FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 16, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-519-M
Petitioner	:	A.C. No. 04-01299-091434 G861
	:	
v.	:	Docket No. WEST 2007-138-M
	:	A.C. No. 04-01299-101436 G861
MORNING GLORY GOLD MINES,	:	
Respondent	:	Sixteen to One Mine

DECISION

Appearances: John D. Pereza, Conference & Litigation Representative, Mine Safety and Health Administration, Vacaville, California, for Petitioner; Michael A. Miller, Morning Glory Gold Mines, Alleghany, California, 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 Morning Glory Gold Mines ("Morning Glory"), 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"). Morning Glory contested two citations issued by the Secretary under section 104(a) of the Mine Act. An evidentiary hearing was held in Nevada City, California.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

Morning Glory is a sole proprietorship owned by Michael Miller. Morning Glory employs the miners who work at the Sixteen to One Mine (the "mine"). Original Sixteen to One Mine, Inc. ("Original Sixteen to One") is the owner of the mine and Mr. Miller is the president of Original Sixteen to One. The mine is a multi-level, underground, high-grade gold mine, located in Sierra County, California. Original Sixteen to One is a public corporation. When it was no longer able to meet its financial obligations, it contracted with Morning Glory for its employment and labor needs. (Tr. 6-7).

A. Contested Citations.

On April 24, 2006, a regular inspection of the Morning Glory Mine was conducted by MSHA Inspector Troy VanWey. He was accompanied by Ian Haley and Kevin McCarthy from Morning Glory. Inspector VanWey issued Citation No. 6393201 under section 104(a) of the Mine Act alleging a violation of section 57.11012 as follows:

> No barrier or railings were provided to prevent persons from falling through the opening at the new dry bldg. The 45 inch by 73 inch opening on the river side of the new dry building was adjacent to the travelway used to access the MCC and other storage accessed by the miners as needed. Multiple footprints were noted on the travelway. This condition creates a potential of a fatality to the miner should he fall through the opening to the ground level which is about 20 feet below the floor level of the new dry building.

Inspector VanWey determined that an injury was reasonably likely and that any injury resulting from the violation was likely to be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Morning Glory's negligence was moderate. The safety standard provides, in part, that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." The Secretary proposes a penalty of $154.00 for this citation.

Inspector VanWey stated that he inspected the dry building that was under construction and observed the alleged violation. A dry building is an area where miners can change from their street clothes into their work clothes and vice versa. This particular area had only one point of access. Inspector VanWey noticed an obvious opening on the river side of the dry building measuring approximately 45 inches wide by approximately 73 inches high. There was a board that was ten inches high across the opening at the very bottom . He believes that the opening was located adjacent to a travelway in an area that was about 20 feet wide and about 50 feet long. Inspector VanWey felt this area was a travelway after observing a motor control area, lockers, and multiple sets of footprints. However, the Inspector did not observe anyone in the area during the inspection, but noted that a miner did come back later in the day to retrieve his coveralls.

Ian Haley, the mine manager, testified that this area was under construction and was being completed as funding allowed. (Tr. 55, 65). Although miners may enter the room, it was not being used as a change room. Mr. Miller testified that the opening in question was going to be a door for a deck, or a window. (Tr. 74-75). Mr. Miller also felt that this area did not meet the definition of travelway as it was not regularly used and there was no place to go. (Tr. 77; Ex. R-4). He was unable to explain the presence of the footprints, but commented that they could have been from a construction worker who admittedly would be covered by the Mine Act.

The term "travelway" is defined in section 75.2 as a "passage, walk or way regularly used and designated for persons to go from one place to another." The area around the opening in the back of the dry building that was under construction did not fit into this definition. The area was neither "regularly used" nor "designated" to be used for persons to "go from one place to another." The electrical panels (Motor Control Center) were near the entrance to the building and were not near the opening. (Ex. R-4). A miner would not pass by the opening to get to the MCC. Although there may have been some sort of locker or storage bin in the room, there is no indication that anyone would have walked by the opening to get to it. As stated above, the opening was at the back of the room. Although nothing prevented anyone from entering the dry area, it was not being used at the time and miners would not be traveling through the area to get to any other area in the mine. Consequently, I find that the Secretary did not establish that there was an opening "above, below, or near" a travelway and I vacate the citation.

On July 25, 2006, Inspector William Berglof issued Citation No. 6393126 under section 104(a) of the Mine Act alleging a violation of section 57.11012 as follows:

> The cover provided over the 31-inch by 24-inch hole located at the 1300 station was not in place to prevent persons or materials from falling through the opening. A fall through this opening would likely be fatal. Miners removed the cover and descended down the ladderway in order to perform an electrical splice. The cover was not put back in place. The exact time the splice was done is unknown per the mine manager. This opening is along a travelway but located in a remote section of the mine. There were no tripping hazards noted.

Inspector Berglof determined that an injury was unlikely but that any injury resulting from the violation was likely to be fatal. He determined that the violation was not S&S and that Morning Glory's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation. The citation was immediately terminated when the cover was closed.

Mr. Berglof is no longer employed by MSHA and he did not testify at the hearing. Inspector VanWey authenticated the citation. Morning Glory Mines presented the testimony of Ian Haley. The cited hatch cover opens to a raise (winze) that goes down to a pump. The hatch cover measures 24 x 31 inches. The cited opening is not along the travelway but is about eight feet from the middle of the entry that is the travelway. (Tr. 62; Exs. R-1, R-2). The travelway is rarely used and the area is accessed only when a new employee is trained and during monthly inspections. (Tr. 58). Mr. Haley stated that the miners did not have to go down the raise or even near the hatch cover to use the secondary escapeway. (Tr. 61, 63, 65-66). In addition, because the hatch cover was located along the hanging wall, which is at a 45 degree angle, you have to stoop over to open the hatch cover. (Tr. 64). "It's not something you can just walk to." *Id.* Mr. Haley also felt that incorrect language was used in the citation which stated that miners removed the cover. He stated that the hatch cover was opened, not removed.

I find that the Secretary did not establish a violation. I credit the testimony of Mr. Haley. The entry through which miners occasionally pass is eight feet away from the cited opening. The opening is at the end of an eight foot long entry that is perpendicular to the travelway. This perpendicular entry cannot be construed as a travelway. Miners would never travel down that entry except to open the hatch and go down the raise to work on the pump. The opening was at the end of that entry on the left side and was partially protected by the angled hanging wall. Tripping hazards were not present in the area. I find that the entry containing the opening where the hatch cover had been left open was not a travelway, as that term is defined by MSHA. Consequently, I find that the Secretary did not establish a violation of the safety standard and I vacate the citation.

B. Uncontested Citations.

The Secretary agreed to modify Citation No. 6393202 to reduce the gravity and delete the S&S designation. She contends that the penalty should be reduced to $60.00. The Secretary agreed to vacate Citation No. 6393122. Morning Glory agreed to accept Citation Nos. 6393124 and 6393125 as written.

Morning Glory seeks to have the penalties for Citation Nos. 6393124, 6393125, and 6393202 reduced on the basis of the ability to continue in business criterion. It set forth its financial arguments at the hearing. (Tr. 83-85 ; Ex. R-5). The SEC 10-Q statement of Original Sixteen to One for the quarter ending June 30, 2007, lists its current liabilities as $1,346,896 and its current assets as $662,900. *Id.* This statement also lists its loss from operations during the first six months of 2007 as $228,185. Mr. Miller testified that Original Sixteen to One had a net loss of $111,490 in 2005 and a net loss of $405,764 in 2004. He testified that "money is very, very tight." (Tr. 85). Mr. Miller is personally liable for the obligations of Morning Glory.

The Secretary proposes a penalty of $60.00 for each violation. This is a nominal penalty. It has not been shown that a penalty of $180.00 will have an adverse affect on Morning Glory's ability to continue in business.

II. 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 Morning Glory had been issued about five citations in the 24 months preceding these inspections. Morning Glory is a small contractor with about ten employees. (Tr. 54-55). The penalties assessed in this decision will not have an adverse effect on Morning Glory's ability to continue in business. The citations were rapidly abated. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

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
WEST 2006-519-M		
6393201	57.11012	Vacated
6393202	57.12032	$60.00
CENT 2007-138-M		
6393122	57.14112(b)	Vacated
6393124	57.3200	$60.00
6393125	57.4201(a)(2)	$60.00
6393126	57.11012	Vacated
	TOTAL PENALTY	$180.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Morning Glory Gold Mines 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

Distribution:

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