FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

January 17, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-124-M
Petitioner	:	A.C. No. 24-01879-101509 R83
	:	
v.	:	
	:	
J.S. REDPATH CORPORATION,	:	East Boulder Mine
Respondent	:	

DECISION

Appearances: John Rainwater, Esq., U.S. Department of Labor, Denver, CO, on behalf of the Petitioner
Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, CO, on behalf of the Respondent

Before: Judge Barbour

This is a civil penalty proceeding brought pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Mine Act or Act") (30 U.S.C. §§ 815, 820). The Secretary of Labor ("Secretary"), on behalf of her Mine Safety and Health Administration (MSHA), petitions for the assessment of civil penalties for an alleged violation of a reporting standard, a standard applicable to all mine operators, and for an alleged violation of a safety standard, a standard applicable to underground metal and nonmetal mine operators. The alleged violations are set forth in citations issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. § 814(a).[1]

[1]Section 104(a) states in pertinent part:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a . . . mine subject to this Act has violated . . . any mandatory health or safety standard . . . or regulation promulated pursuant to this Act, he shall, with reasonable promptness, issue a citation to the operator.

In the first citation, the Respondent, J.S. Redpath Corporation ("Redpath"), is charged with a violation of 30 C.F.R. § 50.10, for failing to "immediately contact . . . MSHA" after "an accident occur[red]."[2] In the second citation, the company is charged with a violation of 30 C.F.R. § 57.14100(b) for failing to "[correct] in a timely manner" a defective mine telephone.[3] The Secretary further charges the violations were unlikely to result in injuries and that they were caused by Redpath's moderate negligence.

The allegations regarding the asserted late reporting of the alleged accident arose out of an incident involving a delay in two of Redpath's miners coming down and out of a raise in the East Boulder Mine, an underground palladium, platinum, and iridium mine (Tr. 150) owned by Stillwater Mining Company and located in Sweet Grass County, Montana.[4] The allegations regarding the telephone arose out of the non-functioning state of the telephone's speaker located near the bottom of the same raise. Following the issuance of the citations – and as required by the Act – the Secretary assessed a civil penalty for each alleged violation. 30 U.S.C. § 110(a). Redpath contested the proposed assessments, the Secretary notified the Commission of the contest, and the case was assigned to me. It was heard on July 11, 2007. 30 U.S.C. § 105(d).

STIPULATIONS

Prior to going on the record the parties agreed to the following stipulations:

> 1. At all times relevant to this proceeding, Redpath was an independent contractor performing services at the East Boulder Mine . . . and is therefore an "operator" as defined by Section 3(d) of the . . . [Mine Act] . . . .

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[2]Section 50.10 states in pertinent part:

> If an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over its mine.

[3]Section 57.14100(b) stated in pertinent part:

> Defects on any equipment . . . that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

[4]A "raise" is defined as: "A vertical or inclined opening in a mine driven upward from a level to connect with the level above." American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 443 (2d ed.1997).

2. At all times relevant to this proceeding, Redpath was an independent contractor performing services at the East Boulder Mine, and its mining services affect interstate commerce.[5]

3. Redpath is subject to the jurisdiction of the Mine Act.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of Redpath on the dates and places stated therein and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.

6. The exhibits . . . offered by Redpath and the Secretary are stipulated to be authentic, but no stipulation is made as to their relevance or the truth of the matters asserted therein.

7. Redpath demonstrated good faith in abating the violations.

8. On August 8, 2006, Redpath was driving a ventilation raise at the Stillwater Mine (the "Brownlee Raise").[6]

9. On August 8, 2006, the length of the Brownlee Raise was approximately 1600 feet.

10. The Brownlee Raise was round, with a nominal diameter of 11 feet, 3 inches.

11. When completed, the Brownlee Raise was 1635 feet in length and, at that time, was the longest . . . ventilation raise in the world driven by air-powered raise climbers, such as those used by Redpath. [*See also* Tr. 217.]

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[5]Terrence ("Terry") Cook, Redpath's project superintendent, described Redpath as one of mining's "premier companies." Tr. 210. The company, which is based in Canada, has had construction projects involving approximately 60 raises all over the world. However, until recently, the company has had only a few construction projects in the United States. Tr. 211.

[6]Work on the raise began in October 2005, and the raise was completed on August 22, 2006. Tr. 217. Once finished, the raise connected an underground portion of the mine with the surface.

12. The primary raise climber in use on August 8, 2006, was a double drive unit with three motors.

13. The secondary raise climber in use on August 8, 2006, was a double drive unit with three motors.

14. The Alicab rescue unit was available for use on August 8, 2006, as a backup unit in the event of an emergency.

15. Redpath Project Manager, Mark Ahlborn, reported the incident at issue in Citation No. 6323250 [, the incident involving the delay,] to MSHA's Rocky Mountain District Office on August 9, 2006, at approximately 8:00 a.m.

16. In the event that the Secretary proves an accident occurred as alleged in Citation No. 6323250, then Redpath stipulates that it did not provide immediate notification of the accident to MSHA.

17. There was a mine phone physically present in the Redpath work area located at the bottom of the Brownlee ventilation raise ("the nest") on August 29, 2006.

18. The mine phone referenced . . . [immediately above] had a speaker attachment that allowed for [oral] messages to be broadcast in the nest.

Joint Exh. 1; Tr. 7-10.

The parties also stipulated a civil penalty of $60 is appropriate for any violation(s) found. Tr. 205.

THE RAISE CLIMBER AND ITS BRAKING SYSTEMS

Joseph ("Joe") Macias is Redpath's lead raise miner at the East Boulder Mine. At the time of the hearing, Macias had worked for Redpath for over two years and had been a lead raise miner for approximately a year and a half. Tr 25. On August 7 and 8, 2006, his duties were "to make sure all . . . equipment [was] running properly." Tr. 26-27. Also, he was responsible for ensuring "communication[s were] understood and production [was] done safely." Tr. 27. As the lead raise miner, Macias was authorized to direct work while in the raise.[7] Macias was

[7]Terry Cook, who trained Macias, described Macias as possessing "excellent leadership qualities" (Tr. 216) and as a miner with a good safety record. Tr. 217.

responsible for his and his co-workers' safety. Two other miners usually worked with him in the Brownlee Raise, but Macias was the person in charge. On August 7, his shift began at 7:00 p.m. and continued past midnight on August 8. Tr. 27-28.

Macias described the Brownlee Raise as a "[v]entilation raise" or shaft used to bring air out of the mine. Redpath specialized in the construction of such raises. Most ranged from 500 feet to 800 feet in length. Tr. 29. However – and as the stipulation states – the Brownlee Raise was to be 1635 feet long when measured from the mine floor to the surface. Tr. 28; Stip. 11.

The raise was being driven from the mine floor upward. Connected to the raise shaft was an area called the "nest." The "nest" was where equipment used in the construction of the raise was kept. The "nest" was located about 60 feet from where the raise began its vertical ascent toward the surface.[8] Tr. 30. On August 8, the raise had been driven approximately 1600 feet up from the bottom and had approximately 35 more feet to go to reach the surface. Tr. 30-31.

Miners constructed the raise while working in a "raise climber"or "climber." As described by Macias, the raise climber consisted of several parts. One part was the "man basket" or cage. A miner or miners occupied the man basket as the climber moved up the raise. The raise climber moved on sprockets that slid into a rail or track running along the wall of the raise. As the raise moved upward, the rail was extended. Tr. 30, 97; *see* Resp. Exh. 3.

When not in use, the climber was kept in the nest in a horizontal position. Tr. 33-34; *see* Gov't Exh. 1. When in use, the climber moved out of the nest into the bottom of the raise where the climber swung to a vertical position. Tr. 34. A miner or miners entered the man basket in the nest. At first, the miner or miners were in a horizontal position, but they swung to a vertical position as the climber rotated after entering the raise. Tr. 34-35.

The climber was "powered" by compressed air. The air was pumped to the climber's motors through a hose, the "bull hose," that served to connect the climber and the mine floor compressor. The bull hose was stored in a roll located on the raise climber. Tr. 36-37; Resp. Exh. 3. The hose also supplied air to the climber's braking system. The hose had a flexible metal cable inside it. The cable helped to keep the hose open by restricting its tendency to close when the hose was stretched as the climber moved up the raise. Tr. 61; *see also* Tr. 220.

A circular work deck was located above the cage. The deck was reached by a miner climbing up and through an opening in the deck once the climber reached its designated work elevation. Above the deck was a grate-like canopy. The canopy was round (about 7 feet in diameter), and it was supported by four posts. The canopy protected miners from falling materials. Tr. 37-38, 50-51; *see* Resp. Exh. 3. Once on the work deck, the miners operated drills

[8]The nest had to be located some distance from the bottom of the raise because of construction noise and because, as Marcias explained, "[w]hen you blast [in the raise], the waste comes straight down . . . and settles at the bottom." Tr. 31.

and other equipment through openings in the canopy's grate. Tr. 50-51.

To ascend the raise, a miner in the basket pulled a hand lever. Macias called it a "plunger." The plunger allowed compressed air to flow through the climber's hoses. The compressed air activated the climber's motors. The compressed air was supplied by the compressor located in the nest and traveled to the hoses leading to the motors via the bull hose. As compressed air was applied to the motors, the motors drove the climber up the rail. Tr. 41-42

Macias explained there were multiple braking systems on the raise climber. There were two air-powered centrifugal brakes that were engaged by pulling a hand brake lever or by activating a foot brake. In addition, there was an emergency brake, the G-5 brake. The hand and foot brakes could control the rate of descent even if air to the raise climber was cut off. Tr. 41. In that case, the climber descended due to gravity (a "controlled descent" or a "free wheel descent") and the brakes could be used to slow it. Tr. 46-47. Under these circumstances, if the climber descended at too great a speed, the G-5 brake was automatically engaged. Tr. 45, 98.

THE EVENTS OF AUGUST 7 AND 8

On August 7, Macias was working with Dan Elliott, another raise miner. Tr. 42-43. Macias began his workday by inspecting the raise climber for wear and tear. Next, he checked to determine if he needed equipment and supplies. *Id.* When everything appeared in order, Macias and Elliott climbed in the raise climber's basket. The climber moved out of the nest and past the curve. At the bottom of the raise, the climber lifted to a vertical position and began its ascent. As it moved up the raise, Macias and Elliott inspected the rail and the walls for signs of damage from prior blasts.[9] Tr. 43-44, 48. Judging from past ascents, Macias believed reaching the top of the raise would take between 50 minutes to two hours. It depended on whether he and Elliott needed to stop and make repairs to the rail as they moved up. Tr. 43-44; *see also* Tr. 48-49. As the climber ascended, Macias did not notice any problems with the climber's bull hose. In addition, the climber's motors operated as usual. Tr. 49.

Upon reaching the top of the raise, Macias and Elliott scaled loose material off the face of the raise and off of the ribs. The face was advanced four to eight feet by each blast. To cover the distance the face advanced after the most recent blast, the miners installed another section of rail. The new rail allowed the raise climber to keep pace with the advancing face. Tr. 50.

The miners now were approximately 1600 feet above the floor of the raise. Tr. 49-50. The bull hose was hanging from the climber to the mine floor. Tr. 61. After the miners bolted the rail in place, they scaled the face of the raise and then drilled into the face and installed bolts and some wire mesh. The mesh covered parts of the face. Tr. 51-52. The mesh was intended to hold loose material so it wouldn't fall on any miners working below. Tr. 52.

[9]The raise was excavated by explosives.

At first, when Macias and Elliott scaled the face, not much loose material fell, and that which did was small in size. However, it soon became obvious to the men that larger pieces of rock were loose. Macias and Elliott began to pull the larger pieces down and one of the pieces fell on top of the canopy. The rock was jagged, sharp, and thick. Macias estimated the rock on the canopy weighed between a ton and a ton-and-a-half. Tr. 55. Because the rock blocked many of the holes through which the miners could work, it prevented Macias and Elliott from installing many more bolts and completing the rest of the mesh work. Tr. 53-54. The only thing the miners could do was put a few random bolts in the face, drill holes in the sides of the raise and fill the holes with dynamite. The miners wanted to blast rock that protruded too much into the raise. The protruding rock made the raise "tight" for the raise climber. Tr. 56-57.

After the dynamite was loaded in the holes, the miners attached detonators to the explosives. Tr. 58. The detonator mechanism included spooled cord, which transmitted a charge to the explosives. After the detonator mechanisms were in place, Macias and Elliott started to bring the climber down. As the climber descended, the cord unwound from the spool. Macias stood on the work deck to make sure the cord did not snag on the deck or otherwise tangle. Tr. 58-59. Finding all was in order, Macias climbed down into the man basket. Elliott controlled the climber's descent in the usual way, by applying the compressed air operated braking system. Tr. 59.

The climber descended approximately 200 feet when, according to Macias, "a piece of [falling] loose material . . . cut [the] bull hose," including the cable inside the hose. Tr. 60, 62. Macias wasn't sure from where the material came. He speculated it was "[e]ither off the deck or somewhere in the raise." Tr. 60. The bull hose fell to the bottom. With the bull hose severed, the climber's compressed air source was cut off, and the climber came to a stop. Tr. 62. This was the first time Macias experienced a situation where both the bull hose and the cable in the hose were severed. Tr. 63.

At this point, Macias decided not to further lower the climber. Tr. 72. He stated, "I made the decision not to come down the raise in a controlled descent on gravity."[10] *Id.* Macias determined he would wait at approximately the 1400 feet level of the raise until the mechanic, Arthur Bravo, could assist him. *Id.*, Tr. 78; 83. Macias had made two previous controlled descents. However, on neither occasion was the bull hose completely severed nor was there loose rock on the climber's deck. *See also* Tr. 125. In addition, in neither situation was he 1400 feet above the mine floor. Tr. 138.

Later, Macias wrote a brief statement describing what had happened. Tr. 64.

> When we lost [the] bull hose, I made the call not to free wheel down [the] raise. Because of loose [rock] on the

[10]By a "controlled descent," Macias was referring to one controlled by the hand brake and foot brake. Tr. 110-111.

> deck unit [the raise climber] could get out of hand on the way down raise. Like loose breaks. Too much weight.

Gov't Exh. 4; Tr. 70.[11]

Macias believed he wrote the statement on August 10. When he was deposed about one month prior to the hearing, Macias stated Cook, Redpath's project manager, asked him to write what " happened . . . the day I was in the raise and why I chose to stay in the raise so . . . [MSHA] would have a better understanding of what was going on in the raise." *See* Tr. 66. Macias later maintained the statement was not a full statement. It did not include everything about why he decided to stay put, because he "had no reason to believe . . . the incident was that important." Tr. 67. For example, he testified he did not mention he was unwilling to put wear and tear on the equipment and to cause extra work for the oncoming crew. Tr. 115-116. Rather, he chose to emphasize the loss of the bull hose at 1400 feet and the weight of the rock on the deck. Tr. 125-126.

Macias testified even though he elected to remain in place, he was certain a raise climber operator never would lose control of a climber during a controlled descent. If the speed of the descent became excessive, the G-5 emergency brake would automatically bring the climber to a "[d]ead stop." Tr. 111. Macias did not regard use of the G-5 as a "catastrophic situation" because of the total reliability of the brake. Tr. 127. Nonetheless, he described the G-5 braking system as a "final system . . . to protect the people in the raise climber from falling all the way to the bottom of the raise." Tr. 143.

After Macias stopped the climber's descent, mechanic Arthur Bravo became aware of the situation and decided to bring a second raise climber up the raise to help Macias and Elliott. Tr. 78. Macias knew the mechanic was on his way. Macias could hear noise made by the second climber as it ascended. Macias also could feel vibrations on the rail.[12] Tr. 79.

The second climber moved up the raise, but stopped prior to reaching Macias and Elliott. Macias believed one of its motors malfunctioned. Tr. 80. The second climber then began to

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[11]The letters and words within the brackets have been added for clarity. That they convey what Macias intended is made clear by his testimony.

[12]There were ways in which miners in the two climbers could communicate. Macias testified that a phone line could be dropped from the upper climber to the lower climber. In addition, part of the raise could be illuminated and miners in the upper climber could drop color coded objects down the raise to indicate what they needed. Tr. 113-114. However, Macias stated he did not attempt to communicate with Bravo on August 8, because once Bravo saw the "significant amount of hose in the [bottom of the] raise . . . he [was] smart enough to know what [was] going on." Tr. 114-115. According to Macias, "It's just common sense . . . . We're on the same page." Tr. 115.

descend, but it stopped again. *Id.* This was not unusual. Macias explained:

> Maybe you've got condensation in your air motors and it builds up ice. Sometimes when you drop down certain feet – maybe 6, 10 feet . . . it throws . . . [the] ice out of your air motors and . . . [the climber] can continue to climb up.

Tr. 81. Shortly thereafter, Macias heard the second climber resume its descent. Macias stated he believed Bravo returned to the bottom to pick up the oncoming crew so they could help him install another air motor on the second climber. Tr. 83. The place were Bravo picked up the crew was about 15 minutes from the nest. *Id.* Meanwhile, Macias waited at the 1400-foot level of the raise. *Id.*

After about 45 minutes, Macias again heard the second climber begin to come up the raise. Tr. 84. The climber reached Macias and Elliott, and the bull hose was repaired. Macias estimated it took between a half hour and 40 minutes for the second climber to reach the first climber and for the mechanic then to fix the bull hose. Tr. 84-85. Macias knew the hose was repaired when he heard the second climber descending and shortly thereafter compressed air started coursing through the hose. Tr. 85. According to Macias, the second raise climber was in the raise a total time of "over an hour" on the second occasion. *Id.*

As best as Macias could recall, the bull hose was cut between 4:30 a.m. and 5:15 a.m. on August 8, and the bull hose was not repaired and the air restored until between 9:00 a.m. and 9:30 a.m on the same day. Tr. 89-90.

Macias was asked repeatedly why he chose to stay in place rather than lower the raise climber to the bottom. He testified while the second raise climber was below him, he did not want to move because he feared rock from his climber might "fall down on top of the other unit." Tr. 86; *see also* Tr. 102, 131. In addition to falling rock, he was concerned bolts on the work deck could fall if they weren't stored properly. Tr. 87-88, 132. Further, if he had come down the raise on a controlled descent, he was sure to put "wear and tear" on the raise climber's parts. However, he stated he could have moved the climber out of the raise had he wanted to. Tr. 100, 120.

Macias did not believe staying in place compromised his and his co-workers' safety. In his opinion, there was no "need to come down out."[13] Tr. 107. It made more sense to Macias to

[13]He stated it was not at all unusual for the climber to remain in place for several hours when the miners in the climber were working at the face or maintaining the rails. Tr. 120. He added, "If there was an emergency . . . I'm coming down the raise. It would take me a while but I'll be there." *Id.* Moreover, in the event of an emergency he would not worry about wear and tear because, "Money's no object then." Tr. 121.

have the mechanic bring the broken end of the hose up to the raise climber and make the repair. After the break, approximately 200 feet of hose was still attached to the climber, and if Macias descended, the attached hose would pile up and tangle on top of the cut hose at the bottom. Tr. 108.

Macias also explained, prior to the incident he and the mechanic had agreed on the procedure to follow if the hose broke:

> We had an understanding depending on the amount of hose in the bottom of the raise . . . And the agree- was for us to sit there and wait for him to do the repair until we got more air. I know where I'm at in the raise. I know if I'm that high there is going to be a significant amount of hose in the bottom. So I'm going to sit and wait. If he knows I'm lower in the raise, it would be easier for me just to drop down far enough for him to do the repair in the nest. . . .

Tr. 109. Macias testified, in view of this agreement, "There [was] no reason for me to come down the raise." Tr. 131.

Project supervisor, Terry Cook, also testified about the incident. According to Cook, he reached the mine around 7:00 a.m. on August 8. Upon his arrival, he realized Redpath's miners from the shift on which Macias worked had not exited the mine. Cook was not concerned. It was not unusual for miners to miss the mantrip, and no one had called out to report any problems. Tr. 232.

Cook proceeded underground. He traveled to the nest area where he was met by Bravo, who told Cook the bull hose on the raise climber "had broken and he tried to take the . . . broken end up into the raise, but blew an air motor, noticed it was quitting time, [and] came" to meet Cook "because he knew . . . [there was] no way of getting up to the raise." Tr. 233. Cook testified he asked Bravo whether Macias and Elliott had dropped the phone line down the raise, and Bravo said "no." T r. 234. The fact the miners had not dropped a phone line signified to Cook they were all right. *Id.* ("If they're not sending the phone line down, I guess they're comfortable." *Id.*)

Cook then accompanied Bravo into the nest, where Bravo and others installed a new air motor on the second raise climber. Tr. 234. The severed bull hose was placed on the work platform of the second raise climber. Another lead miner and his helper took the hose up to Macias's climber and repaired the hose. Cook believed the repairs were completed and the second climber returned between 9:30 a.m. and 10:00 a.m. Tr. 236. Once the hose was repaired and Macias and Elliott were down, no one from Redpath called MSHA to report the incident.

Cook explained he did not call because he did not believe Macias and Elliott were trapped. Tr. 236. They could have lowered the raise climber "at anytime if they wanted." *Id.* In Cook's opinion, Macias made the right decision to stay in place. It is Redpath's policy to have the primary raise climber stay put when a second raise climber is in the raise and there is no communication between the two climbers. Tr. 252-253. On August 8, there was no communication between Macias, Elliott, and Bravo. Tr. 253. Cook maintained all of Redpath's lead miners know when they feel the presence of another climber on the rail below, they don't move until it is clear. This is to avoid inadvertently dropping or causing something to drop on the climber below. ("You don't want to drop your wrench or your water bottle or . . . have a nut or little bolt [drop]. After 100 feet that little bolt is just like a bullet." Tr. 238.)

Cook was adamant a raise climber descending without its motors could not drop in a free fall. In addition to the hand and foot brakes used during a controlled descent, the G-5 brake would stop the descent if the hand and foot brakes failed and control was lost. He explained:

> The G-5 . . . . has its own sprocket . . . that rides on the rail. It . . . has a little brain in there that once that sprocket starts hitting a certain revolution, it locks that G-5 brake in.

Tr. 230-231.

EVENTS OF AUGUST 9 AND MSHA'S INVESTIGATION

The day following the incident, Redpath employee Mark Ahlborn, the project's general manager, reported the incident to MSHA. Stip.15. Ahlborn called after a Stillwater employee complained that the incident had not been reported. Cook quoted the employee telling Ahlborn, "Boy, we're going to get in trouble . . . . You need to make the phone call right now." Tr. 240. Cook described the Stillwater employee as "very excited." Tr. 254. Cook agreed the employee "may have" described the events of August 8 as an "accident." Tr. 255.

Garry Stauffenberg is an MSHA metal/non-metal mine inspector. Prior to August 8, he had inspected the East Boulder Mine at least 12 times. Tr. 149-150. Stauffenberg first became aware of the incident on August 9, when he was told by his "supervisor that an entrapment of two miners in [the Brownlee] raise occurred at the . . . mine." Although he never had operated a raise climber or been trained to do so (Tr. 171), Stauffenberg was "assigned to . . . conduct an investigation" of the incident. Tr. 151-152. The investigation took two-and-a-half days.

On August 10, 2006, Stauffenberg went to the mine and met Terry Cook, Mark Ahlborn, and others. Tr. 152. During the course of the meeting, Terry Cook described what had happened. After hearing Cook's explanation, Stauffenberg told Cook he did not think there was an entrapment, but he would check with his field office and would continue the investigation until he had all of the necessary information. Tr. 169; *see also* Tr. 242.

Subsequently, Stauffenberg spoke with Macias and Bravo. Stauffenberg also was given Macias's signed statement. Gov't Exh. 4; *see* Tr. 155. As a result of what he learned, Stauffenberg changed his opinion regarding Macias's and Elliott's "entrapment" and issued Citation 6323250, charging Redpath with a violation of section 50.10. Gov't Exh. 5; Tr. 155-156. He noted the standard requires an operator to immediately contact MSHA "[i]f an accident occurs" (30 C.F.R. § 50.10) and that one of the definitions of "accident" is "[a]n entrapment of an individual for more than 30 minutes." 30 C.F.R. §50.2(h)(3); *see* Tr. 156. Macias and Elliott were in place at the 1400-foot level of the raise for much longer than 30 minutes. Therefore, the "entrapment" should have been reported to MSHA.

Stauffenberg recognized nothing mechanical prevented the miners from lowering the climber using controlled descent procedures. Tr. 173. However, in Stauffenberg's view, other factors overcame the fact the climber could have descended and warranted finding an entrapment. He noted the raise was one of "the world's longest" and being stopped at the 1400-foot level "ha[d] a definite relevance." Tr. 158. Stauffenberg further took into consideration the fact that a ton-and-a-half of rock was on top of the raise climber. Tr. 159. Based on his interview with Macias, Stauffenberg believed Macias "recognized the potential hazard of trying to descend [from 1400 feet] . . . with that additional weight on top [of the canopy]." *Id.* In addition, the loss of the bull hose was critical to his finding of entrapment because "when you lose your primary bull hose, you lose the control to drive anything with air" (Tr. 160), and Stauffenberg recalled Macias saying he was afraid of losing control of the climber if he tried to descend without air. Tr. 162.

Stauffenberg believed Macias did the right thing by deciding to stay in place. The only thing wrong was the failure of Redpath to report the incident. Tr. 157.

THE ISSUES

The issues are whether Redpath violated sections 50.10, and, if so, whether the inspector's findings regarding the gravity of the violation and Redpath's negligence are sustainable. If a violation is found, the parties agree the resulting penalty should be $60; but, to assess such a penalty, I also must consider whether the statutory civil penalty criteria as a whole support that amount. Tr. 250.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6323250	**8/15/06**	**50.10**	**$60**

Citation No. 6323250 states:

> The person in charge of the . . . Redpath operation at this mine site failed to notify . . . [MSHA] of the delay in two miners . . . com[ing] down out of a raise. Alimak unit is driving a ventilation raise from

> 7200 +108 access to the surface. The bull hose blew completely in half that supplies air for the tramming motors. This was approximately four hundred feet from the climbing unit, which stopped the unit approximately fourteen hundred feet from the bottom of the raise. This occurred on August 8 . . . at approximately [4:30 a.m.]. The miners were in the raise until [9:30 a.m.] of the same day. A call was received from the project manager at approximately . . . [8:00 a.m.] to the Denver district [MSHA] office on August 9, 2006.

Gov. Exh. 5

THE VIOLATION

As noted previously, section 50.10 states in part: "If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine." 30 U.S.C. §50.10. Section 50.2(h)(3) defines an "accident" as "[a]n entrapment of an individual for more than 30 minutes." 30 C.F.R. §50.(h)(2). There is no regulatory definition setting forth a definition for "immediately," but it has long been accepted that the "immediateness" of an operator's notification under section 50.10 must be evaluated on a case-by-case basis taking into account the nature of the accident and all of the relevant variables affecting reporting.

The issue of whether the incident of August 8 constituted an "accident," revolves around whether the incident was an "entrapment." There is no indication "entrapment" is used in the regulation to connote anything other than its plain meaning – to be caught "as if in a trap." *Websters Third New International Dictionary* (2002) at 758. In like manner, the plain meaning of trap is "something by which one is unsuspectingly or surprisingly caught or stopped in an action or progress." *Id.* 2431.

As is clear from the testimony, the events leading to the alleged violation were triggered by severance of the raise climber's bull hose. The bull hose was the only conduit by which compressed air was supplied to the raise climber. The air had two primary functions: (1) It activated the motors that allowed the raise climber to ascend (Tr. 41-42), and (2) it activated the centrifugal braking systems, the raise climber's primary braking systems, the systems usually used and the ones allowing the climber to descend in an indisputably safe and measured manner. Tr. 224-225.

When the bull hose was severed, the raise climber lost the principal means by which it could unquestionably descend safely. While the record establishes the climber could descend without air by using the foot and the hand brakes (a "controlled descent") (Tr. 71, 75, 77), the availability of this other means of descent does not *ipso facto* negate finding an entrapment.

An "entrapment" within the meaning of the standard certainly can signify a total lack of escape from a situation that has "unsuspectingly or surprisingly caught or stopped" miners' actions or progress, but it also can encompass a situation in which miners reasonably conclude, given all of the circumstances within their knowledge, it is safer to stay in their existing situation and location than to extricate themselves via an available means. Here, the question of whether Macias and Elliott were "entrapped" turns on whether the record supports finding they chose to remain in place because they reasonably feared it would be more hazardous to undertake a controlled descent.

After considering all of the testimony and documentary evidence, I find Macias and Elliott were in fact entrapped on August 8. In reaching this finding, I give great weight to the statement Macias wrote immediately after the incident in which he described the reasons why he chose to stay in place rather than to descend. When he wrote the statement, the events of August 8 and his reaction to them were freshest in his mind, and a fair reading of the statement, when coupled with his oral explanation of what he then meant, indicates Macias was concerned 2,000 to 3,000 pounds of rock that had fallen on the canopy of the climber would cause the climber to "get out of hand on the way down the raise." Tr. 73. In other words, he was concerned the added weight would impede a safe descent. Gov't Exh. 4, Tr. 70, 72-73. To be more specific, Macias feared the brakes used in a controlled descent would become inadequate – would become "loose" (Gov't Exh. 4) – as their brake pads wore down. Tr. 75, 77.

When it is remembered he was located 1400 feet above the mine floor and no controlled descent from that height ever had been attempted by Macias (or by anyone else for that matter), his fear about the effect of the added weight on the brakes he would have had to use repeatedly over so great a distance was reasonable, as was his resulting decision to stay where he was.

Moreover, once the second climber was in the raise, Macias had another concern. If he started downward, he believed the rock on the canopy might fall and strike those directly below. Tr. 86, *see also* Tr. 102. In addition, he worried about bolts falling from the work deck. His concerns were valid. After all, it was Cook, his supervisor, who stated falling material like bolts could become "just like . . . bullet[s]." Tr. 238.

In reaching the conclusion Macias and Elliott were entrapped, I recognize both Macias and Cook testified the G-5 brake (the emergency brake) would act to bring the climber to a halt if the speed at which the climber descended became excessive. Tr. 111, 230-231. However, in my view, this has no bearing on the reasonableness of Macias's decision to stay rather than to descend. The existence of a "last gasp" system designed to prevent a plunge to the floor below (Tr. 143), does not make unreasonable Macias's decision to forego totally relying on it to prevent his and Elliott's certain deaths. Moreover, there is no indication on August 8 the existence of the G-5 brake played any role in Macias's decision to stay put. Certainly, he did not mention it in his written statement. Nor did he testify its existence played a part in his decisional process.

For these reasons, I conclude the incident of August 8, 2006, constituted an accident within the meaning of section 50.10. The parties have stipulated that if I find an accident

occurred, Redpath did not immediately notify MSHA. Stip. 16. Therefore, I conclude Redpath violated the standard as charged.

GRAVITY

In assessing the gravity of the violation, I note inspector Stauffenberg's testimony the citation was issued solely for Redpath's failure to report the accident. Tr. 157. I also note Stauffenberg found the violation had no likelihood of producing an injury. Gov't Exh. 5. Based on this testimony, I find, as did the inspector, the violation was not serious.

NEGLIGENCE

Inspector Stauffenberg found the failure to report the accident was due to Redpath's "moderate" negligence. Gov't Exh. 5. Cook arrived at the mine at 7:00 a.m. on August 8. Tr. 233. Shortly thereafter, he traveled underground where Bravo advised him of the situation. Tr. 233-234. Cook testified once he knew of the miners' predicament, he did not think Macias and Elliott were in any danger, because they had not communicated otherwise. Tr. 234, 236. I take Cook at his word. However, when Macias and Elliott were out of the raise and in the nest, it was Cook's duty, as the project superintendent and Redpath's person in charge, to undertake an immediate investigation to discover why the miners had chosen to remain at the 1400-foot level. Had such an investigation been conducted, Cook would have determined Macias chose to stay in place because of his well-founded fear it would have been more hazardous to make a controlled descent, and the incident could have been timely reported. In other words, had Cook exercised the care required of him by the circumstances, the violation would not have occurred. I, therefore, conclude Inspector Stauffenberg was correct when he found Redpath was moderately negligent.

EVENTS OF AUGUST 29 AND THE INOPERABLE MINE PHONE

John O'Brien is an MSHA inspector who, on August 29, 2006, was working in the Helena, Montana, MSHA office.[14] O'Brien was familiar with the East Boulder Mine. Prior to August 29, O'Brien inspected it approximately six times. Tr. 184. On August 29, he conducted another inspection. When he reached the nest located at 72-670 + 98, work was ongoing and Redpath's employees were carrying out assigned tasks. Tr. 198-199, 269. O'Brien inspected the equipment in the nest, including the page telephone.

The phone mechanism was square in shape. The mechanism included what O'Brien described as a "regular receiver" and an external speaker. Tr. 186-187. The speaker was located in the open above the receiver. Tr. 187. O'Brien was unsure who provided the phone. Tr. 198. However, it was in an area of the mine for which Redpath was responsible.

[14]Inspector O'Brien's name is misspelled in the transcript as, "O'Brian."

O'Brien requested a supervisor call "the surface and [ask] the surface to call . . . back." Tr. 187. The supervisor called the surface twice. Although the supervisor could reach someone on the surface, when the person on the surface tried to respond, the underground party could not hear the response over the speaker. O'Brien examined the speaker. He stated, "That's when we observed that the speaker was not plugged in." *Id.* This meant the nest area could not receive a message from the surface or from any other area of the mine in which page phones were used for communication. Tr. 188.

O'Brien testified page phones were located in others area of the mine, as well as in the 72-670 +198 nest. Tr. 189. Information regarding emergencies (*e.g.,* mine fires or medical information for sick miners) could be conveyed from the surface to the miners underground on page phones. In addition, underground miners could initiate conversations with those on the surface regarding mine conditions by using page phones. Tr. 188-189. O'Brien described the phones as "one of the most necessary parts of the mine" (Tr. 188) and as "a primary source of information" for miners. *Id.*

Cook did not disagree with O'Brien's description of the uses to which the page phones were put. As for the phone in the 72-670 +198 nest, Cook stated it was located in the nest so Redpath personnel could contact the mine dispatcher and coordinate their work with the work of Stillwater personnel. Tr. 259.

Despite the importance of the page phone system, Cook described the page phone in the 72-670 +198 nest as unreliable. ("We constantly had trouble with that phone. I don't know if that was the third phone or the fourth phone that was put in there." Tr. 259; *see also* Tr. 262.) Cook quoted Redpath's employees as stating that although they could detect when someone was speaking over the speaker, they could not tell what he or she was saying. Tr. 264. Redpath personnel had asked their Stillwater counterparts to fix the page phone in the nest so Redpath's employees could hear it. Tr. 260-261. Because of the unreliability of the page phone, Cook testified Redpath employees relied on another underground system – the "leaky feeder" phone system. *Id.*

O'Brien believed the non-working condition of the speaker violated section 57.14100(b), in that the phone was defective and the defect was not corrected in a timely manner.[15] O'Brien did not find the violation was S&S. He noted the presence of the alternative means of communication. However, like Cook's concern about the page phones, O'Brien did not think the leaky feeder phones were totally reliable. ("[They] could go in and out[.]" (Tr. 190)). Due to the amount of noise in the nest, it was possible miners would not hear the leaky feeder phones' signals. Tr. 192.

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[15]Section 57.14100(b)(1) applies to "equipment, machinery and tools that affect safety." O'Brien believed the page phone's parts constituted two of the enumerated things: "equipment" and "tools." He stated, "The phone would be a piece of machinery to receive, and the speaker would be a tool." Tr. 195-196.

O'Brien believed the lack of a working page phone speaker was due to Redpath's moderate negligence, because a Redpath official told O'Brien the page phone had been inspected earlier by a Redpath employee – O'Brien understood on August 28 – and was not found inoperable. Tr. 194-195, 202. (In completing the inspection report, the Redpath miner described the nest page phone as "okay." Tr. 203.) O'Brien, therefore, assumed the speaker had not been unplugged for very long, although he did not know when the speaker became unplugged, nor whether the Redpath inspector actually looked at the wire when he inspected the phone. Tr. 199, 202-203.

Finally, O'Brien testified he issued the citation to Redpath because Redpath "was the direct contractor for this area and there [were] no Stillwater employees . . . working in [the] area." Tr. 203-204.

THE ISSUES

The issues are whether Redpath violated section 57.14100(b) and, if so, whether the inspector's findings regarding the gravity of the violation and Redpath's negligence are sustainable. If a violation is found, the parties agree the resulting penalty should be $60, but to assess such a penalty, I must conclude the statutory civil penalty criteria as a whole support the amount. Tr. 250.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6324326	**8/29/06**	**57.14100(b)**	**$60**

Citation No. 6324326 states:

> The provided mine phone located at the 72-670+198 eagles nest would not page when tested. The standard requires that defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons.

Gov. Exh. 6

THE VIOLATION

As the citation states, section 57.14100(b) requires "defects on any equipment that affect safety" to be "corrected in a timely manner to prevent the creation of a hazard to persons." There is no doubt on August 29, 2006, the page phone at the 72-679+198 eagles nest was not fully operational. Both O'Brien and a mine supervisor tried to have someone on the surface call the nest. The phone would not page because its speaker was not plugged in. Tr. 185, 187. The page phone was "equipment" within the meaning of the standard. "Equipment" is not defined in the regulation, but in common usage, the word signifies "implements (as machinery or tools) used in

an operation or activity." *Webster's Third New International Dictionary* (2002) 768. Cook and O'Brien testified the page phone could be used by the mine dispatcher to contact miners in the nest area. Tr. 188, 259. In addition, based on Cook's testimony, I find the cited phone was used, among other things, to coordinate work underground. Tr. 259. Because the phone was an implement used in mining activity, it was "equipment" within the meaning of the standard.

Further, the phone had a "defect", *i.e.*, "an irregularity . . . that . . . causes failure." *Webster's* at 591. In this instance, the defect was uncomplicated; the phone's speaker was unplugged. Nonetheless, the defect caused one of the phone's primary functions to fail.

The standard required Redpath to "correct [the defect] in a timely manner to prevent the creation of a hazard." To prove this mandate was violated, the burden was on the Secretary to show the cited defect (the unplugged speaker) was not timely corrected. It is impossible to determine the timeliness of Redpath's failure unless the Secretary has established outright or through reasonable inference how long the page phone speaker was unplugged and when Redpath personnel should have found and corrected the defect. O'Brien testified he did not know when it was unplugged (Tr. 202-203), but he was told the phone was inspected by a Redpath employee on August 28, and he agreed Redpath's inspectors did "good work." Tr. 194. Moreover, the Redpath inspector described the phone as "okay."

The most reasonable inference to draw from all of this is that the speaker was plugged in on August 28, and that sometime between the August 28 inspection and O'Brien's August 29 observations the speaker became unplugged. When O'Brien saw the phone, Redpath's next scheduled inspection of the phone after August 28 had yet to occur. Tr. 194. The Secretary did not establish when the phone next should have been inspected. Nor did she establish when Redpath otherwise should have known about the condition of the phone. Without a way to infer or otherwise conclude when Redpath should have known of the page phone's unplugged condition, I have no basis for concluding whether Redpath failed to correct the condition in a "timely manner." As a result, the Secretary's allegation of a violation must fail.

Therefore, I conclude the Secretary has not proven the alleged violation of section 57.14100(b), and I will vacate the citation at the close of this decision.

REMAINING CIVIL PENALTY CRITERIA

HISTORY OF PREVIOUS VIOLATIONS

In view of the parties' agreement as to the amount of the appropriate civil penalties should violations be found, the Secretary elected to forego the submission of evidence regarding Redpath's history of previous violations. Tr. 205-206.

SIZE

Perhaps because of the same agreement, no specific evidence was offered by the Secretary regarding Redpath's size. I note that although Redpath is a large international mine construction company, as Cook testified, until recently only a few of its projects have been located in the United States. Tr. 210-211.

GOOD FAITH ABATEMENT

The parties stipulated Redpath demonstrated good faith in abating the cited conditions. Stip. 7.

ABILITY TO CONTINUE IN BUSINESS

No evidence was offered that any penalty assessed will affect Redpath's ability to continue in business, and I find it will not.

CIVIL PENALTY ASSESSMENT

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
6323250	**8/15/06**	**50.10**	**$60**

I have agreed with Inspector Stauffenberg the violation was not serious and was the result of Redpath's moderate negligence. Given these findings and the other civil penalty criteria, I also agree with the parties that a civil penalty of $60 is appropriate.

ORDER

The Secretary has proven the violation of section 50.10 alleged in Citation No. 6323250, and Redpath **SHALL PAY** a civil penalty of $60 for the violation within 40 days of the date of this decision. The Secretary has failed to prove the violation of section 57.14100(b) alleged in Citation No. 6324326, and the citation **IS VACATED**. Upon payment of the penalty, this proceeding **IS DISMISSED**.[16]

David F. Barbour
Administrative Law Judge

[16]I commend counsels on the manner in which they prepared, presented and briefed this case. Their use of the tools of litigation and argument represented an admirable balance of efficiency and effectiveness. The Secretary, Redpath, and the Commission were well served.

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