

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 24, 1999

GETCHELL GOLD CORPORATION,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 99-162-RM
	:	Order No. 7966725; 3/05/99
v.	:	
	:	Turquoise Ridge Mine
SECRETARY OF LABOR,	:	Id. No. 26-02286
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

DECISION

Appearances: Laura E. Beverage, Esq., and L. Anthony George, Esq., Jackson & Kelly, Denver, Colorado, for Contestant;
Susan Gillett Kumli, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Respondent.

Before: Judge Manning

This case is before me on a notice of contest filed by Getchell Gold Corporation (“Getchell”) against the Secretary of Labor pursuant to sections 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d)(the “Mine Act”). Getchell contested an order of withdrawal issued on March 5, 1999, at its Turquoise Ridge Mine alleging a violation of the Secretary’s safety standard at 30 C.F.R. § 57.14204. An expedited hearing was held on May 5 and 6, 1999. The parties presented testimony and documentary evidence, presented oral argument, and waived post-hearing briefs. At the close of the hearing, I entered a bench decision in which I vacated the subject order of withdrawal. (Tr. 482-96). This written decision supersedes my bench decision. I have amplified certain findings and conclusions in this written decision based on my review of the record and further legal research.

I. BACKGROUND

The Turquoise Ridge Mine is an underground gold mine in Humboldt County, Nevada. It is less than a mile away from the Getchell Mine, which is also operated by Getchell. The two mines are jointly managed by Getchell. On February 16, 1999, one miner was killed and another seriously injured while attempting to adjust a compressed air line at the Turquoise Ridge Mine.

The area of the Turquoise Ridge Mine where the accident occurred was under development and the compressed air lines were being installed on February 16. The compressed air system was working in parts of the mine. Two types of piping are used in the compressed air system. Steel utility pipes carry air throughout the mine. Wire-braided rubber air hose is used in working sections. This hose is referred to as a "bull hose." In this instance, the bull hose was installed to carry compressed air through the intersection of the TR1550 ramp and the TR3955 access roadway. At the north end of the intersection, the bull hose was already connected to a steel pipe. A steel pipe had recently been installed up to the south end of the intersection.

On February 16, Thomas Gross and Thomas Crowley were to connect the bull hose to the steel pipe at the south end of the intersection. After completing installation of the airline, Mr. Gross noticed that the handle of the valve located at this coupling was facing the rib rather than the haulageway. While repositioning the valve at the south end, Mr. Gross noticed that a part of the coupling had not been properly installed by the previous crew. The two employees began disconnecting the coupling to reposition the valve and to correctly install the misadjusted portion of the coupling. Unknown to these employees, the compressed air system was energized at this location. When they loosened the coupling, the bull hose began thrashing about violently. The hose struck the employees, killing Mr. Gross and seriously injuring Mr. Crowley.

MSHA conducted an investigation of the accident and issued a number of citations and orders. Only Order No.7966725 is at issue in this proceeding. It alleges a violation of 30 C.F.R. § 57.14205 as follows:

At the three-way intersection of the 1550 Turquoise Ridge ramp and the TR3955 access, a combination nipple [was] being utilized as the interconnecting device between a Victaulic coupling and 4-inch diameter rubber hose on a high pressure air line. Accordingly to readily available information from the manufacturer, this nipple was designed for low pressure discharge and suction purposes and was not engineered for use on high pressure air lines. The mine operator's failure to require and insure that this device was used in applications within its design capacity as intended by the manufacturer is a lack of reasonable care constituting more than reasonable negligence and is an unwarrantable failure to comply with the standard.

Inspector David Kerber determined that a fatal injury was reasonably likely; that the alleged violation was of a significant and substantial nature; and that Getchell's negligence was high. He issued the order under section 104(d)(2) of the Mine Act. The cited safety standard provides:

Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer, where such use may create a hazard to persons.

Getchell contested the order in this proceeding and the parties attempted to resolve the issues through settlement negotiations. On April 19, 1999, I granted Getchell Gold's motion to schedule an expedited hearing in this case because the cited combination nipple is used throughout the Turquoise Ridge and Getchell Mines. Replacing them with another type of coupling would require shutting down the compressed air system for a significant period of time. At the hearing, Leland Page, who is the mine manager for the Turquoise Ridge and Getchell Mines, testified that there are about 98 such couplings in the Getchell Mine and about 43 in the Turquoise Ridge Mine. (Tr. 302).

It is important to understand the parts used to connect the 6-inch steel pipe with the 4-inch bull hose. Three interlocking parts are used: a reducer, shut-off valve, and the combination nipple. The reducer is attached at the end of the steel pipe. The reducer changes the diameter of the opening from 6 inches to 4 inches. It is attached to the end of the steel pipe by a Victaulic coupling. A Victaulic coupling consists of two C-shaped metal bands that are drawn together with two bolts around the joint to be connected. A rubber gasket is placed between the Victaulic coupling and the joint. A groove is cut into the end of the pipe and a groove is manufactured into the various devices to be attached, such as the reducer. When the Victaulic coupling is tightened, the ridge on each edge of the coupling fits into the corresponding groove on the components that are being attached. As the bolts on the Victaulic coupling are tightened, the rubber gasket is compressed, making an airtight joint, and the ridges engage in the grooves, making a mechanically strong coupling.

A Victaulic coupling is also used to attach the shut-off valve to the reducer and to attach the combination nipple to the shut-off valve. The use of Victaulic couplings to attach the components in the compressed air system at the mine is not contested by MSHA. That is, MSHA does not consider the use of Victaulic couplings to be in violation of section 57.14205.

The method of connecting the combination nipple to the bull hose is what is in dispute in this case. As stated above, the combination nipple has a groove at one end that was used to attach the nipple to the shut-off valve with a Victaulic coupling. The combination nipple fits inside the bull hose at the other end and is secured with several band clamps. The outside surface of the steel nipple is equipped with a number of ridges that face away from the outer edge of the nipple. Thus, when the nipple is forced into the bull hose these ridges cut into the hose to help prevent the hose from separating from the nipple. The band clamps are tightened with a special tool. Once the clamps are attached, they cannot be removed except by cutting them off.

As stated above, the accident occurred when Mr. Gross noticed that the Victaulic coupling attaching the nipple to the shut-off valve was not properly seated into the groove for the valve. When he attempted to fix the problem by loosening the bolts for the Victaulic coupling, the energized bull hose began whipping around and struck Messrs. Gross and Crowley. The connection between the bull hose and the nipple did not fail.

MSHA contends that the use of the combination nipple in the mine's compressed air system exceeds the design capacity intended by the manufacturer. During its accident

investigation, MSHA asked for information about the combination nipple and received from Getchell a copy of the parts catalogue from Dixon Valve and Coupling Company (“Dixon”). Under the entry for Dixon’s “King Combination Nipple” the catalogue states as follows:

Combination nipples are recommended for low pressure discharge and suction services. **The working pressure of combination nipples varies with the size of the nipple, the size and construction of the hose, and the type of clamping system used; consult the Factory for recommendations. NOT INTENDED FOR COMPRESSED AIR.**

(Ex. S-9, emphasis in original). Dennis Ferlich, who is a mechanical engineer with MSHA’s Mechanical Safety Division at the Approval and Certification Center in Triadelphia, West Virginia, contacted Dixon. Mr. Ferlich testified that Paramjit Singh, Vice President of Engineering with Dixon, told him that its King combination nipple should not be used with any type of compressed air. (Tr. 96; Ex. S-4 at 9). After considering the language in Dixon’s catalogue and discussions with Mr. Singh, MSHA officials determined that Getchell was in violation of section 57.14205 and the subject order was issued by Inspector Kerber.

II. DISCUSSION AND FINDINGS OF FACT

One of the key disputes in this case is the meaning of the words “used beyond the design capacity intended by the manufacturer” in the safety standard. The Secretary contends that if equipment is put to a different use than that intended by the manufacturer and that use may create a hazard to persons, a violation has been established. Getchell, on the other hand, argues that the equipment must be used beyond its “design capacity.” That is, the use must be beyond the design tolerances of the equipment. Thus, according to Getchell, there is a quantitative element in the standard.

I find that the words “design capacity” cannot be equated with use. Thus, if a mine operator uses a piece of equipment for a purpose not intended by the manufacturer, there is no violation without proof that such use exceeds the design capacity. None of the witnesses at the hearing could precisely define the term “design capacity.” Indeed, none of the witnesses were very comfortable with the term because it is not a traditional engineering concept. The word “capacity” means, “the power or ability to hold, receive, or accommodate ... the ability to store, process, treat, manufacture, or produce....” *Webster’s Third International Dictionary* 330 (1976). Thus, based on the language of the standard, I interpret the standard to mean that a mine operator cannot use equipment for a task that is beyond the ability of the equipment to perform, as designed by the manufacturer, if such use may create a hazard to persons. There is a quantitative element in the standard and the mere fact that equipment is used for a different task than that intended or anticipated by the manufacturer does not establish a violation.

A review of the regulatory history is instructive. This standard has existed in a similar form for a considerable time. In 1988, the Secretary substantially revised its standards for

machinery and equipment in metal mines. In the preamble to the final rule, the Secretary addressed some of the comments filed by mine operators about this standard, as follows:

Some commenters considered the requirement to use machinery, equipment, and tools according to the manufacturers' specifications and instructions ... to be unrealistic in some mining situations. They propose that this standard be deleted. *MSHA agrees that the manufacturers' specifications and instructions could go beyond the intent of this regulation.* However, MSHA notes that serious mining accidents can occur from the misuse of equipment. For example, haulage trucks can be loaded beyond their design capacity, and braking and suspension systems can fail. MSHA has, therefore, retained the requirement that machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons.

The final standard permits mine operators to modify the machinery, equipment, or tools they purchase from manufacturers to suit their particular mining needs provided that hazards to persons aren't created. Overloading of equipment, such as haulage equipment and cranes, that can create a hazard to equipment operators and other persons in the area would not be permitted by the standard.

Some commenters also considered this standard to be duplicative of [§ 56/57.14100(b)] (defects affecting the safe operation of machinery, equipment, or tools). ***The focus of this standard is the safe use and modification of mining equipment*** while [§ 56/57.14100(b)] addresses defective equipment....

(53 Fed. Reg. 32496, 32514-15 (August 25, 1988)(emphasis added). The regulatory history makes clear that mine operators can modify equipment for their own use so long as they do not "overload" such equipment in such a way as to create a hazard to persons. Thus, one issue in this case is whether, by using a combination nipple in its compressed air system, Getchell overloaded the nipple beyond its capacity as intended by the manufacturer.

Getchell contends that its use of the combination nipple to connect the bull hose to the shut-off valve does not violate the safety standard. It raises a number of factual and legal issues in its defense. First, it contends that there is no proof that the combination nipple in question was a King combination nipple manufactured by Dixon. Its witnesses testified that combination nipples are manufactured by a number of different companies. Because Getchell purchases combination nipples from a supplier rather than directly from a manufacturer, it does not know where they come from. All combination nipples are essentially the same and brand names are

not marked on them. Getchell introduced into evidence portions of parts catalogues from three other manufacturers that sell combination nipples. (Ex. C-4, 5 & 6). These exhibits do not contain language indicating that such nipples are not intended for use in compressed air systems.

Because the cited combination nipple may well have been manufactured by Dixon and Getchell provided MSHA with Dixon's catalogue when asked for information about the nipple, I will assume, for purposes of this case, that the cited combination nipple was a King combination nipple manufactured by Dixon.

Next, Getchell argues that it was the manufacturer in this instance because it assembled the coupling by inserting the nipple into the bull hose and secured the connection with band clamps. It states that the combination nipple by itself is just a component part of the assembly. In addition, it maintains that if a failure were to occur in this assembly, the hose or the band clamps would fail, not the nipple. The nipple is made of heavy gage steel that can withstand more pressure than that found in Getchell's compressed air system.

I agree with Getchell that it manufactured the combination nipple, bull hose, and band clamp assembly (the "nipple assembly"). Getchell assembles these components on the surface before the bull hose is taken underground. The nipple itself is just one part of the assembly and the Secretary did not show that the nipple was incapable of holding or carrying 118 psi of compressed air, which is the working pressure in Getchell's system.

Nevertheless, because Dixon put the disputed language in its catalogue, further analysis is required. I will assume that Dixon is one of the manufacturers of this assembly along with the manufacturer of the bull hose and the band clamps. I find the language in the catalogue to be confusing and somewhat contradictory. On one hand, it states that "the working pressure of combination nipples varies with the size of the nipple, the size and construction of the hose, and the type of clamping system used." (Ex. S-11 at 109). On the other hand, it states that it was not "intended for compressed air." *Id.* The amount of pressure the nipple can safely hold depends on many factors including the construction of the hose and the integrity of the clamping system. The "design capacity intended by the manufacturer" likewise depends on these factors. There does not appear to be a quantitative element to Dixon's recommendation. Even if the pressure were very low, it would not recommend use of the nipple in air systems. The reasons for this recommendation are not clear.

The Secretary issued a subpoena to Mr. Singh but he did not appear at the hearing because of a family medical emergency. (Ex. S-1). Mr. Singh testified, without objection, through his affidavit dated April 29, 1999. (Ex. S-2). In his affidavit, Mr. Singh testified that:

The KNC [King Combination Nipple] is not intended to be used with compressed air. This means that it is not intended to be used with compressed air *at any level of pressure*. Absolutely under no circumstances is a KNC intended to be used with compressed air at a pressure level of 100 psi (pounds per square inch).

(Ex. S-2, at 2)(emphasis added). Mr. Singh goes on to state that Dixon manufactures other devices that it recommends for use in compressed air systems. He states that such couplings are “either swaged onto hoses using swaging equipment, or they are installed with bolt-on type clamps for which tightening torque can be specified and readily measured in order to ensure a sufficiently tight connection.” *Id.*¹ He suggests two proprietary devices manufactured by Dixon be used to connect a hose to a compressed air system.

At the end of his affidavit, Mr. Singh raises safety issues by stating:

Although it is difficult to quantify risk of hose separation, it is safe to say that this risk is increased if inappropriate equipment, such as the KNC used with compressed air, is used. Dixon also cautions that air hose couplings are of particular concern because when pressurized air releases suddenly, it does so explosively and can cause rapid hosewhip.

(*Id.* at 2-3).

There is no dispute that compressed air systems present safety hazards and that a failure of a coupling can cause death or serious injury. It is clear the Dixon does not intend for its customers to use its combination nipple in compressed air systems. It recommends that customers use proprietary couplings that it manufactures specifically for use in compressed air systems, such as “Boss Clamps.” Mr. Singh states that the use of its combination nipple in compressed air systems raises the risk of hose separation, but he did not quantify that risk. He also did not state that the nipple assembly used at the Turquoise Ridge Mine exceeded the design capacity intended by Dixon.

The issue is whether Getchell, by using a combination nipple in its compressed air system, overloaded the nipple and the nipple assembly beyond its capacity as intended by the manufacturer. The Secretary focuses on the words “intended by the manufacturer” when interpreting the safety standard. She argues that the fact that Dixon does not intend its King combination nipple to be used in compressed air systems proves that, by doing so, Getchell was exceeding the design capacity intended by the manufacturer. She equates the manufacturer’s intended use with “design capacity.” I reject this interpretation of the safety standard.

First, as discussed above, the Secretary’s interpretation is not consistent with the plain language of the standard or the preamble to the final rule. If I assume that the language of the regulation is ambiguous, I must defer to the Secretary’s interpretation of the standard. It is well

¹ In a swaged system, a coupling is crimped onto the hose with special equipment. This work would normally be done by the distributor and not the customer. (Tr. 362).

established that an agency's interpretation of its own regulations should be given "deference ... unless it is plainly wrong" and so long as it is "logically consistent with the language of the regulation and ... serves a permissible regulatory function." *General Electric Co. V EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995)(citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978).

Although the Secretary's interpretation is consistent with the remedial purposes of the Mine Act, it is contrary to the plain language of the standard and is therefore not reasonable. In addition, I believe that the safety standard does not provide mine operators with sufficient notice of the requirements of the standard, as interpreted by the Secretary. The language of section 57.14205 is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory [health] standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether 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."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. V. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not realize that the standard is violated because a mine operator uses equipment for work that is not intended by the manufacturer. The language speaks of design capacity not intended use.

It is worth noting that the Secretary's interpretation could lead to unintended results. A manufacturer of mining equipment could state in its sales documents that its equipment can only be safely used in conjunction with its own line of equipment and that any other use could create a hazard to miners. A mine operator would be forced to purchase all of the parts and ancillary equipment from the same manufacturer to avoid potential violations of the safety standard.

I hold that, in order to prove a violation, the Secretary must establish that the manufacturer has tested its equipment and determined that it is capable of performing a certain amount of work. The Secretary can also rely on testing performed by such organizations as the American Society for Testing and Materials ("ASTM"). The Secretary need not always produce evidence of formal laboratory studies; the designed capacity can often be based on empirical information or knowledge of the manufacturer. For example, if a braking system on a haulage truck is designed by the manufacturer to carry no more than the weight of the truck plus 50 tons and the mine operator modifies the dump on the truck to carry 80 tons, the Secretary may be able to establish a violation with this information. My holding in this regard is consistent with the decisions of other Commission administrative law judges. *See Stillwater Mining Co.*, 18 FMSHRC 1291 (July 1996), *aff'd* 142 F.3d 1179 (9th Cir. 1998); *Eastern Ridge Lime Co.*, 19 FMSHRC 398 (February 1997).

As further support for her position, the Secretary argues that the nipple assembly was unsafe because the bands used to secure the hose to the nipple cannot be tested for torque. She believes that a clamping system that uses bolts that can be tightened with a torque wrench and tested periodically provides a greater measure of safety. She relies on the testimony of Messrs. Singh and Ferlich. The Secretary contends that the individual who installs the bands around the hose to secure the nipple can only guess if the bands are tight enough through visual examination and by the "feel" as they are installed. She maintains that one never knows whether the bands are correctly installed and mistakes can be made. With a bolting system, on the other hand, the torque can be tested to make sure that the coupling is secure.

Getchell argues that, in fact, the banding system is easier to install and is less prone to human error. Bolts can become loose over time and visual examination will not detect the problem. Bands, on the other hand, cannot loosen and can be checked with a visual inspection without the use of special tools. Getchell produced evidence to support its position, including the testimony of Michael Pfister, Vice President and General Manager of Punch-Lok. His company manufactures several types of coupling devices including band clamps. He testified that it is easy to determine whether band clamps have been properly attached and tightened to a nipple assembly. (Tr. 358). He recommends using band clamps in this type of application rather than swaged or bolted systems. (Tr. 356-62).²

² Mr. Pfister sits on the standards committee of the National Association of Hose and Accessory Distributors. (Tr. 321). In developing standards for industrial hoses, the committee has

determined that nipple assemblies will be allowed in compressed air systems. (Tr. 355-56).

I find that this dispute is largely irrelevant. The issue is not whether a system using bolted connectors are safer or less prone to human error than a banded system; the issue is whether Getchell's system exceeded the design capacity intended by the manufacturer.

As part of its defense in this case, Getchell sent a sample of its nipple assemblies to Michael Fourney, a registered professional mechanical engineer, for testing. Each nipple assembly consisted of a combination nipple that had been inserted into a section of bull hose and secured with three band clamps. This is the type of installation that is typically used by Getchell. Mr. Fourney subjected the assemblies to a number of tests. He pressurized the assemblies with gas in his laboratory to determine at what pressure they would fail. (Ex. C-9). He also performed these tests with water. He ran tests with only one or two band clamps securing the hose as well.

The lowest level of pressure at which a nipple assembly with three band clamps failed was 1000 psi. (Ex. C-10). With two bands, failure occurred as low as 700 psi; and with one band failure occurred as low as 450 psi. Getchell contends that these results demonstrate that its use of the combination nipple at 118 psi did not exceed the design capacity intended by the manufacturer.

If the Secretary establishes the design capacity intended by the manufacturer, independent testing performed by a mine operator would be largely irrelevant. In this case, however, Mr. Fourney's tests provide some support for my holding that the Secretary did not establish a violation.

The Secretary produced evidence that, at the connection in question, only one band clamp or perhaps two band clamps were securing the hose to the nipple. Only one clamp was found at the accident site; Mr. Crowley testified that he believes that there was only one clamp, and there were only two clamps present on the nipple assembly at the north end of the bull hose. Getchell maintains that the Secretary's evidence is insufficient to establish that less than three were present.

On reviewing the record as a whole, I find that it has not been established that there was only one band clamp present. The combination nipple was damaged as it whipped about the haulageway following the accident. Parts were strewn all over the area. The area was very muddy and clamps could have been lost. Because the nipple assembly was not a suspected cause of the accident, an exhaustive search for band clamps was not undertaken. Mr. Crowley was not asked about the number of bands on the cited nipple assembly until two days before the hearing. There was no real effort to look for the clamps on the scissors lift in the area. The fact that only one was found does not establish that there were not more clamps securing the nipple.

Mr. Crowley testified that he thought he saw only one band clamp on the day of the accident. (Tr. 167-69). I find that he was a credible witness and I do not question his integrity or honesty. Nevertheless, the events that occurred on that day were very traumatic and his memory on this issue may not be accurate. Consequently, whether there were less than three band clamps

at the cited nipple assembly has not been established. There well could have been two clamps since two were installed on the other end of the bull hose and these assemblies are put together on the surface. It is important to recognize that the Secretary did not base her allegations in the order of withdrawal on the number of band clamps on the nipple assembly.

My holding would be the same if two clamps were present, although I note that there is a smaller margin of safety as the number of band clamps decreases. Mr. Fourney testified that with compressed air systems, one should divide the test results by four to provide a working pressure that is safe to use. (Tr. 404-06). With three band clamps, the working pressure would be 340 psi; with two band clamps, the working pressure would be 230 psi; and with one band clamp, the working pressure would be 120 psi. *Id.* The compressed air system normally operates at 118 psi, but excursions above that pressure are possible. Since Mr. Fourney sampled only a small number of nipple assemblies, his results are not exact.

The safety standard provides that there is a violation only if the mine operator uses the equipment beyond the design capacity intended by the manufacturer *and* such use may create a hazard to persons. If I had deferred to the Secretary's interpretation of the standard and determined that Getchell's use of the nipple assembly was beyond the design capacity of Dixon's combination nipple, I would still find that a violation was not established. The record does not show that Getchell's nipple assembly creates a hazard to persons.

There is no question that compressed air systems have seriously injured miners at the nation's mines. (Ex. S- 15). Given the testimony in this case, however, it has not been established that a properly assembled and installed nipple assembly creates a hazard to miners at the Turquoise Ridge Mine. If a given nipple assembly is improperly "manufactured" by Getchell, it would likely violate section 57.14100(b).

III. ORDER

For the reasons set forth above, the notice of contest in this case is **GRANTED** and Order of Withdrawal No. 7966725 issued on March 5, 1999, is **VACATED**.

Richard W. Manning
Administrative Law Judge

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