FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

February 24, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-284
Petitioner	:	A.C. No. 42-02263-22817
	:	Bear Canyon No. 3 Mine
	:	
v.	:	Docket No. WEST 2004-372
	:	A.C. No. 42-02263-28001
	:	Bear Canyon No. 3 Mine
	:	
C. W. MINING COMPANY,	:	Docket No. WEST 2004-385
Respondent	:	A.C. No. 42-01697-28929
	:	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 three 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 six citations issued at the Bear Canyon Nos. 1 and 3 Mines, which are underground coal mines in Emery County, Utah. The Secretary proposes a total penalty of $7,725.00 in these cases. The parties introduced testimony and documentary evidence at a hearing held in Salt Lake City, Utah.

I. DOCKET NO. WEST 2004-284

MSHA's Price, Utah, office received a complaint under section 103(g) of the Mine Act stating that some miners at the Bear Canyon No. 3 Mine had not been properly trained. (Tr. 11). MSHA Inspector Lester Coleman investigated the complaint on November 11, 2003, by looking at the mine's training records and time cards. After his review, Inspector Coleman issued Order No. 7635413 under section 104(g)(1) of the Mine Act alleging a violation of 30 C.F.R. § 48.6(b). The body of the order provides as follows:

> The operator acknowledges that the following newly employed experienced miner, Manuel Lopez, did return to work at this underground coal mine on September 9, 2003, after an absence of more than fourteen months. The afore mentioned miner was not provided with any training as required by this part and section. The operator is aware of this training requirement. The operator is hereby ordered to withdraw the miner from the mine until the employee is trained. The Federal Mine Safety and Health Act declares that an untrained miner is a hazard to himself and others.

The inspector determined that an injury was unlikely, that the violation was not of a significant and substantial nature ("S&S"), and that the negligence was high. The safety regulation provides, in part, that "[e]xperienced miners must complete the training prescribed in this section before beginning work duties." Subsection 46.6(a)(4) states that the training requirements in section 46.6 apply to miners returning after an absence of 12 months or more. The Secretary proposes a penalty of $500.00 for this order.

Inspector Coleman testified that the time cards showed that Mr. Lopez had worked at the mine for about eight to ten days in September 2003 but there was no record that he had received any experienced miner training. He worked on the surface as a mechanic at that time. (Tr. 23). The inspector testified that he based this conclusion on Lopez's time cards. (Tr. 17; Ex. G-4). He had previously worked at the mine from April through July 2002 and had received new miner training, task training, and annual refresher training during that employment period. (Tr. 15, 18-20; Ex. G-5). Lopez worked underground in 2002. (Tr. 45). Inspector Coleman determined that the violation was a result of CW's high negligence because Ken Defa, the mine superintendent, acknowledged that Lopez had never received experienced miner training. In addition, the inspector believed that Lopez had only worked at the mine for a few months in 1992. Coleman immediately terminated the order on November 11, 2003, because Lopez was not working at the mine. Lopez was apparently out on strike. (Tr. 13, 22).

Robert Brown, maintenance superintendent, testified that Lopez worked in the surface shop in August and September 2003. (Tr. 31). He did not work underground. Lopez performed light repair and body work at the surface shop. Brown testified that Lopez was a safe worker. Brown believed that Lopez had received all required training because the checklist that he saw had the training box checked off.

Ken Defa testified that when a person is hired, CW checks to see if he has completed the requisite training. Training is often obtained through the College of Eastern Utah. In the case of Mr. Lopez, a clerical employee at CW mistakenly checked the box on an internal checklist that indicated that Lopez was fully trained. (Tr. 39-40). Training is offered in both English and Spanish at the college.

CW argues that the section 104(g)(1) order is invalid because Mr. Lopez was not employed at the mine on November 11, 2003, so that an order withdrawing him from the mine served no purpose. In *Twentymile Coal Co.*, 26 FMSHRC 666, 673 (Aug. 2004), the Commission held that "a section 104(g) order is an order aimed at a specific individual (one deemed a hazard to himself and others), and it is to be issued on the spot in real time." The miner must be immediately withdrawn from the mine. In the face of this argument, counsel for the Secretary replied that she has no objection to modifying the order to a section 104(a) citation with the same proposed penalty. (Tr. 48). CW does not dispute that Lopez did not receive experienced miner training when he was re-employed at the mine and that, as a consequence, it violated section 48.6. (Ex. G-2). The purpose of section 104(g) is to remove the miner from the work environment until he has been fully trained. I modify this order to a section 104(a) citation under my authority in section 105(d) of the Mine Act. *See Twentymile*, 26 FMSHRC at 672.

CW also argues that the Secretary failed to establish that the violation was the result of its high negligence. I agree. The inspector based his high negligence determination on the fact that CW was aware of the requirements of section 48.6 and was aware that Lopez's prior mining experience was quite minimal. I credit the evidence presented by CW that, as a result of a clerical error in Lopez's processing, mine management believed that he had completed all required training. (Tr. 39-40). As a consequence, I find that CW's negligence was moderate. A penalty of $200.00 is appropriate for this violation.

II. DOCKET NO. WEST 2004-372

On November 30, 2003, MSHA Inspector Donald Durrant issued Citation No. 7613156 at the Bear Canyon No. 3 Mine under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.360(a)(1). The body of the citation provides as follows:

> The required preshift examination along the Main North, Main East, Main South, and South East Mains had not been conducted within the mine operator's predetermined time frame on Saturday, November 29, 2003, and Sunday, November 30, 2003, for the day shift crews. The mine operator's examination schedule for this area of the mine for the day shift starts at 4:30 a.m. and must be concluded no later than 7:30 a.m. The mine examiner, who was also the section foreman in the South East Mains section, stated that he was told by management personnel that the preshift examination just needed to be completed by 9:00 a.m. and was not aware of the revolving preshift schedule and thus had conducted the examinations on these two days between 8:30 a.m. and 8:40 a.m. Observation of the date, time, and initials along these travelways verified the examiner's statements . . . for the day shift on November 30, 2003 . . . .

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that "a certified person designated by the operator must make a preshift examination within three hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. . . . The operator must establish 8-hour intervals of time subject to the required preshift examinations." The Secretary proposes a penalty of $1,100.00 for this order.

At the hearing, the Secretary moved to modify the citation to strike the S&S designation and to modify it to a section 104(a) citation with a high negligence designation. (Tr. 51). The motion to modify is granted. CW admitted that it violated the safety standard and that preshift examinations are scheduled to be conducted at the mine between 4:30 a.m. and 7:30 a.m.. (Ex. G-6, p. 3). It also admitted that the examinations on the dates cited were actually conducted between 8:30 a.m. and 8:40 a.m. *Id.*

Inspector Durrant discovered the violation as he was talking to Lynn Stoddard, the examiner and section foreman, while examining the preshift books. (Tr. 52). Durrant discovered that CW divided the mine into segments with slightly different shift schedules. Stoddard told the inspector that he thought the preshift examinations had to be completed by 9:00 a.m. (Tr. 54). Inspector Durrant determined that the violation was a result of high negligence because Stoddard was CW's agent and should have known when preshift examinations were required. (Tr. 55).

Mr Stoddard testified that he worked as a weekend foreman during the fourth quarter of 2003. (Tr. 99). He lived in the Salt Lake City area and traveled to the mine to work Friday, Saturday, and Sunday. His shift started at 9:00 a.m. on Friday, 6:30 a.m. on Saturday, and 6:00 a.m. on Sunday. He testified that he thought that he had until 9:00 a.m. to complete the preshift examinations, in part because of his schedule on Friday. (Tr. 100). Stoddard testified that Defa had previously told him that the preshift examinations were required to be completed by 7:30 a.m., but that he was confused about the schedules.

Defa testified that he did not advise Stoddard that the preshift examinations did not have to be completed until 9:00 a.m. (Tr. 126). He also testified that this citation is the first citation issued at this mine for improperly completing a preshift examination.

The only issue with respect to this citation is whether the violation was a result of CW's high negligence. Stoddard was CW's agent because he was a member of management. In addition, a miner is considered to be the agent of a mine operator when he is conducting required examinations. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-96 (Feb. 1991). As a consequence, Stoddard's negligence is imputed to CW. Inspector Coleman testified that the violation was caused by CW's high negligence because Stoddard "knew or had reason to know of the preshift intervals . . . [and] Mr. Defa . . . obviously had made no effort to explain the preshift times, revolving intervals, to Mr. Stoddard because he wasn't aware of them." (Tr. 55-56). The inspector admitted that, given the different shift schedules at the mine, it was

"somewhat confusing" to determine when the preshifts were required to be completed. (Tr. 56). The schedules were posted on a mine bulletin board.

I find that the violation was caused by CW's moderate negligence. The inspector's testimony that Stoddard "knew or should have known" when the preshift exams were required to be completed correlates to a moderate negligence finding. Stoddard credibly testified that he was simply confused. Since this mine operates during multiple shifts, Stoddard's examination occurred more than 8 hours after the previous exam. I find that the violation was serious but I reject the Secretary's high negligence arguments. Given the modification of the citation made by the Secretary at the hearing and my finding of moderate negligence, I find that a penalty of $400.00 is appropriate.

Inspector Durrant also issued Order No. 7613157 on November 30. This order was issued under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.360(b)(9). The body of the citation provides as follows:

> No preshift examination had been conducted at the South East Mains section electrical installation, at or about X-Cut 4, between the hours of 6:00 a.m. and 9:00 a.m. for the day shift crew. When questioned, the section foreman/mine examiner stated that he had just forgotten to do the examination. Slip, trip, and fall hazards were found to exist along both sides of the electrical installation.

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that the "person conducting the preshift examination shall examine for hazardous conditions . . . at . . . underground electrical installations. . . ." The Secretary proposes a penalty of $875.00.

At the hearing, the Secretary moved to modify this order to a section 104(d)(1) citation because of the modification made to Citation No. 7613156, above. The motion to modify is granted.

Inspector Durrant testified that when he inspected the mine he discovered the current date, time, and initials of a preshift examiner had not been posted at the electrical installation at the crosscut. (Tr. 58). He stated that this power center was required to be examined under the cited safety standard. Durrant testified that self-contained self-rescuers (SCSRs), tools, and other equipment were kept in and around the electrical installation. (Tr. 61). He determined that no examination had been conducted in this area. Durrant testified that when he questioned Stoddard about it, he told him that he forgot to examine the area. (Tr. 62; Ex. G-8, p. 2). Durrant testified that Stoddard did not tell him that he conducted the examination but he forgot to record it. (Tr. 63, 86). Inspector Durrant believed that the violation was S&S because it was reasonably likely that a serious injury would occur. Durrant found tripping and stumbling hazards in the area.

Jacks, surveying equipment, and other supplies were lying around the area which presented a tripping hazard. There was also loose coal in the area which presented the same hazard. (Tr. 64-65). There was an informal lunch room in the same area so miners frequently walk by the electrical installation. About seven miners were exposed to the hazard. Durrant testified that it was reasonably likely that miners would suffer arm, shoulder, or head injuries if they stumbled over the loose coal or equipment. (Tr. 66).

Inspector Durrant determined that the violation was the result of an unwarrantable failure because CW's agent forgot to examine the area. He believes that CW has a history of these types of violations. (Tr. 67). "Stoddard knew or had reason to know that this examination was required and he just did not do it . . . and when he did do it, the exam . . . was poor at best because he missed a hazardous condition." *Id.*

Stoddard testified that he examined the cited electrical installation and the SCSRs on November 30. (Tr. 102). He stated that, although he examined the area, he must have forgotten to record the date, time, and his initials at the electrical installation. He testified that he did record his examination of the SCSRs, which are within ten feet of the electrical installation. (Tr. 104). Stoddard testified that when Inspector Durrant asked him why his name, date and time were not recorded at the electrical installation, he replied "I must have forgotten that one." *Id.* In making that statement, Stoddard testified that he meant that he forgot to record his preshift examination, not that he forgot to do the required examination. (Tr. 104-05). Stoddard testified that when he performs preshift examinations he looks for roof hazards and tripping hazards. At electrical installations he checks for coal accumulations in the area and makes sure that the electrical equipment is clean. Stoddard passed through that area several times before Durrant inspected the area. Stoddard testified that although there was equipment in the area, there were no significant tripping hazards and there were no major accumulations of coal. (Tr. 107, 110). Stoddard stated that he had to do a minimal amount of cleaning and he moved some jacks against the ribs to abate the citation. He admitted that his name was not on CW's list of certified people who are qualified to perform preshift examinations, but he was qualified and a certified person. (Tr. 110-12).

Defa testified that, when he observed the electrical installation with the inspector, he did not observe "any real hazards or problems with the area." (Tr. 125). There was some coal present, but it did not create a trip or fall hazard. Electrical cables are always present in this area, but they were flat on the ground. Defa believes that he heard Stoddard tell the inspector that he performed the preshift examination. (Tr. 134).

The Secretary has the burden to prove a violation of a safety standard. Inspector Durrant based his citation on two factors. First, he believes that Stoddard admitted that he did not perform a preshift examination at the cited area. Second, he found conditions in the area that led him to believe that the examination had not been performed. CW contends that Stoddard performed the examination but that he forgot to record it with the date, time, and his initials. I find that the Secretary established a violation. I credit Inspector Durrant's testimony that

conditions in the area indicated that a competent examination had not been completed. Stoddard and Defa testified that the conditions did not create any real hazards. I find that, given the heavy foot traffic in the area, a competent preshift examination would have revealed these hazards. In addition, Durrant was quite certain that Stoddard did not tell him that he performed a preshift examination at the electrical installation. (Tr. 62-63, 68, 86; Ex. G-8, p. 2). I credit the inspector's testimony in this regard.

I also find that the violation was S&S. 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).

There was a discrete safety hazard presented by the violation. It was reasonably likely that, assuming continued mining operations, the hazard contributed to by the violation would result in an injury. Preshift examinations play a crucial role in ensuring that miners work in a safe environment. I credit the testimony of Durrant that conditions were present in the area that presented a tripping, slipping, and falling hazard to miners. Durrant testified that "there was a pretty good rip roller . . . where coal had come off the rib . . . for an area of five feet . . . there were some simplex jacks . . . some surveying equipment . . . just numerous things that were around the area that one would have to step over . . . ." (Tr. 64-65). I credit his testimony. Miners ate lunch in there so there was heavy foot traffic through the area. I also find that there was a reasonable likelihood that an injury would be of a reasonably serious nature. It was reasonably likely that a miner would suffer strains, pulled muscles, or more serious injuries if he tripped while walking through the area.

I find that 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 at 193-94. I find that CW's conduct does not reach that level of negligence. As stated above, Inspector Durrant testified that "Stoddard knew or had reason to know that this examination was required and he just did not do

it." (Tr. 67). Although this is a close issue, I find that the preponderance of the evidence establishes that Stoddard's failure to conduct the examination was a result of moderate negligence. He passed through the area several times, but he did not conduct the required examination. He believed that the conditions that Durrant subsequently observed were not serious enough to require correction. He exercised poor judgment but his conduct did not rise to the level of "reckless disregard," "intentional misconduct," or "indifference." I also find that his failure to more thoroughly examine the area did not constitute a serious lack of reasonable care.

In light of the above, the citation is modified to a section 104(a) citation with moderate negligence. The violation was S&S and serious. A penalty of $400.00 is appropriate.

Inspector Durrant issued Order No. 7613170 on December 9, 2003. This order was issued under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.1914(f). The body of the citation provides as follows:

> The Bobcat skid loader, company #2, being operated in the South East Mains section, MMU 001-0, had not been examined by a qualified person, as required by Sec. 75.1915, since May 2003. When questioned, the mine operator stated that the machine had been mistakenly put on the section permissibility check list, and that it was being checked weekly, but the individual making the weekly examination has not been qualified as per Sec. 75.1915. The approved book was also used to verify this condition as no entry was present after May 12, 2003.

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that the "[a]ll diesel-powered equipment shall be examined and tested weekly by a person qualified under § 75.1915." The Secretary proposes a penalty of $1,500.00.

Inspector Durrant testified that he inspected the cited diesel skid loader and found "some deficiencies." (Tr. 68). When the inspector examined the record books he discovered that it had not been examined by a qualified person in more than six months. The last entry in the book for the skid loader was on May 12, 2003. (Tr. 70). Inspector Durrant testified that Robby Brown, the surface and mobile maintenance equipment superintendent, told him that the skid loader had been incorrectly placed on the section checklist. Brown told Durrant that Warren Pratt was assigned to examine the equipment and that Pratt was doing the exams. (Tr. 71). The inspector does not dispute that Pratt examined the skid loader. (Tr. 87). Inspector Durrant had talked to Mr. Pratt previously who told him that he was not a qualified diesel mechanic. (Tr. 72; Ex. G-9, p. 3). Brown did not dispute this fact. (Tr. 72).

The inspector testified that diesel equipment is required to be examined and tested weekly by a qualified person to make sure that the equipment is being maintained in a safe operating condition. The skid loader was not being used at the time of his inspection, but the inspector believes that it was used earlier in the shift. Inspector Durrant believes that the violation was S&S because it was reasonably likely that a serious injury would occur. He issued two non-S&S citations on the skid loader. Durrant testified that there are a number of tests that must be conducted during the weekly examinations, including carbon monoxide readings. He believes that miners could receive permanently disabling injuries such as burns, smoke inhalation, as well as other injuries. Warren Pratt had not been trained to look for the types of hazards found on diesel equipment that create a danger to miners. (Tr. 77).

Inspector Durrant believes that the violation was caused by CW's unwarrantable failure because the skid loader was being examined for about six months by a person who was not qualified. Someone in the mine's maintenance department should have noticed that the skid loader was being examined by the section crew rather than by a trained mechanic.

Brown testified that, at the time of Durrant's inspection, the skid loader was examined by the underground section crew rather than by the maintenance crew. (Tr. 113). Brown testified that the skid loader was regularly examined by Mr. Pratt. He was not qualified to inspect diesel equipment at that time, but he performed competent examinations. (Tr. 114). Brown performed the exhaust tests on the skid loader on December 9 to abate the citation and it passed. (Tr. 115). He stated that the equipment operator will usually know if there is a problem with the skid loader that needs attention by a mechanic. In addition, the foreman carries a gas meter. Brown does not believe that this violation created a hazard. (Tr. 117-18).

Defa testified that CW requires equipment operators to perform a pre-operational check on all diesel equipment. (Tr. 127). All equipment operators are task trained and are given a check list to use when examining their equipment for defects. Defa does not believe that the skid loader was out of compliance during this period. Although Brown was certified to examine diesel equipment, Pratt did not have this certification. (Tr. 128-29). Brown is responsible to make sure that the skid loader is properly being inspected by a qualified person. (Tr. 130). Defa and Brown knew that Pratt was not qualified to perform these inspections.

CW admits that it violated the safety standard by not having a qualified person examine and test the skid loader on a weekly basis. It also admits that this violation had existed since May 12, 2003. CW contends that the violation was not S&S because the skid loader was examined weekly by a responsible person. CW also contends that the violation was not caused by its unwarrantable failure to comply with the safety standard.

I find that the Secretary established that the violation was S&S. In analyzing whether a violation is S&S, the judge must assume continued normal mining operations. *U. S. Steel* at 6 FMSHRC 1574. If not for Inspector Durrant's inspection, the skid loader would have continued to be operated without the required weekly examination by a person qualified under § 75.1915.

That section requires persons who perform "maintenance, repairs, examinations and tests on diesel-powered equipment" to successfully complete a "training and qualification program" that meets the detailed requirements set forth in the section. Mr. Pratt had not been trained under such a program. It is reasonably likely that diesel equipment operated in an underground coal mine will eventually develop problems that will create health or safety hazards. Neither Pratt nor equipment operators have been trained to recognize these problems. Some of the tests require special equipment, such as carbon monoxide monitors. Carbon monoxide is both colorless and odorless so relying on the equipment operator to observe that the exhaust on the skid loader is smoky or that his eyes are burning is not sufficient. (Tr. 115). The test is performed by holding a gas meter in the undiluted exhaust stream while the skid loader is operating in a loaded condition. (Tr. 75, 121). The equipment operators and Mr. Pratt did not test for gas. Without the weekly examinations, the skid loader could be emitting carbon monoxide into the mine atmosphere without anyone knowing about it.

Inspector Durrant was also concerned about other types of mechanical problems that could create a risk of fire. (Tr. 75-76). The skid loader was operating on the intake primary escape route. I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

I also find that the violation was the result of CW's unwarrantable failure to comply with the safety standard. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999). In this instance, the violation had been in existence for about six months without anyone in management recognizing that the examination and tests were not being performed. This failure represents a serious lack of reasonable care beyond ordinary negligence. The Secretary's proposed penalty of $1,500.00 is appropriate for this violation. Because I vacated the unwarrantable failure determination in Citation No. 7613157, above, Order No. 7613170 is modified to a section 104(d)(1) citation.

Inspector Durrant issued Order No. 7613173 on December 11, 2003. This order was issued under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.1914(h)(1). The body of the citation, as amended, provides as follows:

> The carbon monoxide gas readings for the Arnold road grader had not been recorded in the secure book nor electronically for over 10 months. Records were examined back through including February of 2003 and no readings were recorded. Mine management participates in these tests and maintenance, including record keeping, thus exhibiting a serious lack of reasonable care. [This machine is] considered to be heavy-duty nonpermissible diesel

> powered equipment, as [it] is used to move coal or rock. The mine operator states that the tests were conducted, but no readings were recorded.

The inspector determined that an injury or illness was unlikely, that the violation was not S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The safety standard provides, in part, that "records required to be kept by paragraphs (f)(2) and (g)(5) shall be recorded in a secure book that is not susceptible to alteration, or recorded electronically in a computer system that is secure and not susceptible to alteration." Paragraph (f)(2) requires that persons who perform weekly examinations and tests of diesel-powered equipment "make a record when the equipment is not in approved or safe condition." Paragraph (g) provides that the mine operator shall develop and implement standard operating procedures for testing and evaluating exhaust emissions of diesel-powered equipment "that specify . . . (5) the maintenance of records necessary to track engine performance." The Secretary proposes a penalty of $750.00 for this violation.

CW admitted that it violated the safety standard by not recording the carbon monoxide readings for the road grader. (Ex. G-6, p. 6). It contends, however, that the readings were taken and that the grader would have been shut down if the readings were high. *Id.* Inspector Durrant testified that the carbon monoxide readings had not been recorded in the record book for at least nine months. Brown told him that they had been taken, but they were not recorded. (Tr. 80, 88). Durrant determined that the violation was the result of CW's unwarrantable failure because management knew what the standard required and the violation was obvious. Durrant believed that Mr. Brown should have been reviewing the secure records to make sure that all of the required tests and readings were being recorded for diesel-powered equipment. (Tr. 82). Inspector Durrant testified that there were some entries in the book noting that the grader was "OS," out of service, but most weeks there was nothing listed. (Tr. 135). Mine operators are required to list the defects or hazardous conditions found, but are not required to list all of the tests conducted. (Tr. 137).

Brown testified that the road grader was inspected weekly. (Tr. 116). The results of the inspections were not properly reported. This grader is infrequently used and was out of service during a part of the time. Brown does not know when it was out of service or whether it was inspected during this time. (Tr. 122-23). Brown examined the grader to abate the citation and he found no problems. (Tr. 117). Brown does not believe that this violation created a hazard. (Tr. 117-18). Brown believes that he did some of the tests during this period, but he must not have recorded them. (Tr. 119).

Defa testified that the road grader was used to maintain the main roadway going into the underground mine. (Tr. 129). At most it is used once a month. Defa testified that he is the employee who usually operates the grader and he always performs a pre-operational check. This violation did not present a hazard because the grader was only used once a month.

CW admitted the violation. Inspector Durrant determined that an injury or illness was unlikely as a result of this violation. The issue, then, is whether the violation was the result of CW's unwarrantable failure to comply with the standard. I find that the Secretary established an unwarrantable failure violation and that the evidence presented by CW to rebut the Secretary's case was not persuasive. The secure book did not include the carbon monoxide readings for a substantial period of time. CW admitted that these readings were required to be kept in the record book. It contends that the readings were taken whenever the equipment was operated, which was infrequently. CW was cited, however, for a record-keeping violation. The Secretary contends that CW should have been reviewing these records on a periodic basis to make sure that the required records were being kept. (Tr. 82). The violation was obvious. Although there were some entries in the book indicating that the road grader was out of service part of the time, the evidence establishes that many readings required to be kept in the secure record book were not recorded. This violation existed for a substantial period of time and CW's actions demonstrated a serious lack of reasonable care beyond ordinary negligence. Given that the violation was not serious, I find that a reduced penalty of $500.00 is appropriate.

III. DOCKET NO. WEST 2004-385

On May 12, 2003, MSHA Inspector Dave Markosek inspected the Bear Canyon No. 1 Mine. This mine is now closed and sealed. He was at the mine on the graveyard shift. (Tr. 143). He traveled about 3,000 feet into the mine into the Blind Canyon Seam which was on retreat mining. As he looked into the working section, he saw Chris Peterson, the section foreman, standing by the crosscut. Inspector Markosek walked up the No. 1 entry and saw two miners standing by the continuous mining machine. Markosek testified that when Peterson saw him, he yelled something to the miners in Spanish. When the inspector arrived at the last open crosscut, he "could immediately tell there was no air coming through that crosscut from where the bolters were [in the No. 2 entry]." (Tr. 147). When the inspector walked over toward the roof bolting machine, he saw a miner starting to put up a curtain from the corner of the crosscut toward the No. 2 face. (Tr. 148, Ex. G-13). After that curtain was installed, Inspector Markosek walked to the face and he "could tell there was no air." (Tr. 149). He did not think he could get any reading from an anemometer, so he opened a smoke tube. The smoke did not move in any direction. This fact indicated to the inspector that there was insufficient ventilation at the working place.

After he discussed his concerns with Peterson, miners proceeded to hang additional curtains into the intersection. (Tr. 152; Ex. G-13). When the curtains did not appear to improve the ventilation, the inspector walked down entry No. 2 a short distance and opened another smoke tube. He could not detect any air movement at that location. When the inspector pointed this out to Peterson, Peterson again yelled something out in Spanish. Inspector Markosek testified that within five minutes he could feel air moving up the No. 2 entry. (Tr. 153). The inspector testified that, because a roof bolting machine was operating on the section, CW was required to have 3,000 cfm of air. (Tr. 153; Ex. G-11A).

As a result of these events, Inspector Markosek issued Citation No. 7612750 under section 104(d)(1) of the Mine Act alleging a violation of 30 C.F.R. § 75.370(a)(1). The body of the citation provides as follows:

> The approved ventilation plan was not being complied with in the #2 entry of the Blind Canyon Seam section, MMU-004-0. There was no movement of air at the end of the line brattice when checked with a smoke tube. The roof bolter was running, installing the last row of bolts. The foreman was in the immediate area and should have been aware of this condition.

The inspector determined that an injury was reasonably likely, that the violation was S&S, that the negligence was high, and that the violation was the result of CW's unwarrantable failure to comply with the safety standard. The citation notes that a citation was issued on April 10, 2003, for no air movement in an idle face in this section and management was warned about this type of condition. The safety standard provides, in part, that the "operator shall develop and follow a ventilation plan approved by the district manager." The Secretary proposes a penalty of $3,000.00.

Markosek testified that anyone who has worked in a mine should be able to tell when there is no air movement. You can feel the air on your face, so that when the air is dead, it is noticeable. (Tr. 156). He believes that the lack of air movement on the section was obvious. The inspector determined that the violation was S&S. Although roof bolting machines have water sprays, the water sprays are generally not used for the first inch or so of drilling because the bolters do not want to get wet. (Tr. 157). The bolting crew would have drilled between 30 and 34 holes on a 40-foot cut. This drilling would have created dust that could be inhaled, including quartz dust. (Tr. 159-61; Ex. G-15). Inspector estimated that the violation lasted about one and one-half hours. Respirators were not being worn. The inspector was concerned about the development of lung disease. He did not raise any concerns about the buildup of methane.

Inspector Markosek issued other citations alleging violations of section 75.370(a)(1) in the months preceding May 2003. He issued a citation in the same section of the mine in April 2003 because a ventilation curtain was not within 20 feet of the bolted, idle face. (Tr. 164; Ex. G-14). He issued another citation in April 2003 for not supplying enough air to another idle face. *Id.* The inspector discussed these citations with Mr. Defa at the time they were issued.

Inspector Markosek designated Citation No. 7612750 as being the result of CW's unwarrantable failure to comply with the standard because the foreman should have known that air was not being properly maintained at the face. The inspector also relied on the fact that he had previously discussed the importance of maintaining air at faces with mine management in recent months. Markosek believed that the violation was obvious.

Chris Peterson testified that he was attempting to reestablish ventilation when Inspector Markosek first arrived on the section. (Tr. 176). He stated that the continuous mining machine was not operating because the section had lost its ventilation when the machine tore down the curtain at the No. 1 face. (Tr. 177, 201). The problems started at about 2:05 a.m. (Tr. 201; Ex. R-2). Peterson testified that he was aware that there was no air movement in the section when the inspector arrived and that the crew was in the process of rehanging brattice. (Tr. 177). Peterson stated that his "buggy drivers" also told him at about 2:30 a.m. that another brattice fell down inby the face due to a roof or rib fall. (Tr. 177, 203; Ex. R-2). When there is insufficient ventilation during pillar recovery, all you can do is stop mining and try to reestablish the air. (Tr. 177, 202-03). Peterson testified that he had experienced problems maintaining air movement over the previous few days due to caves and sloughing ribs. (Tr. 178). On April 29, the crew was trained on how to reestablish and maintain ventilation during retreat mining.

Peterson believes that this citation should be vacated because his crew was working to reestablish ventilation by rehanging brattice in areas outby the face. (Tr. 180-84; Ex. R-1). He also believes that the inspector's smoke tube tests were not indicative of the conditions in the section. One side of an entry may show that there was no air movement when the air is moving up the other side. (Tr. 184). Peterson testified that he told Inspector Markosek that he was in the process of reestablishing ventilation in the section. (Tr. 185). He stated that the top was between 9 and 12 feet above the floor and it was difficult to hang curtains. He thinks the top was. Peterson also testified that the roof was coal, not rock as the inspector believed. (Tr. 186). Peterson testified that he checked the air before mining commenced and before the roof bolter went in and started bolting. There was adequate air movement at that time. He did not take any additional readings after that. (Tr. 204-05). Peterson believed that there was adequate ventilation in the section when the inspector arrived and used the smoke tube. (Tr. 187-88). The inspector should have blown the smoke across the entire intake entry to test for air movement because it is such a wide and high area. (Tr. 188). Peterson did not take any air readings after the inspector arrived. (Tr. 192).

Peterson further testified that CW had been mining at the face for about an hour and one-half before the inspector arrived and that the continuous mining machine had been down about 15 minutes before the inspector arrived. (Tr. 190). He testified that after the inspector arrived, he instructed the crew to check on the inby curtains on the section. (Tr. 191-92; Ex. R-1). He further testified that he might not immediately notice if the air ventilating the section stopped, especially if you are near the roof bolter because he does not believe that you can feel 3,000 cfm of air. (Tr. 196-97).

Mr. Defa testified that the mine has not had any significant problem with quartz dust. (Tr. 206-07). The top and bottom of the entries in the Blind Canyon Seam are coal, not rock. (Tr. 207). During 2003, CW took at least 30 dust samples and only one was out of compliance. (Tr. 208-09). MSHA took about 20 dust samples during this same period. None of these samples was out of compliance. (Tr. 210). Defa testified that CW did not contest the ventilation

citations issued in April 2003, even though the company disagreed with them, because they were designated as non-S&S citations.

On rebuttal, Inspector Markosek testified that Peterson did not tell him during the inspection that he was in the process of reestablishing ventilation in the section. (Tr. 217-18). He also testified that the curtain that was knocked down in the No. 1 face by the continuous mining machine would not have had any effect on the ventilation at the roof bolting machine at the No. 2 face. (Tr. 218-19).

I find that the Secretary established a violation. I credit Inspector Markosek's testimony that there was no air movement in the cited area. I also credit his testimony that he could immediately tell that there was no air movement when he entered the section because he could not feel air against his face. I reject Mr. Peterson's testimony that the absence of ventilation would not be immediately noticeable to an experienced miner. Finally, I credit the inspector's method of using the smoke tube to test for air movement. If there had been any ventilation coming up the No. 2 entry or at the No. 2 face, Inspector Markosek would have felt it and the smoke would have stirred. He credibly testified that the smoke that he released in the middle of the entry did not move at all. He also testified that the smoke did not move at the curtain for the No. 2 face near the roof bolting machine. There is no dispute that the crew was using this roof bolter to install the last row of bolts at the time the inspector arrived on the section. (Ex. G-11, p. 3). The ventilation plan requires the operator to maintain 3,000 cfm of air at the roof bolting face. (Ex. G-11A). I find that the Secretary established there was no air movement at that location.

I also find that the Secretary established that the violation was the result of CW's unwarrantable failure to comply with the standard. CW had been placed on notice that it needed to do more to ensure that faces were adequately ventilated during retreat mining. Although it appears that CW provided some training to its employees, the problem persisted. Based on the evidence presented at the hearing, I conclude that the ventilation was restored to the cited No. 2 face only after Inspector Markosek pointed out that there was no air movement. Had he not arrived on the section at that time, the ventilation would not have been immediately restored. I do not credit Peterson's testimony that he was in the process of restoring the ventilation when the inspector arrived. As stated by the inspector, the ventilation curtain that was knocked down in the No. 1 face would have little or no effect on the ventilation in the No. 2 face. Ventilation was fully restored only after changes were made further outby and these changes were made in response to Inspector Markosek's inspection. The violation was obvious. CW demonstrated aggravated conduct constituting more than ordinary negligence. The negligence was high.

Whether the violation was S&S is a closer question. I find that the Secretary established the first two elements of the *Mathies* test. The hazard contributed to by the violation is that miners were exposed to respirable dust. Without ventilation, miners would breathe any dust generated by the roof bolting machine. I credit the inspector's testimony that the water sprays on

the bolting machine are generally not used when drilling is started for each hole. I find that the roof was mostly coal at that location.

The duration of the violation is not clear. The inspector assumed that the crew had been bolting without sufficient ventilation for an hour or more. He based this testimony on his estimate of the time required to install a row of roof bolts. There is no direct evidence that there was no ventilation for that length of time, however. I credit the testimony of Peterson that ventilation is unstable in retreat mining with the result that ventilation is often lost and must be reestablished. Given that the ventilation was not corrected until after the inspector arrived, I find that at least a significant portion of the last row of roof bolts was installed without ventilation in the section. I do not credit CW's evidence that there was adequate ventilation until the curtain at the No. 1 face was knocked down by the continuous mining machine at 2:05 a.m.

I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I rely on the phrase "hazard contributed to" in this element of the *Mathies* test in reaching this conclusion. 6 FMSHRC at 3. A single exposure to respirable dust will not generally result in an illness, but an exposure to respirable dust is a hazard that contributes to the development of an illness. *See Consolidation Coal Co.*, 8 FMSHRC 890, 894-99 (June 1986). By the same measure, installing roof bolts in an environment where there is no ventilation is unlikely to produce an illness, but it is a discrete hazard that contributes to the development of an illness. Any illness would be of a reasonably serious nature. As a consequence, the Secretary established that the violation was S&S. The Secretary's proposed penalty of $3,000.00 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 the Bear Canyon No. 1 Mine had a history of about 248 paid violations in the two years prior to May 12, 2003, and that the Bear Canyon No. 3 Mine had a history of 3 paid violations in the two years prior to November 5, 2003. Bear Canyon No. 1 Mine produced about 412,387 tons of coal in 2003 and Bear Canyon No. 3 produced about 316,433 tons of coal in 2003. 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/Order No.	30 C.F.R. §	Penalty
WEST 2004-284		
7635413	48.6(b)	$200.00
WEST 2004-372		
7613156	75.360(a)(1)	400.00
7613157	75.360(b)(9)	400.00
7613170	75.1914(f)	1,500.00
7613173	75.1914(h)(1)	500.00
WEST 2004-385		
7612750	75.370(a)(1)	3,000.00
	TOTAL PENALTY	$6,000.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED** as set forth above and C.W. Mining Company is **ORDERED TO PAY** the Secretary of Labor the sum of $6,000.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

Carl E. Kingston, Esq., 3212 South State Street, Salt Lake City, UT 84115-3882 (Certified Mail)

RWM