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

August 27, 2008

CLIMAX MOLYBDENUM COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2007-330-RM
	:	Citation No. 6315468; 02/23/2007
v.	:	
	:	Docket No. WEST 2007-333-RM
	:	Citation No. 6315469; 02/26/2007
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Henderson Operations Id. No. 05-00790
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 2007-480-M
	:	A.C. No. 05-00790-115261
v.	:	Docket No. WEST 2007-776-M
	:	A.C. No. 05-00790-121855
CLIMAX MOLYBDENUM COMPANY, Respondent	:	Henderson Operations

DECISION

Appearances: Timothy R. Olson, Esq., Jackson Kelly PLLC, Denver, Colorado, for Climax Molybdenum Company; Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor.

Before: Judge Manning

These cases are before me on two notices of contest filed by the Climax Molybdenum Company ("Climax") and two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA") 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"). Climax contested Citation Nos. 6315468 and 6315469. An evidentiary hearing was held in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. THE CITATIONS

Climax is a division of Freeport-McMoRan Copper & Gold, Inc., and it operates the Henderson Mine and Mill. The mill, which is located in Grand County, Colorado, crushes and processes the ore that has been transported from the mine. MSHA inspector Rodric Breland was at the mill on February 23, 2007, when he observed conditions which he believed violated the Secretary's safety regulations. Inspector Breland issued Citation No. 6315468, under section 104(a) of the Mine Act, alleging a violation of 30 C.F.R. § 57.14112(b) as follows:

> The inspection/maintenance cover plate was left open on the North Dry Feed conveyor. The conveyor belt was in operation and the open cover plate exposed an approximate 18 inch wide by 12 inch high opening to the head pulley. The open access measured approximately 37 inches from the working platform and the head pulley measured approximately 16 inches inside the chute/guard. With the cover plate open, a miner is exposed to an entanglement injury with the head pulley.

He determined than an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Climax's negligence was moderate. The Secretary proposes a penalty of $614.00 for this citation.

Inspector Breland also issued Citation No. 6315469, under section 104(d)(1) of the Mine Act, alleging a violation of 30 C.F.R. § 57.14105 as follows:

> It is common practice to clean material build-up inside the head pulley guard/chute on the North Dry Feed conveyor while the conveyor is in operation. According to two different operation supervisors, Dean Schonlau and Mike Birmingham stated that the cover plate is opened and a wooden bar is used to scale build-up of material off the inside of the chute where material dumps off the conveyor. . . . Where scaling of material build-up is performed, the head pulley measures approximately 12 inches between the pulley and chute structure. This hazardous work practice is performed on an as-needed basis, the cover plate is opened and material build-up is checked for approximately six times a day. The company has engaged in aggravated conduct constituting more than ordinary negligence in that this hazardous work practice has been [accepted] and not recognized as a hazard for a great length of time. Miners have been exposed to serious injury while performing this hazardous task of cleaning material build-up inside the guard/chute

in close proximity with the head pulley while the conveyor is in operation.

He determined than an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that the violation was the result of the company's unwarrantable failure to comply with the safety standard. Negligence was designated as high. The Secretary proposes a penalty of $4,500.00.

II. FINDINGS OF FACT

1. Climax operates a leach plant at the Henderson Mill and the citations were issued for conditions at the north dryer feed chute in the leach plant.

2. Molybdenum material is fed onto the north dryer feed belt by a chute from the drum filter. (Tr. 8-9). It is then carried by the north dryer feed belt to the north dryer feed chute where the material drops off the belt and onto the distributor augers approximately nine feet below. (Tr. 9-11, 113). This assembly is depicted in the Secretary's first exhibit. (P-1).[1]

3. There is a door on the north dryer feed chute. (Tr. 12; Ex. P-2). The dimensions of the door are 18 inches wide by 12 inches high and the bottom of the door is 37 inches from the work surface below. (Tr. 14-16; Exs. P-4, P-5, C-1). This door is what the inspector referred to as the "inspection/maintenance cover plate" in Citation No. 6315468.

4. When the door is opened the inside walls of the chute and head pulley are visible. (Ex. P-6). The head pulley is 16 inches from the door opening. (Ex. P-6). The minimum distance between the north dryer feed belt and the inside wall of the chute below the door is 12 inches. (Ex. P-7).

5. The north dryer feed belt is a slow moving belt. It travels at a rate of 3.56 feet per second or 2.4 miles per hour. (Stip. 10; Tr. 73).

6. The north dryer feed belt is 18 inches wide, which is the same width as the door opening. (Tr. 115; Ex. P-5).

7. The pulley for the north dryer feed belt is wider than the belt itself and extends at least two inches beyond the outside edge of the belt on each side. (Tr. 115-16).

8. The head pulley itself is smooth, with an exterior of half-inch machined rubber and smooth recessed sides. (Tr. 116-17). The width of the gaps between the smooth ends of the head

[1] Counsel for the Secretary designated his exhibits as "Petitioner's Exhibits," and I have used this same designation in this decision.

pulley and the inside walls of the chute are 3.75 inches on the north side and 4 inches on the south side. (Stip. 11; Exs. P-11, P-12).

9. Molybdenum can be used as a lubricant and is a powdery substance that has the consistency of graphite. (Tr. 140).

10. The head pulley, feed belt, and chute at issue in these cases are coated with molybdenum material, making all of the surfaces inside the chute smooth and slippery. (Tr. 11, 56, 116, 119).

11. The door on the north dryer feed chute allows Henderson leach plant employees to inspect the belt and clean molybdenum accumulations off the inside walls of the chute as needed. This cleaning occurs, on average, three times per shift or six times in a 24-hour period. (Tr. 12, 17-19, 114). Molybdenum primarily accumulates two to three feet below the elevation of the pulley. (Tr. 149, 186).

12. The practice of scraping molybdenum accumulations off the inside walls of the north dryer feed belt has been occurring at the Henderson Mill since 1976, when the mill was built. (Tr. 114). This cleaning generally occurs when the pulley is operating.

13. The door in the north dryer feed chute has been opened at least 50,000 times over a 30-year period while the pulley and belt were operating with no reports of injury as a result. (Tr. 113-14).

14. All employees are instructed to never "break the plane" of the opening of the door on the chute with any body parts. They are also told that if they need to reach into the opening, the Henderson Mill policy is that the belt is shut down and locked out. (Tr. 117).

15. When scraping molybdenum accumulations off the inside walls of the chute, Climax employees use a scaling bar made of wood or metal that is between six and eight feet in length. (Tr. 21-23. 124).

16. Climax employees have not engaged in the practice of scraping molybdenum off the belt or the head pulley. (Tr. 80, 149). Employees only scrape the sides of the chute.

17. There is a permanently affixed scraper inside the chute that removes excess molybdenum accumulations from the belt after it passes over the pulley. (Tr. 122-23).

18. The chute itself has no moving parts, except the head pulley, and there are no rollers, skirting, controls, valves, or levers inside the chute. (Tr. 74, 158, 166).

19. When a new belt is installed, recessed stainless steel splices are used. Bolts are installed at the splices and ground smooth before the belt is put into operation. (Tr. 27-28, 121).

20. Steve Schake, Dean Schonlau, and Mike Birmingham have worked at the Henderson Mill for 30, 27, and 28 years, respectively, all beginning employment in hourly positions. (Tr. 7, 103, 183). Mr. Schake is now a senior health and safety specialist at the Mill. (Tr. 103). Messrs. Schonlau and Birmingham are both operations supervisors. (Tr. 7, 183).

21. Henderson Mill supervisors have been training employees on how to inspect and clean the north dryer feed chute for over 28 years. (Tr. 113-14, 191). Schake, Birmingham, and Schonlau never believed that they were putting employees at risk or exposing them to hazards by having them inspect and scrape the inside walls of the chute. (Tr. 125, 145, 191). Birmingham and Schonlau have personally inspected and scraped the inside walls of the chute many times and they never felt that they were in danger. (Tr. 144-45, 191).

22. Schonlau testified that he performed the task of scraping the north dryer feed chute in the presence of an MSHA inspector about 25 years ago and that the inspector did not issue a citation or instruct him to discontinue the practice. (Tr. 165-66, 177).

23. On February 23, 2007, Inspector Breland was at the Henderson Mill when he observed that the door on the north dryer feed chute was open. (Tr. 162; Ex. C-9). Mr. Schonlau, who accompanied the inspector, told him that he did not know who left the door open or how long the door had been left open. (Tr. 44). It is Climax's policy to keep the door on the chute closed to keep steam from the dryers contained. (Tr. 109-10).

24. Inspector Breland discussed the cleaning process with Schonlau, but he did not issue any citation or indicate that any enforcement actions would be taken. (Tr. 162). The inspector told Schonlau that the door should be kept closed, but Schonlau testified that he was not instructed to stop performing visual inspections or stop scraping the sides of the chute with the belt operating. (Tr. 163; Ex. C-9).

25. At the hearing, Inspector Breland testified that if he had observed anyone scraping the sides of the chute while the belt was operating, he would have issued an imminent danger order. (Tr. 46, 89).

26. Inspector Breland returned to the Henderson Mill on Monday, February 26, 2007. He discussed the cleaning practice with Schake and Birmingham and he issued the two citations. Climax rapidly abated both citations by installing a guard over the door opening.

III. DISCUSSION WITH FURTHER FINDINGS AND CONCLUSIONS OF LAW

A. Citation No. 6315468.

Inspector Breland cited Climax for a violation of section 57.14112(b). That safety standard provides that "[g]uards shall be securely in place while machinery is being operated,

except when testing or making adjustments which cannot be performed without removal of the guard." This safety standard is typically cited when a previously installed guard has not been replaced or is otherwise missing. In this instance a door to a chute was open. The inspector referred to this door as an "inspection/maintenance cover plate" in the citation. Climax did not consider the door to be a guard, as that term is typically used in MSHA's safety standards. It did not really function as a guard since it could be easily opened.

The Secretary argues that Climax violated the standard every time the door was kept open while the conveyor was running. She argues that to find otherwise would defeat the purpose of the standard by allowing entry to moving parts. Climax does not contend that it was testing or making adjustments when the door was opened. The Secretary maintains that Climax's argument that the door was not a guard is irrelevant. Whether or not the door functioned as a guard, the standard plainly requires that an opening exposing moving machinery must be guarded. It is undisputed that the opening was uncovered when Inspector Breland observed it. She contends that the door is often left open. Since no guard was securely in place and the machinery inside was operating, Climax violated section 57.14112(b).

Climax contends that the door to the chute was not a guard because it was not installed to prevent injury to miners. The opening observed by Inspector Breland did not expose miners to a reasonable possibility of injury. As a consequence, there was no requirement that the company fit the opening with a guard and there was no violation of section 57.14112(b).

The safety standard cited by the inspector does not specifically require the installation of guards and does not set forth criteria for the installation of guards. Was Climax required to install a guard at the opening to the cited chute? To answer this question, the applicability of section 57.14107, which sets forth criteria for the installation of guards, must be evaluated.

Section 56/57.14017, entitled "Moving Machine Parts" provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades; and similar moving parts that can cause injury." The issue is whether the door on the chute is required to be kept closed under this safety standard to guard moving machine parts inside the chute.

There is no question that the head pulley in the chute is covered by 57.14107. An important case discussing when moving machine parts must be guarded is *Thompson Brothers Coal Co.*, 6 FMSHRC 2094 (Sept. 1984). That case involved section 77.400(a), which is substantially similar but not identical to section 56/57.14107. The Commission held that in order to establish a *prima facie* case, the Secretary of Labor must prove: "(1) that the cited machine part is one specifically listed in the standard or is 'similar' to those listed; (2) that the part was not guarded, and (3) that the unguarded part 'may be contacted by persons' and 'may cause injury to persons.' " *Id.* at 2096. The Commission interpreted the third element of this test to "contemplate a showing of a reasonable possibility of contact and injury including contact

stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id*. at 2097.

The safety standard must be interpreted to recognize that human behavior can be erratic and unpredictable. Guards are designed to prevent miners from being injured by moving machine parts especially at those times when they are not as focused on their jobs as they should be. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

It is clear that the head pulley and accompanying belt are covered by the standard. It is also clear that the pulley was not guarded when the door to the chute was open. What remains at issue is whether the cited condition presented a reasonable possibility of contact and injury. For the reasons discussed below, I answer that question in the affirmative.

Inspector Breland provided a number of examples of the hazards present when the door to the chute is left open. The conveyor structure sits on an elevated platform. (Tr. 56; Exs. P-2, P-9). There were low-hanging pipes around the chute as well as potential tripping hazards. (Ex. P-10). If a miner were to trip and fall in the area when the door was open, his hands and arms could enter the opening and strike the moving conveyor. Although I agree with Climax that the belt moves at a relatively slow rate of speed, the movement of the belt could cause a miner's hand or hands to slip down. (Tr. 53). A miner's hand could also slip up the belt due to the slippery nature of the molybdenum on the belt. In either event, the miner's head or neck could hit the frame around the door causing an injury. If a miner were to trip and fall in the area when the door was closed, he still might injure himself. Indeed, Schonlau testified that, on more than one occasion, he has hit his head on the low pipes in the area and has fallen down. (Tr. 28-29, 159-60; Ex. C-8). He hit his head on the side of the chute when he fell on one occasion.

I find that the Secretary established that the violation was S&S. A violation is classified as S&S "if based upon the 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).

The Secretary established the first two elements of the S&S test, but whether the third element was established is a closer question. Clearly, if someone were to trip and fall in front of the chute, he could be injured even if the door to the chute were closed. As stated above, I determined that, because the door on the chute was open, there was a "reasonable possibility" of contact with the belt and pulley. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would have resulted in an injury. I find that the record demonstrates that if a miner were to trip and fall while the door was open and he came in contact with the moving machine parts it is reasonably likely that he would be injured. It is also reasonably likely that the miner's injuries would be more serious than if the door were closed because his hands would likely slip on the moving conveyor which could cause his head to strike the edge of the door opening. The belt is only 16 inches from this door opening. Any injury is likely to be of a reasonably serious nature.

In reaching this conclusion, I have taken into consideration that it was company policy to keep the door closed and that it was normally kept closed except when a miner was scraping the inside walls of the chute. I have also taken into consideration the fact that no miner has ever reported an injury involving contact with the head pulley.

It is important to understand that it is not very likely that, by merely touching the belt, the miner would injure himself. Schake, Schonlau, and Birmingham all testified that the moving belt would not injure a miner if he accidently came into contact with it, in part because it was covered with molybdenum. (Tr. 121, 157, 191). I credit this testimony as well as the testimony that the splice is relatively smooth. In addition, the pinch points were far enough from the opening that contact with them was highly unlikely. (Tr. 117-18, 124). It would also be unlikely that anyone would come in contact with the shaft (axle) for the pulley or get his hand caught between the pulley and north or south walls of the chute. Finally, I reject the inspector's testimony that a miner could get pulled into the opening of the chute or fall into this opening. The chance of that happening is remote at best. The inspector also testified that a miner's head could get caught between the conveyor as it travels around the pulley and the wall of the chute and he could then be pulled down into the chute. It is practically inconceivable that such events could occur. As a consequence, I reduce the gravity from "fatal" to "lost workdays or restricted duty." I base my S&S finding on circumstances in which a miner trips, slips, or falls by the chute while the door is open and his hand enters the door opening and slips on the moving belt.

I find that the negligence of the company was moderate. Climax has operated the leach plant in the same manner for at least 28 years. It did not consider the door to the chute to be a "guard," as that concept is set forth in the Secretary's safety standards. On the other hand, Company policy was to keep the door closed except when necessary. Although the primary purpose of this requirement was to contain the steam rising from the dryers, a reasonably prudent

person would have recognized that it was also safer to keep the door closed. Climax does not know who left the door open.[2]

B. Citation No. 6315469.

Inspector Breland also cited Climax for a violation of section 57.14105. That safety standard provides, in part, that "[r]epairs or maintenance on machinery or equipment shall be performed only after the power is off and the machinery or equipment is blocked against motion." The inspector cited Climax because miners were cleaning the inside walls of the chute with a scaling bar while the conveyor was in operation. He considered the violation to be an unwarrantable failure because Climax has been using this hazardous work practice for a long period of time.

The Secretary argues that cleaning the buildup of molybdenum on the sides of the chute constitutes "repairs or maintenance" as that phrase is used in the standard. She contends that the plain language of the standard supports her position. In addition, her interpretation of the standard is reasonable and is therefore entitled to deference by the Commission.

Climax contends that the standard does not apply because scraping the sides of the chute is cleaning rather than "repairs or maintenance," and, even if the standard applies, it was not violated because the chute does not have any moving parts that can be blocked against motion. The only moving parts were the pulley and belt. Those parts were not being repaired or maintained so the standard does not apply.

The key phrase in the standard is "repairs or maintenance." The Commission discussed this phrase in *Walker Stone Co. Inc.*, 19 FMSHRC 48 (Jan 1997); *aff'd* 156 F.3d 1076 (10th Cir. 1998). In that decision, the Commission held:

> The term "repair" means "to restore by replacing a part or putting together what is torn or broken: fix, mend . . . to restore to a sound or healthy state: renew, revivify . . . ." *Webster's Third New International Dictionary, Unabridged* 1923 (1986). The term "maintenance" has been defined as "the labor of keeping something (as buildings or equipment) in a state of repair or efficiency: care, upkeep . . . " and "[p]roper care, repair, and keeping in good order." Id. at 1362 . . . .

[2] In its brief, Climax argues that the citation should be vacated because it had not been put on notice that the safety standard applied to the chute. I reject this argument. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard applied to this installation because of the presence of the head pulley.

Id. at 51. I find that scraping the sides of the chute with a bar does not fit within the definition of repair. Whether it fits within the concept of "maintenance" is a closer issue. The term maintenance is also defined as "[p]roper care, repair, and keeping in good order." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 328 (2d ed. 1997). Climax instructed its employees to clean the inside of the chute about three times a shift. Because the molybdenum drops off the end of the belt and falls down to the augers below, it tends to stick to the sides of the chute. By cleaning the sides of the chute, the employees are arguably keeping the equipment in a " state of efficiency" or "in good order." It is clear, however, that the chute was not clogged when employees used the scaling bar to clean the chute. In addition, the belt was functioning and operating properly at all pertinent times.

In *Walker Stone*, a crusher stopped operating because it had become clogged with several large rocks that stalled the engine for the crusher. Employees made several attempts to break or remove the rocks. During this process, an employee jogged the rotor on several occasions by pressing the start button on the engine with the clutch still engaged to see whether the impeller would rotate. An employee was not in the clear one time that the rotor was jogged and he was fatally injured as a result. MSHA issued a citation alleging a violation of section 56.14105. The administrative law judge vacated the citation because breaking and removing large rocks did not constitute repairs to or maintenance of the crusher. 17 FMSHRC 600, 604-05 (April 1995). On review, the Commission reversed the judge. The Commission reasoned that "the effect of removing the rock was to eliminate the malfunctioning condition and enable the crusher to resume operation" and that the work was included in the broad phrase "repairs or maintenance of machinery or equipment." 19 FMSHRC at 51.

As stated above, the belt and pulley in the chute were not malfunctioning in this case. As a consequence, Climax argues that the safety standard does not apply. The cleaning activities performed by Climax employees were not performed because the feed chute had ceased to operate due to a malfunction. Removal of the molybdenum that had stuck to the sides of the chute was "not necessary for the north dryer feed chute to be able to process material." (C. Br. 16). The material is so fine that it would never clog up the chute. As a consequence, the cleaning operation was not "maintenance" as that term is used in the standard.

The Secretary argues that the language of the standard should be interpreted broadly and that the Commission recognized that fact in *Walker Stone*. The Secretary stated:

> The *Walker* panel noted that actions should be considered repairs or maintenance where they are "designed to prevent [machinery] from lapsing from its existing condition or to keep [it] in good repair" or where the action "preserve[d] the ability of the" machinery to perform its function. Work is to be considered repairs or maintenance where it is "performed to keep [the machinery] in the same condition as the day before. . . ."

(S. Br. 11) (*citing* 19 FMSHRC 52). Inspector Breland believed that, if the sides of the chute were not cleaned, the accumulations would eventually build up and lessen the throughput and the efficiency of the process. (Tr. 48).

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that the reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As always, the "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d at 1066 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). In the absence of a statutory definition or a technical usage of a term, the Commission applies its ordinary meaning. *See, e.g.*, *Thompson Bros. Coal Co.*, 6 FMSHRC 2091, 2096 (Sept. 1984). As applied to the facts presented in this case, I find that the language of the standard is not clear. On one hand, by frequently cleaning the sides of the chute, Climax was keeping the equipment in a " state of efficiency" or "in good order." On the other hand, the equipment was operating in the normal fashion and it was not malfunctioning or otherwise out of order.

The Commission must give weight to the Secretary's interpretation of a safety standard "unless it is plainly erroneous or inconsistent with the regulation." *Akzo Nobel Salt, Inc.*, 212 F. 3d 1301, 1303 (D.C. Cir. 2000) (citation omitted). At least one circuit court has held that the Secretary's litigating position before the Commission is also deserving of deference. *RAG Cumberland Res. LP*, 272 F.3d 913, 920 (D.C. Cir 2001). As a consequence, the issue before me is whether the Secretary's interpretation of the standard is a reasonable one that is consistent with the standard's language and Commission precedent.

I hold that the Secretary's interpretation of the standard is reasonable and is consistent with Commission precedent. Moreover, her interpretation is "consistent with the safety promoting purposes of the Mine Act." *Walker Stone*, 156 F. 3d at 1082. Miners were instructed to scrape molybdenum material off the inside walls of the chute about three times a shift for a reason. In scraping material off the walls of the chute, the company was maintaining the chute assembly by keeping it in good order. If the sides of the chute are not cleaned periodically, the chute can get plugged up near the bottom where the auger screws pull the molybdenum into dryers. (Tr. 19-20, 153-54). When that happens, miners sometimes beat on the sides of the chute to knock material off. (Tr. 154). If it really gets plugged up, the machinery is shut down and locked out so that miners can "beat on it, poke it, [and] clean it out probably within 30, 45 [minutes], maybe an hour." (Tr. 153). The company's witnesses testified that this procedure

does not cause any production problems because Climax has a "secondary system" that can be started up. When Schonlau was asked why the system is not shut down every time the sides of the chute are scraped, he replied that it was "just a preference of the operator." (Tr. 154). He also testified that the system could be locked out every time but that a safety hazard was not created by keeping the conveyor operating. *Id.*

I find that Climax's practice of scraping the walls of the chute on a regular basis can reasonably be characterized as a type of maintenance. It is similar to preventive maintenance in the sense that, if the walls of the chute are kept free of accumulations, the molybdenum is less likely to become plugged up at the bottom of the chute. By regularly scraping the sides of the chute, Climax reduces the risk that it will need to spend 30 minutes to an hour cleaning out the bottom of the chute.

Climax also argues that any maintenance was being performed on the chute, not on machinery or equipment. Employees do not clean or scrape the conveyor, the pulley or any other moving parts. The Secretary argues that the chute is an important part of the conveyor system. She contends that the protection afforded by the safety standard extends to the chute between the conveyor and the auger screws. I reject Climax's argument. The molybdenum product drops off the end of the conveyor, falls down the chute, and is picked up by the screws at the bottom of the chute. The chute is an integral part of the entire process. The Commission has held that miners removing obstructions in chutes between belts are protected by section 75.1725(c), a similar standard applicable to underground coal mines. *Jim Walter Resources, Inc.*, 28 FMSHRC 983 (Dec. 2006). In conclusion, I find that the Secretary established a violation of section 57.14105.

I find that the Secretary did not establish that the violation was S&S. Although a slight hazard was created, it was not reasonably likely that the violation would contribute to an injury. (Tr. 125). The miners used long straight rods to scrape the side of the chute. If a miner happened to touch the moving conveyor with his bar, his hands would not be pulled into the opening in the chute. It is extremely unlikely that the moving conveyor or pulley would grab the bar and pull it into the chute. (Tr.148-49). Miners have been scraping the sides of the chute while the conveyor was operating for almost 30 years without anyone reporting that they were injured or otherwise pulled into the opening. As stated above, the conveyor moves at a slow rate of speed and is slick with molybdenum. It would also be highly unlikely for the bar to get caught between the ends of the pulley and the walls of the chute because of the location of the pulley within the chute. I reject the inspector's testimony wherein he stated that the bar could get caught within the pinch points on the sides and it could "come back and strike [the miner] in the head." (Tr. 56-57). Although perhaps such an event is possible, it is highly unlikely, in part, because everything inside the chute is slick with molybdenum, including the pulley and the walls of the chute.

The inspector further testified that:

> Also, while you are scaling, if you slipped and just kind of fell down, the pressure of the bar hitting on the lip of the opening and the bottom of the pulley would just suck the bar in, with the miner's weight on it. As humans, our reaction is to hold on as something is being yanked from us, so we also have a potential for injury there.

(Tr. 57). Again, although I am not in a position to say that such a scenario is impossible, I find that it is highly unlikely to occur given the facts in this case, as discussed above. Every potential hazard in a mine is not S&S. In conclusion, I find that an injury was unlikely and that the violation was only moderately serious.[3]

Finally, I also find that the Secretary did not establish that the violation was the result of the operator's unwarrantable failure to comply with the 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. 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, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is true that the violation had existed for a long time but the operator had not been put on notice that greater efforts were necessary to eliminate the violation. Indeed, Mr. Schonlau testified that soon after the mill was built he scraped the sides of the chute while the belt was operating in the presence of an MSHA inspector and no citations were issued. (Tr. 165-66, 177). I find that Climax genuinely believed that its procedure for cleaning the sides of the chute complied with the Secretary's safety standards. The fact that its belief was incorrect does not establish aggravated conduct. I also conclude that the violation was not very obvious because the company thought that its practices were safe. As stated above, the violation did not contribute to a high degree of danger. Based on the above, I find that the company's negligence was low.

---

[3] I concluded that the previous citation was S&S because, if the chute door were left open while not in use, a miner walking or working in the area could slip, trip, or fall in such a way that his hand or arms could enter the opening and strike the moving conveyor. When a miner scrapes the sides of the chute, he stands in front of the door, opens it up, and then starts scraping the sides with a rod. There is little likelihood that the miner will slip, trip, or fall in such a situation or otherwise come in contact with the moving machine parts.

IV. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. Climax is a large mine operator and its parent company is also large. The record shows that the Henderson Operations was issued about 227 citations and orders in the 24 months prior to February 26, 2007. (Ex. P-17). The vast majority of these were non-S&S citations issued under section 104(a) of the Act. The two citations at issue in this case were rapidly abated in good faith. The penalties assessed in this decision will not have an adverse effect on the operator's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

V. 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 2007-480-M & WEST 2007-330-RM		
6315468	57.14112(b)	$400.00
WEST 2007-776-M & WEST 2007-333-RM		
6315469	57.14105	$200.00

For the reasons set forth above, Citation No. 6315468 is **MODIFIED** by reducing the gravity and Citation No. 6315469 is **MODIFIED** by deleting the unwarrantable failure and the significant and substantial determinations made by the inspector so that the citation is now a section 104(a) citation with low gravity and negligence. Climax Molybdenum Company is **ORDERED TO PAY** the Secretary of Labor the sum of $600.00 within 30 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning
Administrative Law Judge

Distribution:

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958 (Certified Mail)

RWM