FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 2, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-364-M
Petitioner	:	A. C. No. 04-00599-05583
v.	:	
	:	Docket No. WEST 99-427-M
	:	A.C. No. 04-00599-05586
	:	
TXI PORT COSTA PLANT,	:	Docket No. WEST 2000-50-M
Respondent	:	A.C. No. 04-00599-05588
	:	
	:	TXI Port Costa Plant

DECISION

Appearances: Jason Vorderstrasse, Esq., Office of the Solicitor, U. S. Department of Labor, Los Angeles, California and Alan Raznick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California for the Petitioner;
Steven R. Blackburn, Esq., Epstein, Becker & Green, San Francisco, California for the Respondent

Before: Judge Weisberger

Statement of the Case

These cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor ("Secretary") seeking the imposition of civil penalties against TXI Port Costa Plant ("TXI") for allegedly violating various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard in Alameda, California, on July 25 and 26, 2000. On September 29, 2000, TXI filed proposed findings of fact and a brief. On October 2, 2000, the Secretary filed a post hearing brief. On October 23, 2000 TXI filed a reply to the Secretary's post hearing brief. On October 26, 2000, the Secretary filed a reply brief.

I. Docket No. WEST 99-364-M.

Introduction.

TXI's Port Costa Plant extracts shale from an adjoining quarry, and processes it into kiln-hardened aggregate material for use in concrete construction. The finished product, marble-like pellets, approximately ½ inch in diameter, is moved by a series of chutes and conveyors to one of six storage silos grouped together in a single structure covered by a flat roof. A variety of conveyors, screens, and related machinery are located on the roof. The height of the silo structure is approximately 80 feet. Access to the roof of the structure is via a grated metal stairway attached to the side of silo No. 2. The edges of the roof are guarded by three horizontal parallel rails. The upper rail is 40 inches above the ground. The other rails are referred to as the midrail, and toe, respectively.

A miner working in the scalehouse at the foot of the silos is required to go to the roof of the structure twice each 12 hour shift, to check the contents of the silos through observation hatches located on the top of the silos.

A. Citation No. 7972128.

1. Violation of 30 C.F.R. §56.11001.

On April 20, 1999, MSHA inspectors, John Pereza and Jerry Hulsey climbed to the top of the silo structure with several TXI representatives including Doug Evans, TXI's maintenance supervisor. The inspectors observed an accumulation of aggregate on the top of the No. 2 silo. There is some conflict in the record regarding the depth of the accumulated aggregate, but the weight of the evidence establishes that it was at least 6 inches deep. There was no specific designated path for an employee to travel on top of the silos to check their contents. Nor was testimony adduced from any witness having personal knowledge of the path normally taken by miners assigned to check the top of the silos. However, the weight of the evidence clearly establishes that the materials that had accumulated on top of silo No. 2 were generally in an area where a miner regularly travels to inspect the contents of the silos. Indeed, both inspectors testified that they observed footprints in the area of the accumulated material, and their testimony was not impeached or contradicted in this regard. Further, Evans indicated that he has observed a miner walking on top of the silo.

In essence, Pereza opined that the accumulated material constituted a stumbling or tripping hazard, and issued a citation alleging a violation of 30 C.F.R. Section 56.11001 which provides that "[s]afe means of access shall be provided and maintained to all working places".

I find that the weight of the evidence establishes that on the day cited there was an accumulation of marble-size pieces of aggregate to a depth of at least 6 inches on the top of silo No. 2, that a miner regularly traversed the top of silo No. 2 two times in a 12 hour shift as part of his duties, and that the accumulated aggregate constituted some degree of a stumbling or tripping hazard. Accordingly, I find that it has been established that TXI was not in compliance with

Section 56. 11001, supra.

2. 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)(l). 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. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

As set forth above, the record establishes a violation of a mandatory safety standards and the fact that the violative condition contributed to a stumbling or tripping hazard. The critical issues for resolution are the third and fourth elements of Mathies, i.e., the likelihood of a injury producing event, and the likelihood of this event producing an injury of a reasonably serious nature.

It appears to be TXI's position that the evidence does not establish that there was any hazard of an employee falling off the silo as a result of the accumulated aggregate. In essence,

TXI argues in this regard that a guardrail located along the edge of the silo, consisting of three parallel horizontal bars, the highest being 42 inches above the roof surface of the silo, protected an employee from falling off the silo, and landing on the ground 80 feet below. In this connection, the inspector testified that, at a point along the guardrail, the material had accumulated to a height of 20 inches which would have, in essence, diminished the protection of the upper guardrail by effectively reducing its height. In arguing that this testimony should not be accepted, TXI refers to geometry calculations predicated upon a 38 degree angle of repose of the accumulated material, as testified to by Evans, and the sine of this angle which results in a conclusion that at a point 12 inches from the edge of the silo[1], the height of the accumulated material could not have been more than 3.6 inches. However, I take administrative notice of the fact that the sine of an angle, which is part of a right triangle, is the ratio between the side opposite the angle and the hypotenuse, (Random House Websters Unabridged Dictionary ("Webster's") (2nd Ed.,1999) at 1784.) in this case an unknown distance. In contrast, the tangent of an angle in a right triangle, is the ratio between the side opposite the angle and the side adjacent to the angle. (See Webster's at 1941.) Hence, given an angle of 38 degrees, and a horizontal distance of 12 inches from between the edge of the silo, and applying the tangent of a 38 degree angle, the vertical height of the accumulation would be at a maximum of approximately a little more than nine inches. As a result, the relative height of the bars of the guardrail, especially the upper rail, would be reduced thus diminishing their ability to protect an employee from falling off the roof of the silo. In addition, I note the existence of the following conditions: the round shape of the accumulated material; the location of a hose in the area, which created a further stumbling and tripping hazard; the presence of metal structural cross-members in the area; and the fact that the area was traveled twice each 12 hour shift. I find that these conditions, in combination, establish that an injury producing event was reasonably likely to have occurred. Further, due to the presence of metal structural cross-members, the reduction in height of the protective guardrail, and the height of the subject silo, I find that it was reasonably likely that an injury resulting from the violation, would have been of a reasonably serious nature. I thus find that, within the context of this record, it has been established that the violation was significant and substantial.

3. Unwarrantable Failure.

The citation at issue alleges the violation herein was as a result of TXI's unwarrantable failure. Unwarrantable failure has been defined by the Commission to constitute more than ordinary negligence i.e., negligence that reaches the level of "aggregated conduct". Emery

[1]The slope of the material would be the hypotenuse of a right triangle, the horizontal distance of 12 inches from the edge of the silo would be the side of the triangle adjacent to the angle of repose, and the vertical distance, to be determined, between the ground and the height of the material would be the side opposite that angle.

Mining Corp., 9 FMSHRC 1997, 2003-2004 (Dec. 1987).

There is an absence of any direct evidence in the record as to how long the accumulated aggregate had been in existence up until the time it had been observed by the inspectors on April 20, 1999. The only evidence of record relating to the existence of material in the cited area consist of notations found in the OPERATOR'S CHECKLIST BEGINNING EACH SHIFT for April 16, 17 and 18, which, under the listing "Material Build-up", indicates "onto Silo # 2". (Co. Ex. 7)

I note Evans' testimony that when he reviewed each of these reports early in the morning after the shift in which they were written, and noted that "walkways" were checked as "ok", and that they "were being worked on", he concluded that the reports indicated that whatever spillage had occurred was being addressed, and no hazard existed. It appears to be TXI's position in this regard that accordingly it can not be found that its management was not effectively acting to address to problem of material build-up. However, to the contrary, I find that at best, Evans' testimony relates merely to the condition of "walkways", and does not relate at all to the condition of materials on the top of silo No. 2, which is the only area in issue.

I also note TXI's assertion that, in essence, its negligence herein should be mitigated by the fact that it had taken steps to prevent hazards associated with material build-up such as directives in its safety rules to clear walkways, and statements in its collective bargaining agreement requiring employees to report safety hazards. Also, TXI refers to safety meetings conducted in the months preceding April 20, 1999, wherein employees were instructed that "walkways must be cleaned or reported", and that these topics also had been discussed in prior meetings in the preceding September and October. However, I accord more weight to the fact that a build-up of materials in the specific area in issue on April 16, 17 and 18, was noted in pre-shift reports which were transmitted to management. Additionally, I note that the accumulated materials were in an area generally traversed by a miner two times each shift, from April 16 to April 20, as part of normal operations.

The only reliable evidence of record relating to TXI's efforts to clean the accumulated material[2] consists of notations in the STORAGE AND HANDLING LOG for April 16, 4:00 p.m. to 2:00 am, and April 18, 4:00 p.m., as follows: "[h]osed off material from top of silo - 2 when I had the chance" (Emphasis added.) (Co. Ex. 9, page 2, 5). Thus, although some effort may have been made to clean the accumulated violative materials, it is difficult to conclude, based upon this quantum of evidence that the efforts constituted more than a token effort, rather than an intensive effort to make the area once again safe for access.

[2]I note Evans' testimony that at the time of the inspection the leadman stated that "`I had just finished cleaning that thing off Thursday night,' or Thursday." (Tr. 113). TXI did not call the leadman to testify, nor did it indicate that he was not available. Nor is there any other evidence of record specifically cooborating this hearsay statement of the leadman. Accordingly, I accorded no weight to Evan's hearsay testimony in this regard.

Also, I have considered TXI's arguments that, in essence, inter alia, it should be found that there was no unwarrantable failure because of its effective abatement efforts. Such an argument is not relevant relating to the issue of whether the order in question was properly issued under Section 104(d)(1) of the Act. In this connection I note that Section 104(d)(1) citations and orders are to be issued when the violation is "... caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, ...". Hence, what is relevant is TXI's conduct prior to the time of the alleged violation and not subsequent to the violation. As such, any evidence regarding abatement efforts are irrelevant regarding the level of its negligence prior to the cited violation.

Therefore, for all the above reasons, I find, within the context of the record as evaluated above, that the violation herein resulted from TXI's negligence which was more than ordinary, and reached the level of aggregated conduct. Hence, I find that the violation was caused by TXI's unwarrantable failure. (See Emery, supra,)

4. Penalty.

I find that the gravity of the violation to be relatively serious essentially for the reason set forth above (I.) (A.) (2.) supra. Also, I find the level of negligence relatively high essentially for the reasons set forth above (I.) (A.) (3.) supra. Considering the remaining factor set forth in section 110(i) of the Act as stipulated by the parties, I find that a penalty of $2,500 is appropriate.

B. Order No. 7972129.

Pereza also issued Order No. 7972129 which alleges a violation of 30 C.F.R. Section 56.18002(a). Section 56.18002(a) supra provides that "[a] competent person ...shall examine each working place at least once each shift for conditions which may adverse affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions." (Emphasis added.) Hence, in order to prevail, the Secretary must establish either that TXI did not examine each working place at least once per shift, or that it did not promptly "initiate" action to correct the conditions which may adversely affect safety or health.

It appears to be the Secretary's position, as set forth in the posthearing brief, that this order concerns itself not only with regard to the material as it existed at the time of the inspection "... but also with regard to spilled material and lack of effective cleanup over the previous four months." In support of this argument the Secretary refers to Pereza's testimony that spillage on top on the silos "... had been listed everyday for almost four months ... ." (Tr. 40). The basis for this conclusion appears to be Pereza's testimony that "work place examinations" reports for four months beginning January 1, 1999, Pereza's testimony that stated indicated instances of material build-up on top of the silos, not just silo No. 2, and that these instances "far outnumbered" cleanup efforts. (Tr. 41). In response to a leading question on direct examination he agreed that these reports indicated the existence of a hazard. He was asked whether the reports listed the word hazard, and he stated that it was his opinion, i.e., that he had drawn a conclusion that the

reports indicated a hazard.

Clearly the Secretary has the burden of establishing all elements required for a violation. The Secretary did not proffer relevant pages of the reports which allegedly set forth notations of spillages and inadequate cleanup. The Secretary did not proffer any explanation for its failure to do so. The reports are the best evidence as their contents regarding the existence of spillages, their location, the number of instances of spillages on top of silos, and clean-up efforts. As such, I find that Pereza's testimony alone, to be of insufficient probative weight to establish existence of spillages on silos "on many occasions", and that these instances far outnumbered cleanup efforts.

Further, regarding spillages on the top of silo No. 2 on April 16, 17 and 18, TXI's records indicate that a examinations had been performed in the areas in question and build up of materials were noted (Co. Ex. 7). Thus, in order to establish a violation herein, the Secretary must establish that TXI was not in compliance with the second sentence of Section 56.18002(a) supra, which requires that "[t]he operator shall promptly initiate appropriate action to correct such conditions." (Emphasis added.)

It appears to be the Secretary's position that, in essence, this sentence was violated as the unsafe conditions were not corrected, and that there is "no indication in Respondent's records of any time being taken to clean off the material on top of silos." I do not find much merit in the Secretary's position. The clear wording of the second sentence of Section 56.18002(a), supra, does not require the Secretary to establish either the adverse condition was not corrected, or that time had been taken to clean material from the top of the silos. Rather, it must be established that TXI did not initiate cleanup action to correct the spillage of material. In this connection, the only evidence of record relating to TXI's actions or lack of action, regarding spillages that had occurred on April 16, 17 and 18, consists of statements in entries in the Storage and Handling Log for April 16, and 18, as follows: "[h]osed off material from top of silo-2 when I had the chance" (Emphasis added). (Co. Ex. 7) These statements in TXI's reports indicate that it had initiated action to correct the adverse unsafe accumulation of material. Accordingly, for the above reasons, I conclude that the Secretary has failed to establish a violation of Section 56.18002(a) supra.

I. Docket No. WEST 99-427-M.

A. Order No. 7972161.

1. Violation of 30 C.F.R. § 56.12040

On June 19, 1999, Pereza conducted another inspection of the site at issue. He examined a 480v. breaker box that was approximately 82 inches high, 70 inches, wide and 12 inches deep. Two metal doors enclosed the interior of the box, and had to be opened to gain access to the interior. The lower right-hand corner of the box also contained a transformer, 18 to 20 inches wide and approximately 20 inches high. The surface area of the exposed wires on the right side of

the box was approximately one to two square feet. The breaker box also contained energized wire connections, and an energized heat-sink on the left side of the box.

A circuit breaker for a 480v. Steadman crusher was also located in the upper right hand corner of the box. In normal operations, the breaker is thrown several times a week to shut off electirc power to the cursher to allow the cursher to be repaired or maintained.

The breaker box was designed to be used with a handle, located on the outside of the box, which allowed the circuit breaker to be thrown without opening the box. This handle had not been in place for approximately 10 years. Hence, in normal operations, it was the practice of TXI employees to throw the circuit for the crusher by opening the right-hand door of the breaker box and using a "short section" of a 2 x 4 piece of lumber to throw the breaker.

Pereza issued an order alleging a violation of 30 C.F.R. Section 56.12040 which provides as follows: "[o]perating controls shall be installed so that they can be operated without danger of contact with energized conductors."

In essence, it is TXI's position that the breaker box is not an "operating control", and hence, it was improperly cited. TXI relies on the fact that the panel of buttons and switches used to operate the crusher, were located not in the box, but were elsewhere on the site. Thus, TXI argues that accordingly the breaker box is not the operating control for the crusher. TXI does not cite any authority, regulatory history, or commonly accepted definition, that supports its conclusion that a breaker used to de-energize a piece of equipment is not an "operating control". It appears to be TXI's position that the breaker box should not be considered an operating control as it is accessed only infrequently to de-energize the crusher to perform repairs or maintenance work. No authorities are cited which would mandate such a narrow construction to be accorded to the term "operating controls".

In normal operations the breaker at issue is thrown at least once a week to cut off power to the crusher in order to perform repair or maintenance work. It follows that, upon completion of the repair or maintenance work, the breaker would, of necessity, be reset allowing electricity to resume to flow to the crusher which would directly enable the crusher to operate. Indeed, the crusher could not operate if the breaker would not be reset to supply electricity. Since throwing the breaker stops the operation of the crusher, and resetting it allows the crusher to operate, it certainly controls its operation and, accordingly, is within the perview of the term "operating controls" (see, Webster's at 1357).

The only way the breaker could be thrown and reset required a miner to open the exterior doors of the box. According to Pereza, the miner would thereby be exposed to an approximately 1 ½ square foot area of energized 480v. conductors, thus subjecting the miner to an injury by virtue of inadvertent contact with these energized conductors. This testimony by Pereza has not been impeached or contradicted, and I therefore accept it. I find that the manner in which the box was installed, with a missing lever on the outside of the box,required the interior breaker to be

operated in a situation were there was danger of contact with energized conductors. I thus find that it has been established the TXI did violate Section 56.12040 supra.

2. Significant and Substantial.

According to Pereza, in normal operations, as a result of the violative condition, i.e. the lack of the lever outside the breaker box, once a week a miner is required to push or pull a tension lever on the breaker at issue. Pereza testified that, in performing these operations, the miner could lose his balance and slip, and be exposed to a significant area of energized 480v. 1200 amp components, which could result in possible fatal electric shock from contact with the energized components. Since these facts as testified to be Pereza were not impeached or contradicted, I accept them. Within this context I find that it has been established that the violation was significant and substantial, (see Mathies supra.)

3. Unwarrantable Failure.

In its brief TXI argues that, in essence, the violation was not unwarrantable since its managers were not aware that the conditions constituted a violation of Section 56.12040, supra, as it had not been cited for this condition in the past. However, no testimony was adduced from any of TXI's managers to the affect that, a reasonably prudent person familiar with the industry would have understood that the breaker box at issue was not to be considered an operating control, or that its managers did not consider the box to be an operating control, or that it relied on MSHA's not having previously cited the box in the past as indicating that the box was in compliance with Section 56.12040, supra, as it was not an operating control. In the absence of such proof, I do not accept TXI's arguments in this regard.

Also, it appears to be the position of TXI, that its negligence should be mitigated by the fact that, as testified to by Evans, there have been no injuries reported arising from the condition at issue subsequent to TXI's assuming ownership of the site in 1996. TXI further asserts that MSHA has repeatedly inspected this area, and until the issuance of the order at issue, had not previously cited the absence of an outside handle on the breaker box. On the other hand, the hazards involved in opening the box door and throwing the breaker switch with a piece of wood, had existed for 10 years. Management was aware that miners were throwing the breaker in this fashion and had, according to Pereza's uncontradicted testimony, so instructed its employees. Within this framework I find that it has been established that the violation herein was as a result of TXI's unwarrantable failure. (See, Emery supra)

4. Penalty

Inasmuch as the violation could have resulted in a fatality, the level of gravity was

relatively high. Further, for the reasons set forth above, the level of negligence was more than ordinary and reached the level of aggravate conduct. Considering the further factors set forth in Section 110(i) of the Act I find that a penalty of $2,500.00 is appropriate.

B. Order No. 7972162.

1. Violation of C.F.R. § 56.12040, supra

On June 10, 1999, Pereza also inspected the Westinghouse Motor Control Center ("MCC"), which houses circuit breakers for motors and other equipment at the plant. The circuit breakers are contained inside cabinet doors that were designed to be used with a rod that did not require the door to be opened in order to throw the circuit breaker. Three cabinet doors, each enclosing a separate breaker, did not have any rods. Accordingly, these doors would have to be opened in order to throw the circuit breaker inside. A written statement on the outside of each door stated that the door had to be opened to activate the breaker. Hence, once a week, a miner would have to reach inside the cabinet to throw the circuit breaker in order to repair or maintain certain electrical equipment. Various energized wires and a circuit breaker were located inside each cabinet. There were four square inches of surface area of exposed energized 480v. conductors inside each cabinet. Pereza considered the breaker boxes to be "operating controls", and issued an order alleging a violation of Section 56.12040 supra.

Pereza opined that the boxes were operating controls. In contrast, no one testified on behalf of TXI regarding any definition of "operating controls" and whether breakers were within the scope of that definition as commonly understood in the industry. Nor did it present any evidence on this point. Since circuit breakers are thrown to cut off power to equipment to repair or maintain them, and then are reset, which supplies electricity to this equipment, I conclude, for the reasons discussed above ((II.) (B.) (A.), supra,) that they are within the scope of "operating controls".

Further, due to the presence of energized 480v. wires inside the box, which has to be opened to throw or reset a breaker due to the violative condition herein, I find that miners performing this task would be exposed to the possibility of electric shock due to inadvertent contact with the energized conductors inside the box. Accordingly, I find that due to the lack of a rod on the outside of the cabinet doors at issue, the circuit breakers inside these boxes could only have been operated by exposing miners to danger of contact with energized conductors located inside the box. Accordingly I find that TXI did violate Section 56.12040 supra.

2. Unwarrantable Failure.

Because it was obvious that the boxes at issue no longer had handles on the outside, and

that for many years instructions on the outside of the boxes informed employees to open the door in order to throw the breakers, I conclude that it has been established that the violation resulted from TXI's unwarrantable failure (see, Emery supra)[3].

3. Penalty

I find that the gravity of this violation was relatively high as it could have resulted in a serious injury resulting from electric shock. Also, I find, as set forth above, that the negligence was relatively high. Taking into account the further factors set forth in Section 110(i) of the Act as stipulated to parties, I find that the proposed penalty of $2,000.00 is appropriate.

III. Docket No. WEST 2000-50.

During the course of the hearing on July 26, 2000, regarding the citations at issue in Docket No. WEST 2000-50, the parties reached a settlement, and made a joint motion to approve the settlement, and the motion was granted at the hearing.

The parties proposed to have the total penalty initially sought by the Secretary for the violations alleged in these citations to be reduced from $397.00 to $228.00. I reviewed the record regarding these citations and the evidence presented at the hearing, and I found the proposed settlement to be appropriate under the terms of the Act, and I granted the motion.

ORDER

[3]The order at issue was issued under Section 104(d)(2) of the Act, which requires the existence of a violation that resulted from the operator's unwarrantable failure, but not necessarily a significant and substantial violation. Thus, I reject as irrelevant TXI's argument that the order at issue should be vacated because Section 104(d)(1) sets forth that an order can properly be designated as an unwarrantable failure only if the inspector has also concluded that the violation was significant and substantial, whereas the order at bar does not allege the violation at issue to be significant and substantial. However, such an argument does not pertain to the order at issue which was issued under Section 104(d)(2) of the Act. Section 104(d)(2) pertains to a withdrawal order that was issued pursuant to Section 104(d)(1) which does not contain any requirement that the order be predicated upon a violation that is significant and substantial.

It is **ORDERED** that, within 30 days of this decision, TXI shall pay a total civil penalty of $7,228.00. It is further **ORDERED** that Order No. 7972129 be Dismissed.

Avram Weisberger
Administrative Law Judge

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