FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 4, 2005

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2004-256-M A.C. No. 04-00224-21700
v.	:	
PLACERVILLE INDUSTRIES, INC., Respondent	:	Chile Bar Slate Mine

DECISION

Appearances: John D. Pereza, Conference and Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner;[*] David W. Donnell, Esq., Robert D. Peterson Law Corporation, Rocklin, California, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Placerville Industries, Inc. ("Placerville"), 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"). An evidentiary hearing was held in Sacramento, California.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Placerville operates a slate mine near Placerville in El Dorado County, California. Most of the slate is ground up into a fine powder which is added to seal coatings for roadways. (Tr. 77). Placerville also sells rocks of slate that are used in landscaping. (Tr. 74). On January 28, 2004, Gerald Bockman, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the mine. During his inspection, Inspector Bockman issued the three citations that are at issue in this case. At the hearing, the parties announced that they reached a settlement for Citation No. 6356894, which I approved. A hearing was held with respect to the other two citations.

[*] Christopher Wilkinson, Esq., of the Department of Labor's Office of the Solicitor in San Francisco, also appeared for Petitioner.

A. Citation No. 6356895

Inspector Bockman issued Citation No. 6356895 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b). The body of the citation states:

> The hoist trolley over the vertical impact crusher has no travel stops to prevent it from coming off the travel rail. The trolley is used to hang the hoist for removal of the upper ring on the impact crusher, when changing the anvil. Used 2 - 3 times per year. A lack of travel stops can result in the trolley or hoist coming off the rail and injuring a miner. It is required that any safety defect be repaired in a timely manner.

The inspector determined that it was unlikely that anyone would be injured as a result of this condition and, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature ("S&S") and that Placerville's negligence was moderate. The citation was subsequently modified to reduce the negligence to "low." The cited safety standard provides that "[d]efects 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." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Bockman testified that the trolley is used about once or twice a year to remove the upper ring on what he called the vertical impact crusher (the "crusher") when maintenance is performed on the crusher. (Tr. 11, 20-21). The hoist trolley consists of an I-beam rail attached to the beams at the top of the room with a four-wheel trolley that rolls along the beam. (Tr. 11-12; Exs. G-4 and G-5). The beam is about 16 feet long. The trolley is not motorized and it is a freewheeling unit. There is a hole on the bottom of this trolley where Placerville's employees suspend the ring for the crusher when the trolley is in use. At one end of the I-beam rail there is nothing to stop the trolley from rolling off the end. There is no such danger at the end of the rail adjacent to the door of the building because that end of the rail abuts against a perpendicular I-beam.

Inspector Bockman testified that the cited condition violated the cited safety standard even though the trolley has never rolled off the end of the rail. There has never been a stop on the end of the rail. The trolley was not being used on the date of the inspection. (Tr. 33). Bockman considered the trolley to be a piece of equipment. The inspector believed that the lack of a trolley stop affects safety because if a load were suspended from the trolley and someone were to push it toward the open side of the rail, it could come off. (Tr. 15). He believed that someone on that end of the deck or on a walkway below that area could be injured if the trolley were to come off the rail. Such an injury would be reasonably serious. The inspector believed that it was unlikely that the trolley would roll off the open end of the rail because the trolley is not normally used near that end. The trolley is usually positioned on the protected end of the rail near the door. When the ring is removed from the crusher, the crusher's lid would prevent the

trolley from traveling to the open end of the rail because the lid would be in the way of the load suspended from the trolley.

Marc Lemieux is the general manager at the mine. He took a photograph of the crusher, which he called the vertical shaft impactor, which shows the trolley rail above it. (Tr. 62; Ex. R-1). When the lid on the crusher needs to be opened, the chute that enters the crusher on top of the lid is moved off to the side. (Tr. 64; Ex. R-1). Next the clamps holding the lid on the crusher are removed. The hydraulic arm attached to the lid pulls the lid straight up off the top of the crusher. Finally, this arm with the lid attached is swung over the motor, which is shown in the foreground of the photograph. (Tr. 66; Ex. R-1). Once the lid is over the motor, a come-along is attached to the hole in the trolley, which is used to lift the ring out of the crusher. (Tr. 68-69).

The ring attached to the trolley with the come-along is manually pushed toward the door of the building. (Tr. 70). The ring is lowered to the ground using the come-along and a forklift moves the ring out of the building through the door. (Tr. 71). The end of the trolley rail cited by the inspector is at the opposite end of the rail from the door. A load attached to the trolley cannot be pushed toward the open end of the rail because the lid for the crusher would block it. In addition, there would be no place to lower the load attached to the come-along near that open end.

The Secretary argues that she established that there was a defect on equipment that affected safety. The violation did not create a serious safety hazard, but there is a possibility that the trolley rail could be used for a purpose that required the trolley to be near the open end of the rail. Someone could inadvertently roll the trolley off the end of the rail and injure someone. The operator's negligence was low.

Placerville argues that there was no safety defect because the condition did not affect the safety of employees. In order to establish a violation under the cited safety standard, the Secretary must establish that the cited defect affected safety. In this instance, because of the configuration of the crusher and the lid for the crusher, the lack of a stop at the opposite end of the rail did not affect safety. The end of the trolley rail cited by the inspector does not pose any danger when maintenance is performed on the crusher. The rail near the open end is unlikely to ever be used for any other purpose. Placerville does not argue that it would be impossible to use the trolley in a manner which placed it near the open end of the rail, but it contends that such an event is highly unlikely. (Tr. 109).

I find that the Secretary established a violation. The lack of a stop on one end of the rail for the trolley was a defect that could affect safety. I agree that the likelihood that the defect would result in an injury is quite low in this case. The configuration of the crusher, including the top of the crusher, make it impossible for the trolley to be accidently pushed off the unguarded end of the rail when maintenance is being performed on the crusher. Nevertheless, an employee may use the trolley to lift and move some other load near the open end of the rail and not realize that there is no guard to stop the trolley on that end. The safety standard is designed to prevent such accidents. An overly narrow or restrictive reading of the scope of this safety standard

cannot be reconciled with the purpose of the Secretary's safety standards or with the protective ends of the Mine Act. A safety standard "must be interpreted so as to harmonize with and further . . . the objectives of" the Mine Act. *Emery Mining Co. v. Secretary of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). Human behavior can be erratic and unpredictable with the result that it is conceivable that someone might try to use the trolley at the unguarded end of the rail. I find that the violation is not serious and that Placerville's negligence is low.

B. Citation No. 6356896

Inspector Bockman issued Citation No. 6356896 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.20003. The body of the citation states:

> Material build up in the grizzly feeder area is approximately 2 feet deep on the entry side. Material is loose slate, approximately 2 - 4 inches in irregular shapes, creating a slip or twist hazard. It appears the skirting on the feed hopper may be allowing material to spill. Reportedly, this area was cleaned a week ago. It is required to maintain all workplace, service room floors in a clean condition for the safety of the miner. This area is cleaned by shoveling material onto the belt when build up occurs. It is reasonable to expect a miner to twist an ankle or suffer more serious injuries in this condition.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Placerville's negligence was moderate. The cited safety standard provides, in pertinent part, that "[t]he floor of every workplace shall be maintained in a clean and, so far as possible, dry condition." The Secretary proposes a penalty of $91.00 for this citation.

There is an apron feeder and tail pulley in a small basement room under the grizzly feeder. (Tr. 21). The room is about 12 by 6 feet and about 6 feet high. (Tr. 24). Inspector Bockman testified that material had built up to a depth of about 2 feet in the area below the fixed metal ladder used to enter the room. He was not able to measure the depth of the accumulations. The inspector testified that this room is a workplace because the apron feeder is located in this room. The room must be entered on a periodic basis to clean up spilled material so that the material does not get so deep that it damages the conveyor system. The inspector believes that material regularly rolls off the conveyor or apron feeder and that someone enters the room to clean up the material two or three times a week. (Tr. 23).

Inspector Bockman testified that the accumulations in the room were obvious and created a slipping and tripping hazard. The accumulated material tends to shift under your feet if you walk on it. (Tr. 26; Ex. G-8). The inspector determined that an accident was reasonably likely to occur because of the unstable footing created by this material. (Tr. 27). In addition, because the

ceiling was only about six feet high, a miner would have to be stooped over as he began cleaning up the accumulations with a shovel. A miner could twist his ankle, twist his knee, or injure his back while shoveling the material onto the belt. (Tr. 27). If the accumulations were not so extensive, a miner would be able to shovel with solid footing.

Lemieux testified that an employee is assigned to clean the room at the end of every shift. (Tr. 73). The only other time that anyone would be in the room would be to perform maintenance on the hopper or tail pulley. The material that accumulates in the room is a product that is sold for use in gardens and walkways. (Tr. 74). Lemieux built a greenhouse at his home and he used this material for the floor of the greenhouse. Material can accumulate rather quickly if production is high.

Jim Trembley is a shift supervisor at the mine. He testified that material is screened and crushed before it is dumped into a hopper above the grizzly. (Tr. 93). There is an apron feeder under the grizzly in the cited room. A conveyor belt carries the material up above ground to the next step in the processing. (Tr. 94). While the room is being cleaned, the system is locked out. The area is also accessed to check the equipment and to grease the bearings. In January 2004, he would enter the room about two or three times a week. (Tr. 96). Another employee also cleaned the room during this period. The amount of material that will accumulate each shift may vary between one and two feet. (Tr. 96-97). When he shovels the room, there is usually an area where he can position himself that is clear of accumulations. He shovels the material while he is on his knees because it is more comfortable. (Tr. 97-98). The ceiling is too low to comfortably stand and shovel. Trembley testified that if he performs any maintenance on the equipment when there are accumulations present, he cleans away enough of the accumulations to work safely. (Tr. 100). He testified that he has been shoveling out the accumulations in the room for four years and he has not suffered any injuries. The other Placerville employee who cleans up the accumulations gets on his knees to shovel as well.

The Secretary argues that the room under the grizzly is a working place that is required to be maintained. The equipment must be maintained and greased and the accumulations must be removed to protect the apron feeder and conveyor from being damaged. The pile of accumulations was sloped at an angle so that someone could slip and twist an ankle while trying to get to the apron feeder. The operator normally tried to keep the area clean, but in this instance "it just got away from them." (Tr. 106).

Placerville argues that the safety standard must be interpreted to provide the mine operator with the "opportunity to do that which the regulation requires it to do." (Tr. 110). Since Placerville is required to keep the room under the grizzly in a clean condition, it must be given the opportunity to do that. The room is naturally going to contain accumulations when an employee is sent down there to clean up the accumulations. The safety standard does not require an operator to clean the room every hour or so before many rocks have accumulated. Indeed, in order to abate the citation, Trembley had to enter the room and clean it the way he normally does. Placerville points out that the room is a destination, not a travelway. Although the inspector testified that the accumulations had been in the room for a week, he had no proof to support that

testimony. Trembley credibly testified that such an accumulation can occur in a single shift. Finally, Inspector Bockman had no knowledge about how this area is kept clean. As a consequence, his statement that someone could twist an ankle is not supported by the evidence.

The evidence conflicts with respect to how recently the room had been cleaned. Inspector Bockman testified that he was told by Lemieux that the room had not been cleaned for about a week, but that it was usually cleaned two or three times a week. Lemieux testified that an employee is assigned to clean the room at the end of every shift. Trembley testified that one to two feet of material can accumulate after a single shift. The photograph that Inspector Bockman took shows a rather extensive accumulation of rock. (Ex. G-8). I find that the Secretary established a violation of section 56.14100. I credit Inspector Bockman's testimony that he was told by Lemieux that the area had not been cleaned for about a week. There has been no showing that the plant was not operating during that period. The cited room was a workplace. A miner enters the area via the fixed ladder for the sole purpose of cleaning up spilled rock and performing maintenance on the apron feeder and other equipment. The accumulations in this instance were too deep and extensive to comply with the safety standard. There was a risk that an employee cleaning the room would be injured while accessing the area.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great.

I recognize that accumulations will always be present on the floor of this room when a miner enters it. The presence of such accumulations does not violate the safety standard unless the accumulations are so deep or unstable that they create a hazard to a miner entering the area. A miner should be able to safely traverse the accumulations to shovel the rock onto the belt. Cleaning the room after every shift should ordinarily be sufficient to comply with the standard because the floor need not be free of all accumulations.

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 did not establish that the violation was S&S. There was not a reasonable likelihood that the hazard contributed to by the violation will result in an injury. I base my finding in large part on the fact that the cited underground room is not a travelway or passageway. Miners do not enter the room for any purpose other than to clean it up, grease fittings, and maintain equipment. I also credit the testimony of Trembley that miners are usually on their knees when they shovel the accumulations onto the belt. I also find that if anyone were injured while entering the room, the injury would not be of a reasonably serious nature.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining an appropriate civil penalty for a violation. The Chile Bar Slate Mine is a medium-sized mine that worked 14,908 man-hours in 2003. MSHA has issued about 14 citations at the Chile Bar Slate Mine in 2003. The violations were abated in good faith. The total penalty assessed in this decision will not have an adverse effect on Placerville's ability to continue in business. My findings on gravity and negligence are discussed above.

III. 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
6356894	56.14100(b)	$60.00
6356895	56.14100(b)	60.00
6356896	56.20003(b)	60.00
	TOTAL PENALTY	$180.00

Accordingly, the citations contested in this case are **AFFIRMED** or **MODIFIED** as set forth above and Placerville Industries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $180.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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