

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 29, 1998

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 97-49
Petitioner : A.C. No. 02-01047-03529
v. :
 : Docket No. WEST 97-172
BLACK MESA PIPELINE, INC., : A.C. No. 02-01047-03531
Respondent :
 : Kayenta Preparation Plant

DECISION

Appearances: Margaret A. Miller, Esq., U.S. Department of Labor, Office of the Solicitor,
Denver, Colorado, for the Petitioner;
Gregory J. Leisse, Esq., Phoenix, Arizona, for the Respondent.

Before: Judge Bulluck

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, through her Mine Safety and Health Administration (AMSHA@), against Black Mesa Pipeline, Incorporated (ABlack Mesa@), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815. The petitions seek civil penalties for alleged violations of sections 77.103, 30 U.S.C. ' 77.103; 77.502, 30 U.S.C. ' 77.502; and 77.800-2, 30 U.S.C. ' 77.800-2, in the amounts of \$1,500.00, \$2,500.00 and \$200.00, respectively.

A hearing was held in Denver, Colorado. The parties' post-hearing briefs are of record. For the reasons set forth below, Citation No. 3850060 shall be VACATED, and Citation Nos. 4366052 and 4366053 shall be AFFIRMED.

I. Stipulations

The parties stipulated to the following facts:

1. The Black Mesa Pipeline, Incorporated, is engaged in mining and selling of coal in the United States, preparation and transport of coal, and its mining operations affect interstate commerce.

2. The Black Mesa Pipeline, Incorporated, is the owner and operator of the Black Mesa Pipeline Preparation Plant, MSHA I.D. No. 02-101047.

3. The Black Mesa Pipeline, Incorporated, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

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 the Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing their issuance and not for the truthfulness or relevancy of any of the statements asserted therein.

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

7. The proposed penalty will not affect Respondent's ability to continue in business.

8. A certified copy of the MSHA assessed violation history accurately reflects the history of the mine.

II. Factual Background

Black Mesa Pipeline Preparation Plant (Aprep plant@), located near Kayenta, Arizona, is the sole contractor that provides transportation of coal mined at the Black Mesa Coal Mine, owned by Peabody Western Coal Corporation, to an electrical power plant (Tr. 134). The coal from the nearby mine is pressed to a very fine, Apowder chocolate-like@consistency, mixed with water, then piped to a power plant some 200 miles away, where it is extracted from the water for use (Tr. 30). The prep plant employs 36 workers, and operates two production shifts and one graveyard shift for equipment maintenance (Tr. 32). Equipment at the prep plant includes very large pump stations, crushing mills, belts, a variety of motors ranging from 110 volts to high-voltage of 4160 volts, and other high-voltage equipment such as breakers, control circuits, disconnects, cables, and safety equipment (Tr. 30-31).¹

¹MSHA categorizes electrical voltage as follows:

low-voltage ranges from 1 to 660;
medium-voltage ranges from 661 to 1,000; and
high-voltage is anything over 1,000 (Tr. 29).

On June 25, 1996, MSHA electrical inspector Peter Saint, assigned to the Trinidad, Colorado office, conducted his first electrical inspection (CBA) of the prep plant (Tr. 32, 34). At that time, Inspector Saint had been employed by MSHA for less than two years, but had 20 years of mining experience and had held electrical qualifications for approximately 13 years in surface and underground low/medium- and high-voltage electricity, and was qualified to perform high-voltage energized work, as well (Tr. 23-28).

During the course of this inspection, Inspector Saint requested access to the record book of monthly examinations on the high-voltage electrical equipment (Ahigh-voltage book@) (Tr. 34). He was presented with a spiral notebook containing entries which indicated that the examinations on high-voltage equipment were being performed by electricians only qualified in low/medium-voltage (Tr. 34-35). The inspector also observed a high-voltage (4160 volts) motor being Achanged out@by one of the prep plant=s electricians (Tr. 51, 58-60). The inspector=s review of the qualifications of the prep plant=s seven electricians revealed that all held surface low/medium-voltage green cards (Tr. 32, 36-37; Govt Ex. 6). In subsequent conversations with prep plant electricians and officials, including Gilbert Castillo, Andy Mikesell and Lowell Hinkins, Inspector Saint learned that the prep plant=s electricians had been performing all electrical work on the property, including high-voltage work, and that this arrangement had been going on for some 18 years (Tr. 51-52, 64-65, 76). Respecting several 4160-volt switchgears located on the premises, Inspector Saint was told that the electricians Arack out@the units and ship them to a contractor who performs checks and maintenance on them (Tr. 52-55; see Govt Ex. 7). They related their belief to the inspector that they were qualified to perform the work, since they had passed five tests required by MSHA, and they did not work on high-voltage energized circuits/lines (Tr. 64-66, 76). Inspector Saint discussed with the miners that MSHA requires them to maintain a high-voltage book that is approved by the Secretary--hardbound with fixed sequential pages that cannot be altered--and that only high-voltage qualified electricians are authorized to perform the examinations and maintenance, and sign the book (Tr. 50-51, 55-56). After two telephone discussions with his electrical supervisor in Denver, Donald Gibson, Inspector Saint advised Black Mesa that it could either use outside contractors to perform the high-voltage work at the prep plant, or qualify its electricians under MSHA testing (Tr. 75-77, 359-360, 362-364, 368-369). The inspector related several upcoming test dates to Black Mesa officials and informed them that he would be returning to the prep plant in approximately three months, in an effort to afford the electricians ample opportunity to study and pass the test (Tr. 77-80). In keeping with his inclination to give the prep plant time to qualify its electricians in high-voltage, Inspector Saint only issued Citation No. 3849999 for violation of section 77.800-2, failure to maintain a high-voltage record book of monthly examinations, repairs, and adjustments on the 4160-volt circuit breakers and their auxiliary devices (Tr. 32-33, 78, 81; Govt Ex. 5). Black Mesa did not contest this citation and paid the penalty in full (Tr. 33).

Inspector Saint returned to the prep plant on September 12, 1996, to conduct a spot (CAA) inspection (Tr. 82, 86). Respecting abatement of the citation June 25th citation, the

inspector was told by Gilbert Castillo that Black Mesa did not know where to obtain the required book, and that none of the prep plant's electricians had been high-voltage qualified (Tr. 83). Electing not to issue a failure to abate citation, Inspector Saint extended the termination due date to September 17, 1996, and Citation No. 3849999 was subsequently terminated on that date. However, on September 12th Inspector Saint issued 104(a) Citation No. 3850060, alleging a violation of section 77.103, which described the condition as follows:

The mine has not provided a [sic] individual that is certified for high voltage at the Kayenta Preparation Plant. This condition does not provide for a person to do high voltage required checks, or repairs/maintenance on high voltage equipment

(Tr. 85; Gov't Ex. 1). On the second day of the inspection, Inspector Saint met with Castillo, Mikesell, Hinkins and the union representative, discussed MSHA requirements for the high-voltage book and examination and maintenance of high-voltage equipment, and was made aware that Black Mesa intended to seek adjudication of the electrical qualifications issue (Tr. 87-88, 97-98). A teleconference ensued, initiated by Inspector Saint, between the prep plant officials and several MSHA electrical supervisors in Denver and Price, Utah, during which MSHA reiterated that the electricians would have to obtain high-voltage qualifications in order to perform the high-voltage electrical work at the prep plant (Tr. 111-113). As a follow-up to this discussion, Don Gibson sent a test packet to Black Mesa, containing information about the examination and the dates that it would be administered (Tr. 368-369; Gov't Ex. 12).

Inspector Saint returned to the prep plant on September 17, 1996, and terminated the citation issued on June 25th for not maintaining a high-voltage book, as well as the citation issued for not having a high-voltage qualified electrician to perform the high-voltage electrical work at the prep plant (Tr. 113-116). In order to abate the latter citation, the prep plant enlisted the services of a high-voltage qualified electrician from the nearby Black Mesa Coal Mine to perform the monthly high-voltage examinations (Tr. 113-114).

On January 9, 1997, Inspector Saint made an electrical inspection (CBA) of the prep plant, accompanied by Castillo and the union representative (Tr. 117-119). A review of the high-voltage book by the inspector indicated that Castillo, still surface low/medium-voltage qualified, had been performing the monthly visual examinations of high-voltage equipment and signing the entries (Tr. 119-120). A review of the qualification cards of the electricians at the prep plant indicated that they remained qualified in surface low/medium-voltage only (Tr. 122-123). Consequently, Inspector Saint issued 104(d)(1) (unwarrantable failure) Citation No. 4366052, alleging a violation of section 77.502, describing the condition as follows:

Electric equipment was not being frequently examined, tested, and properly maintained by a qualified person to assure safe operation at the Black Mesa Pipeline Preparation Plant. High voltage (4160 volts) motors and circuit breakers are located within the coal preparation plant. Management has failed to provide a qualified person as defined in Part 77.103 Subpart I to conduct the required examination. A 104(a) citation #

3850060 was issued on 9/12/96 to management for not providing a qualified person to conduct high voltage electrical examination.

A conversation was held between management, miners=rep, and management from MSHA. A determination was made that a qualified person is required to conduct examination of high voltage electrical equipment. The last check on high voltage equipment was done for the month of 9/96. No examination [sic] were done by a person qualified to make high voltage checks defined in Part 77.103 Subpart I for the months of 10/96, 11/96, 12/96. The management stated that they did not intend to use a contractor qualified in high voltage to make the required examinations

(Govt Ex. 2). Inspector Saint also issued 104(a) non-significant and substantial Citation No. 4366053, alleging a significant and substantial violation of section 77. 800-2, describing the condition as follows:

The operator could not provide a written record of each test, examination, repair, or adjustment of all circuit breakers protecting high voltage circuits. This preparation plant uses high voltage power to assist in the operation of the plant facility. This same type of violation was issued 6/25/96. A conversation was conducted with the following management and miners representation on the importance and required [sic] by 77.802-2. Also mine management discussed the requirement of 77.502 with Mr. Don Gibson electrical supervisor in the Denver district office, Jim Kirk-electrical coal mine inspector supervisor located in Price, UT, and Larry W. Ramey, coal mine inspector supervisor located in Trinidad, CO, after the issuance of the violation of 77.800-2 issued 6/25/96

(Govt Ex. 3). These two citations were also abated by use of a ~~Alonan~~ high-voltage qualified electrician from the Black Mesa Coal Mine and were terminated on January 10, 1997 (Tr. 132-133).

Ultimately, on March 4, 1997, prep plant electricians Castillo, Strohmeier and Begay passed the MSHA high-voltage examination and became underground/surface high-voltage qualified (Tr. 335, 530-531, 543-544; Govt Ex. 16).

III. Findings of Fact and Conclusions of Law

A. Citation No. 3850060

1. Fact of Violation

This citation charges a violation of 30 C.F.R. ' 77.103, which provides in pertinent part:

(a) Except as provided in paragraph (f) of this section, an individual is a qualified person within the meaning of Subparts F, G, H, I, and J of this Part 77 to perform electrical work (other than work on energized surface high-voltage lines) if:

* * * *

(3) He has at least 1 year experience, prior to the date of the application required by paragraph (c) of this section, in performing electrical work underground in a coal mine, in the surface work areas of an underground coal mine, in a surface coal mine, in a noncoal mine, in the mine equipment manufacturing industry, or in any other industry using or manufacturing similar equipment, and he attains a satisfactory grade on each of a series of five written tests approved by the Secretary as prescribed in paragraph (b) of this section.

(b) The series of five written tests approved by the Secretary shall include the following categories:

- (1) Direct current theory and application;
- (2) Alternating current theory and application;
- (3) Electric equipment and circuits;
- (4) Permissibility of electric equipment; and,
- (5) Requirements of Subparts F through J and S of this Part 77.

(c) In order to take the series of five written tests approved by the Secretary, an individual shall apply to the District Manager and shall certify that he meets the requirements of paragraph (a)(3) of this section. The tests will be administered in the Coal Mine Safety and Health Districts at regular intervals, or as demand requires.

(d) A score of at least 80 percent on each of the five written tests will be deemed to be a satisfactory grade. Recognition shall be given to practical experience in that 1 percentage point shall be added to an individual's score in each test for each additional year of experience beyond the 1 year requirement specified in paragraph (a)(3) of this section; however, in no case shall an individual be given more than 5 percentage points for such practical experience.

* * * *

(g) An individual qualified in accordance with this section shall, in order to retain qualification, certify annually to the District Manager, that he has satisfactorily completed a coal mine electrical retraining program approved by the Secretary.

This regulation defines the term "qualified person" as it is used in other electrical standards in Part 77, and sets forth alternative methods by which electricians may become qualified by MSHA to perform electrical work in surface mines.

The Secretary essentially argues a violation of the regulation because the prep plant's electricians worked on the plant's high-voltage equipment, despite the fact that they had not taken the high-voltage examination, were not carrying high-voltage cards, and had not undergone annual

retraining in high-voltage electricity (Sec. Br. at 15).² Furthermore, the Secretary defends her bifurcated system of testing under section 77.103(b)(3), i.e., a series of written tests for low/medium-voltage qualification, and a separate, additional written test for high-voltage qualification (totaling 5 written tests), as a reasonable interpretation of the regulation and permissible exercise of her duty to qualify electricians under the Act (Sec. Br. at 10-13).

Black Mesa maintains that the citation is unenforceable, by arguing that the Secretary has made substantive changes to section 77.103 by instituting a bifurcated testing system that is inconsistent with the wording of the regulation, without publishing those changes for notice and comment under the Administrative Procedure Act (Resp. Br. at 8-15).

Section 77.103 is definitional in nature and prescribes the manner in which the Secretary qualifies electricians under the Act. The only affirmative duties on the operator, by implication, are to employ electricians to work in the mines that are qualified to perform electrical work by one of the three means delineated, and that their qualifications be maintained through annual retraining. Neither literal reading, nor interpretation of the language requires an operator to employ a high-voltage qualified electrician at its mine. Because there is no such affirmative duty on the part of Black Mesa, as set forth in section 77.103, I cannot find that it has violated the regulation. Accordingly, Citation No. 3850060 is VACATED. However, inasmuch as an analysis of the remaining two citations requires interpretation of Aqualified person,@ as that term is defined in section 77.103, respecting the duties authorized by the levels of electrical qualification, section 77.103 will be discussed more fully below.

B. Citation No. 4366052

1. Fact of Violation

This citation charges an unwarrantable violation of 30 C.F.R. ' 77.502, which provides as follows:

' 77-502 Electric equipment shall be frequently examined, tested, and properly maintained by a qualified person to assure safe operating conditions. When a potentially

² MSHA electrical qualification cards issued under section 77.103 are as follows:

underground low/medium-voltage is orange;
surface low/medium-voltage is green; and
underground/surface high-voltage is white (Tr. 426-427, 434-435).

dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept.

' 77-502-1 A qualified person within the meaning of ' 77.502 is an individual who meets the requirements of ' 77.103.

' 77.502-2 The examinations and tests required under the provision of this ' 77.502 shall be conducted at least monthly.

In resolving the question of whether Black Mesa was properly cited for violating section 77.502, it is necessary to obtain a definition of Aqualified person@from the wording of section 77.103. If the language is clear, the regulation's terms must be enforced as written. *Island Creek Coal Co.* 20 FMSHRC 14,18 (January 1998). If the language is ambiguous, courts have deferred to the Secretary's interpretation of the regulation. *Id.* at 18-19, citing *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 463 (D.C. Cir. 1994). The Commission's review requires a determination of whether the Secretary's interpretation is reasonable. *Id.* at 19, citing *Energy West* at 463, citing *Secretary of Labor on behalf of Bushnell v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1439 (D.C. Cir. 1989). Despite a permissible interpretation, the Secretary cannot prevail unless constitutionally-based due process has been accorded to the operator, through fair notice of the conduct prohibited or required. *General Electric Company v. E.P.A.*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995); *Island Creek* at 24. The Commission applies an objective test in determining whether the operator has been afforded fair notice, i.e., Awhether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard.@ *Island Creek* at 24, citing *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990).

Section 77.103 defines Aqualified person,@as the term is used in Subparts F (Electrical Equipment-General), G (Trailing Cables), H (Grounding), I (Surface High-Voltage Distribution), And J (Low- and Medium-Voltage Alternating Current Circuits) of Part 77, by prescribing the manner in which an individual becomes qualified to perform electrical work in surface mines (other than work on energized surface high-voltage lines). Of the three alternative courses that may be pursued to become qualified, the one applicable to this case is cited at section 77.103(a)(3), i. e., possessing at least one year of electrical experience in a coal mine or related area, and performing satisfactorily on a series of five written tests approved by the Secretary. The wording of the regulation makes no distinction between levels of qualification and the parameters of electrical work that are authorized thereunder, nor is it inclusive of the subject categories that must be covered by the five written tests. To that extent, I find the wording of the regulation ambiguous.

The dispute between the parties arises out of differing interpretations as to the duties authorized by low/medium-voltage electrical qualification. I do not find, however, as Black Mesa contends, that the Secretary has made substantive changes to the regulation. The Secretary was

given reasonable discretion in determining the means of qualifying electricians to work in the mines, by the authority to approve and administer the tests, which subject matter need not be limited to the five categories set forth in the regulation. Based on a determination that the inherent properties and consequences of exposure to high-voltage electricity are far more dangerous and destructive than low/medium-voltage (Tr. 74, 89, 90-96, 108-111, 237-243, 249-250), the Secretary has separated the series of four written tests for low/medium-voltage qualification from the one written high-voltage test (Tr. 484-486). Applicants for electrical qualification are put on notice that successful scoring on the low/medium-voltage test is a prerequisite to taking the high-voltage exam, by cover letter accompanying the application, which includes the following information:

A person may become qualified to perform electrical work in three categories: underground low and medium voltage, surface low and medium voltage, and high voltage (surface and underground). An applicant will be required to satisfactorily complete the requirements for either the surface or underground low and medium voltage qualification prior to being allowed to become qualified to perform electrical work on high-voltage circuits and equipment (emphasis added)

(Govt. Ex. 12; see also Resp. Ex. 4 (Ex. B); Tr. 311-313). Moreover, an applicant is required to indicate which of the three levels of qualification for which he is applying, and if the level is high-voltage, that he has a current surface or underground low/medium-voltage qualification card (Gov. Exs. 17, 18, 19; Tr. 473-474). I find that the Secretary's bifurcated testing program of qualifying electricians reflects a reasonable interpretation of her authority under section 77.103, that this interpretation is consistent with the Act's underlying purpose of promoting the health and safety of miners, and that operators and applicants are duly notified of the separation between low/medium- and high-voltage testing and qualification, and what functions the qualification levels permit. Accordingly, I find that a reasonably prudent person would have recognized that only electricians possessing underground/surface high-voltage qualifications are permitted to work on surface high-voltage electrical circuits and equipment.

In this regard, the record clearly establishes that, at no time were the electricians at the prep plant confused or misinformed as to their electrical qualifications, and at all times prior to applying for and passing the high-voltage test, Black Mesa knew that its electricians all held surface low/medium-voltage qualification cards (Tr. 497-498, 522-523, 542-543; Govt Exs. 6, 16; Resp. Ex. 2).

Plant Manager Andrew Mikesell stated Black Mesa's consistently held position that its prep plant electricians were authorized to maintain the plant's high-voltage equipment, by testifying as follows:

From the very start, we have maintained that our electricians were qualified under 77.103. MSHA had issued them a green card which allowed them to work on all electrical circuits that were not energized. The law specifically says that they

are qualified to work on all subparts...(f) through (j) if they are not energized. And that has always been our--we've always maintained that. Our electricians do not work on energized circuits.

* * * *

We have considered 77.104 applied to energized high-voltage. And we never worked on energized high-voltage, so we've always felt that by passing the five-part test, our electricians were qualified for all the work they were doing

(Tr. 498-499; see also 64-66, 154-155, 512-513, 516-519, 551-552, 556-557). Section 77.104, to which Black Mesa makes reference, requires the following:

An individual is a qualified person within the meaning of ' 77.704 of this part for the purpose of repairing energized surface high-voltage lines only if he has at least 2 years experience in electrical maintenance, and at least 2 years experience in the repair of energized high-voltage lines located on poles or structures.

Section 77.104 is narrow in scope, pertaining to highly specialized work on energized surface high-voltage lines located on poles and structures, requires two years apprenticeship, and is very closely regulated (Tr. 232, 306-308). Because mine operators currently use contractors for construction and maintenance of power lines and substations, it is uncommon for a mine to employ an electrician holding this qualification (Tr. 269-270). The standard relates to high voltage lines, rather than circuits and equipment. The wording implies that high-voltage qualified electricians without specialized training can work on de-energized high-voltage lines. Section 77.103, however, pertains to circuits and equipment (Tr. 308). The language of section 77.104 does not make reasonable an interpretation that section 77.103 permits all levels of qualified electricians to work on all levels of de-energized equipment and circuits. To construe section 77.103 in this manner would render the varying properties of electrical voltage categories and the qualification levels obtained through MSHA testing meaningless. A Qualified person, as defined by this standard, only becomes meaningful when correlated with electrical voltage categories, and because inadequate maintenance of high-voltage electrical equipment/circuits may subsequently jeopardize the safety of other miners when energized, for purposes of this decision, it is immaterial whether the equipment/circuit is de-energized when the electrician works on it.

Inasmuch as the evidence indicates that the high-voltage motors and switchgear at the prep plant were being examined, tested and maintained by electricians not qualified to perform these functions, I find that Black Mesa has violated section 77.502. Accordingly, Citation No. 4366052 is AFFIRMED.

2. Significant and Substantial

Citation No. 5366052, as originally issued by Inspector Saint on January 1, 1997, designated the violation of section 77.502 A significant and substantial (AS&S), due to Black

Mesa's unwarrantable failure to adhere to the standard (Gov't Ex. 2). Pursuant to a health and safety conference held on February 7, 1997, MSHA Conference and Litigation Representative Ned Zamarripa modified the 104(d) citation to a 104(a), non-S&S citation (Resp. Ex. 1). On May 22, 1997, on advice from the Secretary's representative, Margaret Miller, Inspector Saint nullified Ned Zamarripa's modification, by modifying the citation back to a 104(d), S&S citation (Gov't Ex. 2; Tr. 199-209). The citation also alleges that the violation was caused by Black Mesa's high negligence. The Secretary, through Attorney Miller, proposed a penalty of \$2,500.00, as opposed to MSHA's original proposal of \$150.00.

Section 104(d) of the Act designates a violation S&S when it is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard. A violation is properly designated S&S if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 1) the underlying violation of a mandatory safety standard; 2) a discrete safety hazard--that is, 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. See also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-104 (5th Cir. 1998), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of continued mining operations. *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1998). Moreover, resolution of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Saint testified that the prep plant only used a loaner high-voltage electrician to abate the citation previously written on September 12th for violation of section 77.103, and surface low/medium-voltage qualified electrician, Gilbert Castillo, had been making the monthly examinations of the high-voltage equipment and signing the high-voltage book (Tr. 123-125). He explained that he had characterized the violation of section 77.502 S&S because electricians, unqualified to perform the work that they had been undertaking on the plant's high-voltage equipment, were creating a dangerous condition not only for themselves, but for others working around them (Tr. 99). He further opined that he believed the mine to be lucky that a fatality or permanently disabling accident had not occurred already, but that it was likely to happen sooner or later, if the practice continued (Tr. 130).

Based on the cumulative testimony regarding the bridging capabilities and destructive, unforgiving peculiarities of high-voltage electricity, and the potential danger of even the slightest mistake or unclean work-habit, I find that the violation created a discrete safety hazard. Based on

the lack of training specific to the intricacies of work on high-voltage electrical equipment, I find that there was a reasonable likelihood of serious injury, including death, to an unqualified electrician servicing high-voltage electrical equipment, or to others working around or coming into contact with the equipment. In so finding, I have considered the evidence that the prep plant had been utilizing low/medium-voltage qualified electricians to maintain its high-voltage electrical equipment for a number of years, but am persuaded that the danger is ever present and lack of current training in high-voltage electricity amounted to an accident waiting to happen. Accordingly, I find that the violation was S&S.

3. Unwarrantable Failure

Inspector Saint testified that he attributed the violation to Black Mesa's Unwarrantable failure to comply with section 77.502 because with all the conversations with Mr. Gibson, myself, I felt that we went way beyond, and I felt personally I went way beyond trying to bring this to a close without blowing it out of proportion. I felt that they were not trying to meet or work with me anymore. At this time, I believed that they knew better or should have known, by past conversations and they elected not to (Tr. 125).

Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as Reckless disregard, Intentional misconduct, Indifference, or a serious lack of reasonable care. *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

I am persuaded that Black Mesa held a reasonable, good faith belief, although erroneous, that as long as its electricians worked on de-energized electrical equipment and circuits, the voltage level was immaterial. I reach the conclusion that this belief was reasonable, despite a finding that Black Mesa understood its electricians to be surface low-medium qualified only, based, in part, on evidence that Black Mesa had previously made this de-energized equipment argument to other MSHA inspectors, who had apparently been confused also as to the definition of a qualified person under section 77.103, and, therefore, had failed to require that the prep plant's electricians become high-voltage qualified (Tr. 513, 536-537, 542-543, 557). Therefore, I do not find that the Secretary has proven that the violation was the result of Black Mesa's unwarrantable failure.

4. Penalty

While the Secretary has proposed a civil penalty of \$2,500.00 (originally specially assessed at \$150.00), the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Act, 30 U.S.C. ' 820(j). *See Sellersbueg Co.*, 5 FMSHRC 287, 291-292 (March 1993), *aff'd* 763 F.2d 1147 (7th Cir. 1984). While Citation No. 3849999 was not contested, it was the precursor to the instant citations and its history provides some indication that the penalty proposed by the Secretary was based on an assessment by Inspector Saint and Attorney Miller that Black Mesa was not working

with the inspector and would be seeking an interpretation of section 77.103 through the court (See Tr. 85-86, 88, 97-98, 104-108, 208-209). I find that the Secretary has sought to punish Black Mesa through the imposition of higher penalties (the penalty proposed in vacated Citation No. 3850060 was modified from \$50.00 to \$1,500.00). Failure to cooperate is not a valid basis to conclude that a violation is more hazardous or that its occurrence is attributable to a higher degree of negligence, warranting an elevation in penalty. A more appropriate course for MSHA to have followed back in September 1996, upon the initial determination that Black Mesa had no intention of obtaining high-voltage qualification for its electricians, may have been issuance of a 104(b) order for failure to abate the June 25th citation. It appears from the evidence, however, that Inspector Saint was not of the opinion that the danger posed by the lack of high-voltage qualified electricians was particularly grave or immediate, since he was still of a mind to give Black Mesa considerable additional time to take the high-voltage test, and the citation that he subsequently issued under section 77.103 was characterized neither S&S nor unwarrantable.

Black Mesa employs 36 individuals over three shifts and is, therefore, a small operator. Because no violation history has been available since the mine changed hands in August 1996, its history of previous violations is construed in the light most favorable to the operator (See Gov't Br. at 28). As stipulated, the proposed civil penalty will not affect Black Mesa's ability to continue in business.

The remaining criteria involve consideration of the gravity of the violation and the negligence of Black Mesa in causing it. I find the gravity of the violation to be serious, since the potential for grave injuries to miners, including high likelihood of death caused by high-voltage electrocution, is well-documented by the record. Considering that Inspector Saint failed to identify with specificity any unsafe practice of the electricians in examining, testing or servicing the high-voltage equipment, I ascribe moderate negligence to Black Mesa (Tr. 546, 561; see Resp. Ex. 1). While the citation was abated within the time-frame given, I find that it was not abated in good faith, based on evidence that the prep plant borrowed a high-voltage qualified electrician to abate the citation only, and thereafter returned to having its low/medium-qualified electricians maintain the high-voltage equipment. Therefore, having considered Black Mesa's small size, insignificant history of violations, ability to stay in business, seriousness of the violation, failure to abate in good faith and moderate negligence, I find that a penalty of \$400.00 is appropriate for this violation.

C. Citation No. 4366053

1. Fact of Violation

This citation charges a non-S&S violation of 30 C.F.R. ' 77.800-2, a standard promulgated under Subpart I of Part 77-Surface High-Voltage Distribution. Section 77.800-2 provides as follows:

The operator shall maintain a written record of each test, examination, repair, or

adjustment of all circuit breakers protecting high-voltage circuits. Such record shall be kept in a book approved by the Secretary.

The Secretary points out that this is the second violation of section 77.800-2 issued by Inspector Saint, the first having been issued on June 25, 1996, as discussed previously. To abate the former citation, Black Mesa had put into use a book approved by the Secretary, but according to Inspector Saint, while the required monthly visual inspections of the stationary high-voltage equipment were being conducted, they were not being conducted and recorded by a high-voltage qualified electrician (Tr. 210-215). For the reason as previously discussed, that the scope of electrical work authorized by MSHA qualification levels corresponds to the electrical voltage categories, the Secretary has proven a violation of the standard. Accordingly, Citation No. 5366052 is **AFFIRMED**.

2. Penalty

Addressing the six penalty criteria set forth in section 110(i), as discussed above, Black Mesa is a small operator, was cited approximately six months earlier for the same violation but otherwise has an insignificant history of prior violations, and the parties have stipulated that the proposed penalty of \$200.00 will not affect Black Mesa's ability to continue in business. Respecting consideration of the gravity criteria, I find improper maintenance of the high-voltage book to be far less egregious than unqualified electricians working on high-voltage equipment and, therefore, find that the violation is not serious. Because Black Mesa had been made aware of the requirements of the standard, and failed to abate the citation in good faith for the same reasons discussed above, I ascribe moderate negligence to Black Mesa. Accordingly, having considered Black Mesa's small size, insignificant history of violations, ability to stay in business, non-serious nature of violation, failure to abate in good faith and moderate degree of negligence, I find that a civil penalty of \$100.00 is appropriate.

ORDER

Accordingly, Citation No. 3850060 is **VACATED**, Citation Nos. 4366052 and 4366053 are **AFFIRMED**, and Black Mesa is **ORDERED TO PAY** civil penalties of **\$500.00** within 30 days of the date of this decision. Upon receipt of payment, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

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