

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 23, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 98-373-M
Petitioner	:	A.C. No. 26-02321-05504
	:	
v.	:	Docket No. WEST 98-375-M
	:	A.C. No. 26-02321-05505
ALTA GOLD COMPANY,	:	
Respondent	:	Griffon Project

DECISION

Appearances: Steven R. DeSmith, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Ross E. deLipkau, Esq., Reno, Nevada, for Respondent.

Before: Judge Cetti

These consolidated cases are before me upon Petitions for Assessment of Civil Penalty, filed by the Secretary of Labor (Secretary) seeking the imposition of civil penalties against Alta Gold Company (Alta Gold) based upon three citations alleging violations of mandatory standards which are set forth in Title 30 of the Code of Federal Regulations. Respondent filed timely answers and, pursuant to notice, the consolidated cases were heard in Reno, Nevada. Both parties presented testimony and documentary evidence at the hearing. Post-hearing and reply briefs were filed by both parties.

ISSUES

The issues at the hearing were whether at the time of Inspector Cain's inspection of the Griffon Project mine a violation of 30 C.F.R. § 56.9304(b), as alleged in Citation No. 7963330 in Docket No. WEST 98-375-M, occurred and whether a violation of 30 C.F.R. § 56.9301, as alleged in Citation No. 7963328 in Docket No. WEST 98-373-M, occurred.

If a violation of either or both standards occurred, whether it significantly and substantially contributed to the cause and effect of a mine safety or health hazard.

If a violation of 30 C.F.R. § 56.9304(b) is established, did it result from an unwarrantable failure to comply with the cited standard.

If a violation of a standard is established, what penalty is appropriate, taking into consideration the statutory criteria in section 110(i) of the Act.

STIPULATIONS

1. Respondent, Alta Gold Company (with respect to size) has a total of 189,712 man-hours worked per year. Alta Gold Company owns and operates the Griffon Project mine which is a surface mine with 12,420 man hours worked per year.
2. In the 24 months preceding the issuance of the subject citations, Respondent has had 20 assessed violations. (Tr. 9).
3. The payment of the assessed penalties will not affect the ability of the Respondent to continue in business.
4. Respondent demonstrated good faith in timely abatement of the alleged violations.
5. Respondent withdraws its contest of Citation No. 7963333.

DOCKET NO. WEST 98-375-M

Citation No. 7963330

Inspector Stephen Cain, an experienced MSHA inspector, testified at the hearing that he inspected Respondent's Griffon Project mine on a regular mandated 01 inspection. Inspector Cain waited at the mine site for the arrival of Mr. Rick Stork who was employed by Respondent as a part-time safety director as well as a truck driver. On Mr. Stork's arrival, Inspector Cain requested to inspect the mine's stockpile. Cain found the stockpile to be approximately 176 feet in length and 40 to 45 feet in height. Cain testified the stockpile was composed of loose and unconsolidated blasted ore which was being stockpiled for loading into a crusher located at the bottom of the stockpile. Cain observed that approximately 87 feet along the bottom of the stockpile had been undercut to a height of 10 to 15 feet. He noted that 15 feet is the approximate reach of the loader that was parked at the bottom of the stockpile. This front-end loader had been used to feed the ore to the crusher. At the time of the inspection the loader was parked at the bottom of the stockpile in the undercut area.

After inspecting the stockpile from the bottom, Cain asked to be taken to the top so that he could observe Respondent's dumping operation. He was taken to the top of the stockpile accompanied by Mr. Stork. While on top of the stockpile, he saw a haul truck designated at the hearing as No. 2, pull onto the top of the stockpile, drive along the top of the stockpile, turn in, stop and then back up to the berm at the edge of the stockpile. The driver then lifted the bed of Truck No. 2 and dumped his load over the edge. Inspector Cain and Mr. Stork walked over to the edge to see where the truck had dumped its load. Cain testified that he observed that the truck's load of ore had been dumped within the 87-foot area that the stockpile was undercut.

Inspector Cain then issued to Alta Gold Citation No. 7963330. That citation charges Alta Gold with a 104(d)(1) violation of the safety standard set forth at Title 30 C.F.R. § 58.9304(b). That standard reads as follows:

§ 58.9304(b)

Where there is evidence that the ground at a dumping location may fail to support the mobile equipment, loads shall be dumped a safe distance back from the edge of the unstable area of the bank.

The citation at item 8 describes the alleged violation as follows:

The haul truck operator (Eloy Crespin), operating company #HF5 haul truck, was observed dumping a load of ore over the edge of the ore stockpile. The area that he was observed dumping over, had been undercut from below by the 988F loader that feeds the crusher. By undercutting the slope and removing the toe of the dump this made the ground unstable. There were haul truck tire tracks present that indicated dumping had taken place earlier in the shift at the same area. This exposed area was approximately 87 feet in length and the height of this dump was approximately (sic) 40-45 feet. The entire dump was approx. 170 feet in length. There were no barriers, warning signs, or other measures used in this area to alert drivers of this hazard. The company had allowed the practice of dumping over undercut material to exist. This is an unwarrantable failure.

The statement that "There were no barriers ---" may be somewhat misleading as there was undisputed evidence that the top edge of the stockpile had the proper required berm that complied with the berm standard applicable for the 50-ton haul trucks that were used to haul and dump the ore at the stockpile.

At the time of the inspection, three haul trucks were observed backing up to the berm and dumping their load. Only one of the three trucks observed dumping, a truck designated No. 2, is charged with dumping over an undercut area of the stockpile. There was no contention that the other two haul trucks dumped over an unstable or undercut area of the stockpile.

Cain testified that the stockpile was unusually high for its length and for the composition of the material which was loose and unconsolidated. He stated that normally with this kind of material, an operator will form a lower, longer stockpile to maintain stability. Cain added that the higher the stockpile, the more unstable it becomes. Cain was clearly of the opinion that the undercutting of the stockpile for 87 feet along the bottom of the stockpile resulted in the removal of the toe of the stockpile in the undercut area and that removal of the toe compromised the stability of the stockpile to such an extent that, in the words of the standard, it "may fail to

support" the weight of the loaded 50-ton haul truck when it backed up to the berm and lifts its bed to dump its load. Under these conditions the cited standard § 56.9304 requires the load to be dumped a safe distance back from the edge of the unstable area.

When the potential hazard was called to management's attention, Respondent immediately ordered that all the trucks "dump short." That is the term used to instruct the haul trucks to dump a safe distance away from the edge of the stockpile in the absence of a spotter or other means which would direct haul trucks not to dump over an undercut, unstable portion of the stockpile.

The berm that was in place along the entire dump site area was 3 to 3½ feet high with approximately an angle of repose of 1½ to 1. It was the same angle of repose as the general slope of the stockpile. The haul trucks drove about two feet from the berm which was approximately five feet from the edge of the stockpile. Cain testified he saw signs of instability but conceded he saw no signs of cracking. Asked if he saw any signs of failure, Cain testified "unless it fails, you won't see any signs of failure." Cain said he talked to the driver who said drivers were not told where to dump; that they used their own judgment in determining where to dump.

Alta Gold contends that all three of the haul truck dumps that Inspector Cain and Mr. Stork observed at the time of the inspection took place over stable, properly bermed ground. To support its position, Respondent presented the testimony of Mr. Stork and the written statement of Mr. Crespin who was the driver of the haul truck designated No. 2. Mr. Crespin's written statement was received at Respondent's Ex. 4 over objection by Petitioner. The main weakness of Mr. Crespin's statement is the fact there was no opportunity to cross-examine Mr. Crespin. His written statement which remains mere hearsay is as follows:

THE MEETING BETWEEN ,MSHA AND MYSELF, WAS MOSTLY, ABOUT WHAT THE FORMAN DOSE, (Sic) HE ASKED ME IF ANY OF THE SUPERVISORS TOLD ME WHERE TO DUMP THAT DAY, I TOLD HIM NO, THEN HE ASKED IF THE SPOT WHERE I DUMPED WAS UNDERCUT, AND I TOLD HIM IT WAS NOT, THAT THE MOST THE LOADER COULD OF TAKEN OUT OF THAT SPOT WAS ONE BUCKET FULL. HE ALSO WANTED TO KNOW IF THE FORMAN CHECKS THE DUMPS AND HOW MANY TIMES A DAY THEY DO IT, I TOLD HIM THAT THEY DO CHECK THE DUMPS, HOW MANY TIMES A DAY, I DID NOT KNOW, BECAUSE A DRIVER DON'T SPEND THAT MUCH TIME AT THE DUMP. HE ALSO WANTED TO KNOW WHAT WE DO WHEN THE DUMP LOOKS UNSAFE, I TOLD HIM WE DUMP ON TOP, AT THE END OF THE MEETING, HE ASKED ME IF I HAD ANYTHING TO SAY, I TOLD HIM DO YOU REALLY BELIEVE, THAT I WOULD JEOPARDY (Sic) MY LIFE AND DUMP OVER A SPOT THATS UNDERCUT. HE SAID I GUESS NOT.

This is the statement Mr. Crespin gave his employer summarizing his interview with the Inspector.

Mr. Stork presented testimony indicating that only a small part of the alleged 87-foot undercut section was in fact undercut; that only a bucketful of ore was removed by the loader so that only a small portion of the toe of the stockpile was removed in the area where the No. 2 truck dumped its load. Mr. Stork was of the opinion that the stockpile was stable and safe. He pointed out that there were no stress fractures at the dump site and, furthermore, no truck dumped over any undercut area. Mr. Stork testified that No. 2 truck dumped its load just next to and not directly above the area of the stockpile where the loader had taken a bucketful of ore out of the bottom toe of the stockpile. Mr. Stork explained that as the dumped ore cascaded down the stockpile, a portion of the dumped load drifted into the undercut area where the bucketful of ore at the toe of stockpile had been removed. He testified that when Truck No. 2 dumped its load, the truck was on stable ground and a portion of the load spilled or drifted over into the area at the bottom of the stockpile where a bucketful of ore had been removed.

Stork testified that in normal circumstances, the dozer operator after trimming the dump, stays at the dump site to spot the haul trucks and to direct the haul trucks where he wants them to dump. Asked as to why the dozer was not up at the dump site at the time of Cain's inspection, Stork testified:

A. Yes. In normal circumstances, we have a dozer operator up on that dump approximately 90 to 95 percent of the time.

Q. All right. Could you explain why the dozer operator wasn't on the dump when inspector Cain and you visited the site in April of last year?

A. The dozer operator had been present on the dump until shortly after Mr. Cain arrived on the property. Rudy Montoya, the foreman, had just went (sic) through a safety inspection about a month and a half, two months before out at the Kinsley project by Mr. Cain, and Mr. Cain has got a way on his inspections of being very forceful, sometimes arrogant -- "intimidating" is the words that I've gotten from some of the people -- the way that they felt that he conducts his safety investigations.

Rudy knew that we had a pit above that was covered, the haul road into it was covered in with snow because it was snowing that day, and he felt that if Mr. Cain was wanting to go out and to do the inspections like he'd done at Kinsley, would go into the pit and inspect it, and he went down and pulled the dozer off of the dump to take him up there specifically to clean a haul road out in the pit so that, if we went in to inspect it, we would have a clean road and not a snow-packed road to do it.

Had Rudy not been so jumpy, worried about what the inspector might want to inspect, what he's going to think, that dozer would have been left on that dump and it would have been there directing every load over. (Tr. 128-129).

Stork also testified that the area at the top of the stockpile dump was stable and compacted. Asked as to why that was so, he testified:

As the trucks roll over it, completely loaded, the wheel motion of the trucks rolling over the ore compacts that ore tight, and that — the type of material that we have at Griffon, we have the dirt — the ore, once it's been blasted, has got anywhere from small rock up to six-inch rock in it, sometimes a little bit bigger, with the fine dirt, with a tremendous amount of clay, with a little bit of moisture in it.

As the truck rolls over it, the top of that dump gets so hard that sometimes when we need to trim it, the dozer actually has to sink his rippers into the dirt to cut it and rip it so that he can push it. (Tr. 133-134).

With respect to the top of the stockpile, Stork also testified:

There was no signs of settling in the dump which is an indication of an unstable dump, there was no stress cracks, which is an indication of an unstable dump, and when the trucks ran across it, there was no settling, no cracking, no vibrations, no movement.

It had to be stable or it would have moved. (Tr. 134).

Stork testified that the area of the stockpile where the No. 2 haul truck operator made his dump was stable. Asked as to reasons why he determined it was stable he testified:

A. The fact that the dozer had just trimmed that whole face of that dump that morning, pushed off all loose materials from it, had reestablished a new berm that morning, and the surface showed no signs of stress cracks in it, the truck where Eloy backed up to did not sink into the dump, did not settle the dump, it did not cause any stress cracks to appear in the dump after he dumped there.

When he pulled away from it, it was just as good as condition after he dumped there as before he ever backed into it.

Q. Okay.

A. And it had to be stable to be able to do that. (Tr. 141).

Cain, on the other hand, testified that although he was not a geologist or a mining engineer he had a high school diploma and 1½ years of formal college. Prior to his employment with MSHA he worked eight years in the mining industry. He has taken special training courses in stockpile safety. He described the courses as follows:

A. They would do with the inspecting, the stability, the composition of the stockpiles, how to design a proper stockpile, how to maintain a stockpile, how to make sure that the stockpile can be dumped on, and that it doesn't present a hazard.

Q. And did you also take a course in haulage awareness training?

A. Yes, I did.

Q. And what were the details of that? Or describe that training.

A. Well, that training is, it talks about where haul trucks operate, haul roads, on top of waste dumps, stockpiles, how to properly dump over stockpiles, how to maintain a dumping location, where the truck should dump.

Mr. Stork testified there was a good solid berm all across the face of the dump. The ore had a tremendous amount of clay and a little moisture. The trucks and dozer running over the top of the stockpile, compacted it down. Stork said there was no sign of settling in the dump and there were no stress cracks, which is an indication of an unstable dump and when the trucks run across the top of the dump there was "no settling, no cracking, and no vibration, no movement." (Tr. 134).

Obviously, Cain and Stork differed in their perception of the facts and even more on their evaluation on the stability of the ground at the dumping location from which truck designated No. 2 dumped its load. On evaluation of all the evidence and particularly on considering the experience and training of Inspector Cain with respect to maintaining stability of the ground at a stockpile dumping location, I find that a preponderance of the evidence establishes a violation of the cited standard. Because of Inspector Cain's experience and specialized training in stockpile stability, I credit his testimony with respect to the potential lack of stability of the dumping site at the location where the operator of the haul truck designated No. 2 made its dump. I find the hazard was not obvious and management was not aware of the hazard. I find the negligence was moderate rather than high.

Significant and Substantial

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "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 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Tell Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

I find the testimony of Inspector Cain established the four elements of the *Mathies* formula for designating the violation S&S. Certainly with respect to the third and fourth elements of the *Mathies* formula the most likely result for the operator of the truck falling 40 feet from the top of the stockpile would be serious or fatal injuries.

Although I concur with the inspector's finding that the violation was S&S, I reject the finding that the violation resulted from an unwarrantable failure of the operator.

Unwarrantable Failure

The Commission stated in a number of cases the factors applicable to determining whether a violation was the result of unwarrantable failure. In *Windsor Coal Co.*, 21 FMSHRC 997, 1000, (Sept. 1999), the Commission stated that the unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* At 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* At 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission explained that 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 violative condition, the length of time that the violative condition existed; whether the violative condition is obvious or conspicuous; the operator's efforts to eliminate the violative condition; and whether an operator was placed on notice that greater efforts are necessary for compliance. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992), *Beth Energy Mines Inc., Kitt Energy Corp.*, 6 FMSHRC. Upon evaluation of the evidence presented and consideration of the above factors, I find the preponderance of the evidence fails to establish aggravating conduct. The unwarrantable failure finding in this citation shall be deleted.

The citation, as modified, is affirmed.

Citation No. 7963333

This citation charges Alta Gold with the violation of 30 C.F.R. § 56.14100(b) for having an unoperable front light and a rear light on the 580E Case backhoe. The citation stated injury was unlikely; the violation was not S&S; and the negligence was high. The proposed penalty was \$800.00.

At the hearing Alta Gold withdrew its contest to the citation and offered no evidence; it did not dispute liability and accepted the citation and the proposed penalty. Both the citation and its proposed penalty are affirmed.

DOCKET NO. WEST 98-373-M

Citation No. 7963328

This citation charges Alta Gold with a S&S violation of 30 C.F.R. § 56.9301 and proposed a penalty of \$3,000.00.

The citation, item 8, describes the cited condition or practice as follows:

The loader operator (Biff Braman) was observed driving the 988F loader over and on to the metal bumper block at the feed hopper for the crusher. The bumper block had been buried with material (dirt) and no longer served as a restraint. The hopper sits approximately 60 feet above the ground level below. The hopper was approximately 15 feet long by 15 feet wide and was full of material. The dirt had become a ramp into the hopper and the operator drove the loader up on top of it. This presented a hazard of loader overtraveling feed area.

The cited standard 30 C.F.R. § 56.9301. That standard reads as follows:

§ 56.9301 Dump site restraints.

Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.

The 998 front-end loader takes a bucketful of material from the stockpile and drives up to the feeder hopper where the loader operator stops and dumps the load into the feed hopper. From there the material travels, gravity fed, into the crusher below.

Inspector Cain testified the company designed the feed hopper with a three-foot high metal bumper block. The bumper block has a three-foot high metal restraining bar. The three-foot high bar consisted of an eight inch diameter metal pipe. Its purpose is to prevent the front-end loader from overtraveling the spot where it dumps its load into the feed hopper. That area is approximately 30 to 60 feet above the ground below. The purpose of the bumper block is to prevent the loader from overtraveling and going into the feed hopper or even further on downhill, which would result in serious injury to the operator.

At the time of the alleged violation, Inspector Cain and Mr. Stork were in the control room next to the feed hopper. Cain testified he observed a loader that drove right up to the feeder hopper area and kept going, traveling up on top of the bumper block where the driver stopped the loader by using his brakes. Cain testified that he stepped out of the control room and examined the area to see what the problem was. He found that material dropping from the front-end loader bucket had been allowed to accumulate over time until it made a ramp leading up to and covering the three-foot high bumper block so there was nothing to impede the wheels of the loader. The accumulation of material had buried the bumper block so it could no longer serve its purpose as an impeding device.

Cain stated that when he observed the loader coming to stop on top of the bumper block, he issued an imminent danger order. Management then asked what they could do to correct the situation and continue with production. Cain told them they could install an adequate earth berm to serve as a restraining or impeding device. To terminate the violation Alta Gold installed a three-foot earth berm on top of the buried metal bumper block that reached mid-axle height of the loader.

Mr. Stork's testimony as to the facts was different than that given by Inspector Cain. Stork testified that the distance from the feed hopper to ground below was 31 feet 6 inches and not 60 feet. Stork and Cain observed only one run of the loader to the feed hopper. Stork testified that there was an earth berm on top of the metal bumper block. When the loader, traveling too fast, came up to the feeder hopper, the loader bounced and came to a stop on top of the "dirt berm" which the loader had "flattened out." Stork stepped out of the control room and told the driver he was driving too fast. Stork also told him to get a bucketful of dirt to replace the berm which the loader had flattened out. Stork stated that the metal bumper block referenced by Cain in the citation was no longer in use at the time of the inspection.

Management had decided to bury it with earth and material and put a dirt berm on top of it. Thus the company, by design, decided to use a dirt berm on top of the buried metal bumper block as an impeding device.

After Stork completed his testimony, Cain was called on redirect and testified there was no earth berm on top of the metal bumper block which was buried. There was a little bit of dirt over the top of the metal bar that you could wipe away with your shoe. He could see the top of the metal bar that constituted the top portion of the buried metal bumper block.

On evaluation of the evidence I find, even under Respondent's testimony, that the so-called earthen berm was so unsubstantial that it was wiped out and cleaned off and had to be "reestablished 10 to 15 times a day." (Tr. 251).

On evaluation of the evidence, I find there may have been some dirt on top of the buried metal bumper block but not of sufficient substance to qualify as an impeding device, as that term is used in the standard cited. I find that a preponderance of the evidence established the violation of the cited standard 30 C.F.R. § 56.9301.

Based on Inspector Cain's testimony I find that the Secretary established the four elements of the *Mathies* formula for finding the violation is significant and substantial. I therefore agree with Inspector Cain that the violation is S&S.

This citation, as modified, is affirmed.

Appropriate Civil Penalties

The Judge is required by Commission Rule 30, 29 C.F.R. § 2700.30, as well as by the Mine Act itself, to consider the statutory criteria set forth in § 110(i) of the Mine Act in determining the appropriate civil penalty to each violation.

Section 110(i) provides in relevant part:

The Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Size of Operator and Ability to Continue in Business

The parties stipulated at the hearing that Respondent, Alta Gold Company, with respect to the size of its business, has a total of 189,712 man hours worked per year. Alta Gold

Company owns and operates the Griffon Project mine, which is a surface mine with 12,420 man hours worked per year.

Based upon this stipulation of hours worked, I find the business of its operator medium size. In addition, I find in the absence of any evidence to the contrary, that appropriate penalties will not affect the operator's ability to continue in business.

Negligence

With respect to both contested violations, I find the negligence to be moderate. I find that the operator was unaware that it was in violation of either standard. Perhaps the operator should have known it was in violation but it did not. Management had good faith but a mistaken belief that they were not in violation of the safety standard in either of the contested cases.

History of Previous Violations

Alta Gold's history of previous violations is not excessive. It was stipulated that in the 24 months preceding the issuance of the subject citations, Respondent has had 20 assessed violations. There is no evidence that any of the violations established in this case were repeat violations.

Gravity

The Commission stated that the gravity penalty criterion contained in § 110(i) of the Mine Act requires an evaluation of the seriousness of the violations and that the focus of the gravity criterion is on, "the effect of the hazard if it occurs" (*Hubb Corp.*, 22 FMSHRC 606, 609 (May 2000) (quoting *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (September 1996)). In this case the hazard, fortunately, did not result in any injury whatsoever but the effect of the hazard, if it occurred, would have been a serious injury or death. Consequently, the degree of gravity in both violations is relatively high.

Good Faith and Rapid Compliance

I find the operator, without question, demonstrated good faith in attempting and achieving rapid compliance after notification of the violation with respect to both violations; there was unhesitating, immediate compliance after notification of the violations.

On the basis of my foregoing findings and conclusions and my *de novo* consideration of the civil penalty assessment criteria found in § 110(i) of the Act, I conclude and find that the following penalty assessments are reasonable and appropriate for the violations that have been affirmed in these proceedings:

<u>Citation No.</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
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7963330	58.9304(b)	\$1,200.00
7963333	56.14100(b)	800.00
7963328	56.9301	<u>1,500.00</u>
	TOTAL	\$3,500.00

ORDER

Accordingly, it is **ORDERED** that Citation No. 7963330 be modified to amend the negligence factor from "high" to "moderate" and to delete the unwarrantable failure finding. It is further **ORDERED** that Citation No. 7963328 be modified to amend the "gravity" factor from "highly likely" to "reasonably likely." The finding of a violation which is significant and substantial is **AFFIRMED** in both Citation Nos. 7963330 and 7963328 and both citations, as modified above, are **AFFIRMED**. It is further **ORDERED** that Citation No. 7963333, as written, is also **AFFIRMED**. It is further **ORDERED** that Alta Gold pay the Secretary of Labor a civil penalty of \$3,500.00 within 30 days of this decision and order.

August F. Cetti
Administrative Law Judge

Distribution:

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