find that the Secretary did not establish that the violation was S&S. The fused disconnect box was effectively grounded through the metal conduit. I credit the testimony of Jackson that the cable was snug within the conduit. The bare ground wires and the shielding for the cable were in direct contact with the conduit. Given that this condition had existed for about 15 years without incident, it is highly unlikely that the ground would have failed assuming continued normal mining operations. Although this connection violated the safety standard, I find that there was not a reasonable likelihood that the hazard contributed to by the violation would result in an injury. If the conduit became loose from the fused disconnect box, Mr. Grundvig would have detected that condition during his normal examinations in the shop. There was a slight safety hazard, however, because the grounding connection in the metal conduit could deteriorate over time.

I find that the violation was the result of CW's high negligence. The ends of the ground wires were not attached to the lugs in the fused disconnect box and these ends were taped up. The

failure to connect the ends of the ground wires when the box was initially installed demonstrates a high degree of negligence. It should have been obvious to the miner installing the box that the ground wires were taped up and that they needed to be connected to the grounding lug. CW argues that, because the system was grounded through the conduit, the violation was never detected and its failure to detect the violation demonstrates low negligence. I base my negligence finding on the failure to properly wire the box when it was installed. A penalty of $800.00 is appropriate for this violation.

B. Other Citations under Section 75.701

Inspector Marietti issued six other citations under section 75.701. The citations related to each of the active branch circuits. For example, Citation No. 7612352 states, in part:

> The 480 VAC, three phase, 5 HP, 7 amp bench grinder metal enclosure that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by the authorized representative of the Secretary. The enclosure was not grounded to a solid connection to the resistance ground conductors provided by the energized power cable supplying power to the 100 amp Main Disconnect enclosure. The ground conductors were taped together with insulated tape and laying in the enclosure, not connected to a grounding lug. The grinder ground conductor was connected in the main enclosure relying on the ground system from these resistance ground conductors that were not solidly connected providing a mechanical and electrically efficient connection. There was some grounding provided due to the metallic shielding on the 2/0 power cable where it had the outer jacket removed and pulled down through a rigid conduit and touching the ground conductors through skin effect along the cable to the transformer feeder circuit breaker. There was rigid metal conduit to the grinder from the main disconnect . . . . Miners touch the enclosures when working with equipment.

This citation is merely stating that, although a grounding wire connected the grinder to the fused disconnect box, the ground wires from the transformer were not connected at that box, so the grinder circuit was not properly grounded with resistance ground conductors. (Tr. 155). Inspector Marietti issued similar citations for each piece of electrical equipment in the shop. (Citation Nos. 7612351 - 7612356) (Tr. 160-82). None of these citations would have been issued if the grounding wires had been attached to the lug in the fused disconnect box. In each instance, the gravity was lowered on June 26, 2003, following a safety and health conference. The citations were designated as S&S and CW's negligence was listed as high. Inspector Marietti

testified that the violative conditions and the hazards presented were the same for each piece of equipment (Tr. 177-78). The Secretary proposes a penalty of $1,400.00 for each citation.

Mr. Jackson testified that all of these citations relate back to the fact that the ground wires were not connected to the fused disconnect box. For the same reasons as discussed above, he does not believe that these conditions created a hazard. As stated above, no miner had ever been shocked as a result of the conditions described in the citations. He believes that these citations repeat the same condition for each piece of equipment in the shop. Mr. Grundvig's testimony supports Jackson's testimony. (Tr. 393-98).

Mr. Pratt testified that the ground connection between the welder, grinder, and the other equipment in the shop was properly made to the fused disconnect. (Tr. 250-55). It was the fused disconnect that was not properly grounded as set forth in Citation No. 7612350. The system was grounded because the fused disconnect was grounded through the metal conduit. Thus, no hazard was presented by the conditions described in these citations. In addition, because there were ground wires running from the fused disconnect to each piece of equipment on these branch circuits, there was no separate violation for each branch circuit. The only violation was at the fused disconnect where the grounding wire from the power center was not attached at the grounding lug.

The first issue presented by these citations is whether they are unlawfully duplicative. The Commission has addressed this issue in cases where the Secretary has issued several citations under different safety standards for the same condition. The Commission held that "citations are not duplicative as long as the standards involved impose separate and distinct duties on an operator." *Western Fuels-Utah, Inc.,* 19 FMSHRC 994, 1003 (June 1997) (citations omitted). All six of these citations were abated when CW abated Citation No. 7612350. Inspector Marietti issued a separate citation for each piece of electrical equipment in the shop. Each piece of equipment was properly grounded to the fused disconnect box, but the fused disconnect box was not properly grounded to the transformer, as discussed above. All of these citations relate back to the violation in Citation No. 7612350. Nevertheless, I find that it was within the Secretary's enforcement discretion to issue a separate citation for each piece of equipment because each piece of equipment was not properly grounded back to the transformer. Grounding back to the transformer is necessary in order for the circuit breaker to trip. A fault at the bench grinder, for example, could injure a miner using the bench grinder because of the lack of grounding to the transformer.

My findings with respect to negligence, gravity, and S&S are the same for these citations as for Citation No. 7612350. The equipment was, in fact, grounded because of the way the power cable entered the shop through the fixed metal conduit. As a consequence the violations were not S&S and were not particularly serious. CW's negligence was high. Because the violative condition was fully addressed in Citation No. 7612350 and each citation only affected one piece of equipment, I find that a penalty of $200.00 for each citation is appropriate for these

violations. I find that a cumulative penalty of $2,000 for the violations of section 75.701 is appropriate.

C. Citation No. 7612358

Inspector Marietti issued Citation No. 7612358 under section 104(a) of the Mine Act alleging a violation of section 75.902 of MSHA's safety standards. The body of the citation states:

> The 480 VAC, three phase, 55 amp welder and fused disconnect metal enclosures were not provided with a fail safe ground check circuit to monitor continuously the resistance ground system circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check is broken. The pilot conductor from the feeder circuit breaker at the transformer supplying power to the main enclosure from the resistance grounded system was connected in parallel to six other circuits in use and two others that had the load cables removed but the pilot conductors were still hanging open in the fused disconnect enclosures. These circuit grounds and pilot conductors were in parallel and if a ground opened as in the one fused disconnect that was removed from the ground check circuit that was opened, it would not open the circuit breaker. The parallel circuitry would require that all the individual grounds would have to be open to open the feeder circuit breaker. This would create a hazard to the miners for no resistance ground protection if the enclosure became alive from a fault. Miners touch the enclosed parts when operating the fused disconnect.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in pertinent part, that "[l]ow and medium-voltage resistance grounded systems shall include a fail-safe ground check circuit to monitor continuously the grounding circuit to assure continuity which ground check circuit shall cause the circuit breaker to open when either the ground or pilot check wire is broken . . . ." The Secretary proposes a penalty of $325.00 for this citation.

Pilot wires, which make up part of the ground check monitoring system, carry low voltage current. As described above, this current flows through the pilot wires to the equipment, then back through the grounding wires to the circuit monitor. (Tr. 185-86). If the low voltage power in this ground monitoring circuit is interrupted for any reason, the circuit breaker for the circuit supplying power to the equipment is opened, thereby de-energizing the power. The power in the ground monitoring circuit can be interrupted if the ground wire is broken or the pilot wire is broken. The citation states that the pilot wires to the welder and the other equipment in the

shop were incorrectly installed. As installed, the grounding system for each piece of equipment in the shop would have to fail before the circuit breaker would open. For example, if the ground wire going from the fused disconnect to the welder were to break or fail, the ground check monitoring system would not detect this failure.

An easy way to visualize the issue is to think of the two types of Christmas tree lights. Most lights are now wired in parallel so that if one light fails, the entire string of lights does not go out. Older Christmas tree light strings were wired in series with the result that if one light burned out, the entire string of lights went out. In the case of this ground check monitoring system, the pilot wires should have been wired in series so that if there were to be a problem anywhere in the system, the circuit breaker would to cut the power. The citation alleges that the ground check monitoring system was not fail-safe because the circuit breaker would not open in the event the pilot wire or ground wire for the welder broke.

Inspector Marietti determined that the negligence was high because CW should have done a better job of making sure that the electrical system in the shop was installed in accordance with the requirements of the standard. (Tr. 190-91). During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> A ground circuit, between the 100 amp disconnect and the stationary electrical equipment, was provided by a properly connected internal conductor and by rigid metal conduit attached to the frames. Tests indicated that the system was grounded. However, because the ground monitor circuits were wired in parallel . . . , the monitor would not open if one ground circuit lost continuity. The condition is violative but not reasonably likely to cause an accident resulting in injury. The citation gravity was reduced to non-S&S.

Mr. Jackson agrees that the pilot wire was not properly installed. (Tr. 345). He does not believe that this condition created a hazard. This condition had existed since the shop was constructed without creating any problems. Mr. Grundvig also confirmed that the pilot wires to the equipment were not wired correctly. (Tr. 378-79, 398).

Mr. Pratt testified that this condition violated the safety standard but it did not present a hazard. (Tr. 255-56; Ex. R-1). A hazard was not present because the pilot wire had a good connection to all of the circuits and therefore also acted as a ground wire by itself. Thus, if the grounding system ceased to function, the pilot wires would provide adequate ground. (Tr. 257-58). The pilot wire had a sufficient ampacity to act as a ground wire. Thus, two grounding systems would have to be broken in order for a hazard to be presented by the violation.

The parties do not dispute that this citation should be affirmed. The Secretary modified the citation during a conference. I find that the gravity was somewhat serious and that it was not

S&S. I accept the evidence presented by CW that the violation did not present a significant safety hazard. CW's negligence was high when it improperly installed the electrical system in the shop. I find that a penalty of $150.00 is appropriate for this violation.

D. Other Citations under Section 75.902

Inspector Marietti issued a total of six citations under this standard, one for each of the six active branch circuits in the underground shop. (Citation Nos. 7612358, 7612359, 7612360, 7612421, 7612422, 7612423) (Tr. 191-202). Each citation contains the same allegations with respect to each separate piece of equipment in the shop. At the MSHA conference, three of the citations were modified to non-S&S citations and the gravity of the heater citations was reduced. It should be noted, that when CW abated the citations at issue in this case, it completely redesigned the electrical circuits in the shop. With respect to the ground check monitoring system, it installed a separate ground monitor for each branch circuit so that if there were a failure in the resistance ground circuit for the welder, for example, it would shut down the power to the welder. As a consequence, the pilot wires were not connected in series because it installed a separate and an independent ground monitoring system for each branch circuit. (Tr. 197-98).

Mr. Jackson testified that the conditions cited in these citations were identical to the conditions cited in the previous citation. Grundvig agrees. (Tr. 400-05). Mr. Pratt testified that the conditions described in these citations would not present any hazard for the same reasons as described above. (Tr. 259-62). I find that each citation presented a discrete safety hazard with respect to the specific piece of equipment listed. Consequently, I find that the citations are not duplicative. I also find that the violations were somewhat serious and that CW's negligence was high. I find that a penalty of $150.00 for each citation is appropriate for these violations. I find that a cumulative penalty of $900.00 for the violations of section 75.902 is appropriate.

E. Citation No. 7612424

Inspector Marietti issued Citation No. 7612424 under section 104(a) of the Mine Act alleging a violation of section 75.601 of MSHA's safety standards. The body of the citation states, in part:

> The 480 VAC, three phase, No. 1 and No. 2 portable wheeled floor heaters trailing cables were not provided with a circuit breaker with instantaneous short circuit protection as required. The No. 1 with an AWG 8/5 trailing cable was protected with a 20 amp fuse. No. 2 with an AWG 10/5 trailing cable was protected with a 10 amp fuse. The cables get strung out on the floor in the shop with heavy metal and materials being moved and used that can damage the trailing cables.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in pertinent part, that "[s]hort circuit protection for trailing cables shall be provided by an automatic circuit breaker or other no less effective device approved by the Secretary of adequate current-interrupting capacity in each ungrounded conductor." The Secretary proposes a penalty of $450.00 for this citation.

During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> Although not provided with circuit breakers, the trailing cables for the portable shop heaters were protected by correctly sized fuses. Also, the circuits were protected by the circuit breaker at the power center. The condition described in the citation is not likely to cause an accident resulting in serious injury. The citation gravity was reduced to non-S&S.

Inspector Marietti determined that the heaters were portable equipment so that the power cables were trailing cables within the meaning of the safety standard. (Tr. 203). Section 75.601 requires all trailing cables be protected with an automatic circuit breaker that provides instantaneous short circuit protection. Inspector Marietti testified that trailing cables are required to be protected because they are subject to damage while being pulled around. (Tr. 205). The cables for the heaters were protected by fuses. Fuses do not meet the requirement of the standard because they do not provide instantaneous protection. A fuse will provide some degree of protection, but it will not automatically open the electrical circuit when a fault occurs. (Tr. 206). A fuse will only open a circuit after a period of time based on the design specifications of the fuse. Inspector Marietti does not know the amount of time it would take before these particular fuses would open the circuit in the event of a fault. (Tr. 233). The inspector testified that, in the alternative, CW could have relied on the circuit breaker at the power center for the shop, since the cables for the heaters were simply branch circuits of the shop circuit. To be effective, however, the circuit breaker would have to be set at 150 amps magnetic to provide the degree of protection required by the standard. (Tr. 208). In this case, the potentiometer at the circuit breaker for the shop was set at the maximum number of amps, which was considerably above 150 amps. (Tr. 168-70, 208-09). As a consequence, the circuit breaker would not trip in the event of a fault in the cables for the heaters.

Mr. Jackson testified that the fuses were installed when the shop was constructed. (Tr. 350). He stated that this condition has never created any problems. He does not believe that this condition created a shock hazard. He believes that the fuses used did not have delay and, if they did, it would not be enough to notice. (Tr. 351). Grundvig admitted that fuses would not disconnect all phases at once since each phase has a separate fuse. (Tr. 405).

Mr. Pratt testified that the condition violated the safety standard but that no safety hazard was presented. (Tr. 262). He based this conclusion on the fact that the circuit breaker at the

power center would adequately protect the circuit. In addition, he testified that it takes a fuse only a hundredth of a second longer to blow than a circuit breaker to open a circuit. (Tr. 264).

I find that the Secretary established a violation of the safety standard. The citation was modified to a non-S&S citation at the MSHA conference. I find that, because the potentiometer at the circuit breaker was out of adjustment, the circuit breaker might not provide adequate protection. The potentiometer adjusts the sensitivity of the circuit breaker. I credit the testimony of Inspector Marietti on this issue. I find that the citation was moderately serious. I also find that CW's negligence was high because it improperly installed fuses rather than circuit breakers in the two heater branch circuits. This violation was obvious. The Secretary's proposed penalty of $450.00 is appropriate for this violation.

F. **Citation No. 7612425**

Inspector Marietti issued Citation No. 7612425 under section 104(a) of the Mine Act alleging a violation of section 75.900 of MSHA's safety standards. The body of the citation states, in part:

> The energized 480 VAC, three phase circuits for the welder, bench grinder, air compressor, No. 1 and No. 2 portable wheeled floor heaters and 5 KVA transformer were not provided with a circuit breaker to provide undervoltage, grounded phase, short circuit and overcurrent [protection]. They were provided with fused disconnects.

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in part, that "[l]ow- and medium-voltage power circuits serving three-phase alternating current equipment shall be protected by suitable circuit breakers of adequate interrupting capacity . . . ." The Secretary proposes a penalty of $325.00 for this citation.

During an MSHA health and safety conference with CW on June 12, 2003, the gravity of the citation was lowered with the following language:

> Although not provided with separate circuit breakers, the circuits were protected by correctly sized fuses. Also, the circuits were protected by the circuit breaker at the power center. The condition described in the citation is not likely to cause an accident resulting in serious injury. The citation gravity was reduced to non-S&S.

Inspector Marietti testified that the branch power circuits in the shop were low voltage and were covered by the standard. These circuits were protected by fuses rather than circuit breakers. Section 75.900 goes on to state that the required circuit breakers "shall be equipped

with devices to provide protection against undervoltage, ground phase, short circuit, and overcurrent." The inspector testified that fuses cannot provide undervoltage and ground fault protection. (Tr. 212). He further stated that the circuit breaker at the power center could have provided the necessary protection if it were properly adjusted. In this case, however, the potentiometer was "set all the way up and the ground fault wasn't working." (Tr. 212).

Jackson testified that if a fuse blew out one of the phases, the motors would stop and hum. (Tr. 352). The motor might get a little hot, but the condition would likely trip the circuit breaker at the power center. He does not believe that the conditions described in this citation posed a hazard to miners. Grundvig testified that he had never opened the fuse boxes, so he did not know what type of fuses was used. (Tr. 407). He believes that if there had been a fault of any kind, the breaker at the power center would have tripped.

Mr. Pratt testified that there was some protection provided by the circuit breaker at the power center. (Tr. 264). If you had a short circuit in one of these pieces of equipment, there might not be enough current to trip the circuit breaker, but a fuse would blow. He did not see a danger presented in the conditions set forth in the citation. He admitted, however, that when a fuse blows, only one phase may be opened with the result that equipment could have current running through it. (Tr. 265). Because most people are used to circuit breakers, which cut off all power when tripped, they may troubleshoot equipment without knowing that it is still hot.

I find that the Secretary established a violation. The citation was modified to a non-S&S citation at the MSHA conference. I find that, because the potentiometer at the circuit breaker was out of adjustment, the circuit breaker might not provide adequate protection. I credit the testimony of Inspector Marietti on this issue. I find that the citation was moderately serious. I also find that CW's negligence was high because it improperly installed fuses rather than circuit breakers in these circuits. This violation was obvious. The Secretary's proposed penalty of $325.00 is appropriate for this violation.

G. **Citation No. 7612426**

Inspector Marietti issued Citation No. 7612426 under section 104(a) of the Mine Act alleging a violation of section 75.512 of MSHA's safety standards. The body of the citation states, in part:

> The welder fused disconnect, 480 VAC three phase rated at 480 for 30 amp fuses maximum was provided with two 60 amp fuses and one 50 amp fuse. The physical size is bigger around than a 30 amp and the holders were spread open to the point that the holder was not making adequate contact with the fuse. The A phase had been forced in breaking the insulated load side fuse holder. The holder was not bolted to the enclosure. The bench grinder fused disconnect was rated for 15 amp fuses at 480 VAC, there were 30

> amp fuses installed. These two enclosures were not being maintained in safe operating condition. This with all the [other] violations . . . contribute to an inadequate weekly electrical examination. The examination was conducted on 07/02 and previous weeks. The individual equipment was not identified . . . in the book provided. The examiner said, "I look to see if covers are on and any cables are cut, I have not checked inside the panels or for anything else."

The inspector determined that the gravity was serious, that the violation was S&S, and that the negligence was high. The safety standard provides, in part, that "[a]ll electric shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions." The standard also provides that when a potentially dangerous condition is found, the equipment shall be removed from service and a record of electrical examinations must be kept. The Secretary proposes a penalty of $2,000.00 for this citation.

Inspector Marietti testified that he issued this citation based on all of the other electrical citations he issued in the underground shop. Marietti stated that the person who most recently performed the weekly electrical examinations, Mr. Grundvig, told him that he was never taught how to perform electrical examinations. (Tr. 213). The inspector testified that Mr. Grundvig told him that he never opened electrical boxes to examine the fuses or other components. Grundvig simply made sure that the covers for electrical boxes were closed and that electrical cables entering the boxes were not damaged. Marietti testified that such a cursory examination is inadequate under the standard. (Tr. 218). Many of the fuses inside the electrical boxes were of an incorrect size. For example, the fused disconnect for the welder had a rating of 30 amps, but CW used 50 and 60 amp fuses. The holder for the 50 amp fuse had to be spread out to such an extent that it was not longer providing adequate electrical contact. (Tr. 215). Inspector Marietti testified that if an electrical examiner had opened the cover for the fuse box, the condition would have been obvious. He further stated that he issued 78 electrical citations and 7 electrical orders of withdrawal during his inspection of the mine. (Tr. 220). The inspector testified that, although he had previously conducted electrical inspections at the mine, he had never inspected the underground shop. (Tr. 223). Marietti did not know if the shop had been subject to any comprehensive MSHA electrical inspections in the past 15 years.

Inspector Marietti testified that the violation was serious and S&S, because if these conditions were allowed to continue, it was highly likely that someone would be seriously injured. CW was highly negligent because the examinations were totally inadequate to comply with the requirements of the safety standard.

Mr. Grundvig testified that he performed a general safety inspection of the shop every week. (Tr. 386). He examined each piece of equipment in the shop for safety defects. He looked for slip and fall hazards, fire hazards, and he checked the ventilation. He testified that he did not open electrical boxes because CW had never experienced any electrical problems in the

shop. (Tr. 387, 409). Grundvig testified that other MSHA inspectors looked at his examination books without advising him that his examinations were insufficient. (Tr. 410).

Mr. Pratt testified that this condition "was really scary" when he first heard about it. (Tr. 266). He was concerned about using a 30 amp disconnect with 60 amp fuses. As a consequence, he performed an experiment using the same types of fuses. (Tr. 266-76). As a result of this experiment, he concluded that the condition did not present a real hazard. (Tr. 278). There was enough contact between the fuse and the bent fuse holder to provide adequate protection. He admitted that he did not consider other aspects of concern to Inspector Marietti.

I find that the Secretary established a violation of the safety standard. I also find that the violation was S&S. The weekly examinations that were being conducted in the shop were completely inadequate to discover latent safety defects. CW's failure to conduct competent electrical examinations created a reasonable likelihood that the hazard contributed to will result in an injury of a reasonably serious nature. I also find that CW's negligence was high. This violation was obvious. Inspector Marietti discovered numerous violations during his inspection. The fact that other MSHA inspectors may have been in the shop does not reduce CW's negligence. It is the duty of the mine operator to comply with safety standards. In addition, it is not clear whether an MSHA electrical inspector had ever conducted an electrical inspection of the underground shop. CW argues that, because it had not experienced any problems with the shop's electrical system, it was not remiss in failing to conduct more thorough examinations. The purpose of electrical examinations is to make sure that problems do not arise. Waiting for a problem to develop before performing adequate examinations for potential hazards creates a serious risk that someone will be killed or injured. The Secretary's proposed penalty of $2,000.00 is appropriate for this violation.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that CW has a history of about 55 violations at the Bear Canyon No. 1 Mine and no violations at the Bear Canyon No. 3 mine in the two years prior to the inspections. Bear Canyon No. 1 Mine produced about 952,000 tons of coal in 2002 and Bear Canyon No. 3 produced about 3,500 tons of coal in 2002. All of the citations were abated in good faith. The gravity and negligence findings are discussed above. The penalties assessed in this decision will not have an adverse effect on CW's ability to continue in business. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
WEST 2003-332		
7612553	75.360(a)(1)	$200.00
7612544	75.1106	Vacated
Citation No.	30 C.F.R. §	Penalty
WEST 2004-148		
7612350	75.701	800.00
7612351	75.701	200.00
7612352	75.701	200.00
7612353	75.701	200.00
7612354	75.701	200.00
7612355	75.701	200.00
7612356	75.701	200.00
7612358	75.902	150.00
7612359	75.902	150.00
7612360	75.902	150.00
7612421	75.902	150.00
7612422	75.902	150.00
7612423	75.902	150.00
7612424	75.601	450.00
7612425	75.900	325.00
7612426	75.512	2,000.00
	TOTAL PENALTY	$5,875.00

For the reasons set forth above, Citation No. 7612544 is **VACATED**; the other citations are **AFFIRMED** or **MODIFIED** as set forth in this decision; and C.W. Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $5,875.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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