APRIL 1999

COMMISSION DECISION AND ORDERS

ADMINISTRATIVE LAW JUDGE DECISIONS

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APRIL 1999

Review was granted in the following cases during the month of April:

Rawl Sales & Processing Company v. Secretary of Labor, MSHA, Docket No. WEVA 99-13-R. (Judge Feldman, February 25, 1999)

Secretary of Labor, MSHA v. Cantera Green, Docket No. SE 98-141-M. (Judge Melick, March 9, 1999)

Review was Denied in the following case during the month of April:

Gregory Bennett v. Newmont Gold Company, Docket No. WEST 98-115-D. (Request for Reconsideration of April 6, 1999 Commission Notice)

COMMISSION DECISIONS AND ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 15, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 99-65
RIVER POINT PROCESSING INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 5, 1999, the Commission received from River Point Processing Inc. ("River Point") a request to reopen a penalty assessment that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under section 105(a) of the Mine Act, an operator has 30 days following receipt of the Secretary of Labor's proposed penalty assessment within which to notify the Secretary that it wishes to contest the proposed penalty. If the operator fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 30 U.S.C. § 815(a).

In its motion, River Point states that its facility was shut down at the time the assessment issued. The operator also requests that the $55.00 proposed penalty assessment be waived due to the operator's dissolution in bankruptcy court.

On March 26, 1999, the Commission received a memorandum from Tamara Nelson, Chief of the Compliance Group with the Department of Labor's Civil Penalty Compliance Office. In the memorandum Ms. Nelson states that, because River Point Processing Inc. was sold on August 20, 1998, and is no longer in the mining business, the case is being closed as uncollectible.

Based on the foregoing, we deny River Point's motion to reopen as moot. *See generally Phelps Dodge Morenci Inc.*, 17 FMSHRC 1525 (Sept. 1995) (granting motion to withdraw Motion for Relief from Final Order where proposed penalty assessment was rescinded). Accordingly, this proceeding is dismissed.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 22, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 96-21-M
EASTERN RIDGE LIME COMPANY, L.P.	:	

BEFORE: Jordan, Chairman; and Marks, Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), involves citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") against Eastern Ridge Lime Company, L.P. ("Eastern Ridge"). Administrative Law Judge Avram Weisberger concluded that Eastern Ridge violated 30 C.F.R. §§ 57.3360[1] and 57.3201[2] and that both violations were significant and substantial ("S&S") and resulted from Eastern Ridge's unwarrantable failure. 19 FMSHRC 398 (Feb. 1997) (ALJ). The judge assessed penalties totaling $85,000. *Id.* at 407, 409, 410. The Commission denied Eastern Ridge's petition for review. Eastern Ridge appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and vacated and remanded in part the Commission's decision. *Eastern Ridge Lime, L.P. v. FMSHRC*, 141 F.3d 1158 (table), 1998 WL 169213 (4th Cir. 1998).

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[1] Section 57.3360 provides in pertinent part: "Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary."

[2] Section 57.3201 states: "Scaling shall be performed from a location which will not expose persons to injury from falling material, or other protection from falling material shall be provided."

By order dated July 2, 1998, the Commission remanded the case to the administrative law judge for further consideration consistent with the court's decision. 20 FMSHRC 1333 (Dec. 1998). On remand, the judge reiterated his initial findings and again imposed penalties totaling $85,000. 20 FMSHRC 758, 758 (July 1998) (ALJ). Eastern Ridge appealed, and the Commission directed review. For the reasons that follow, we vacate the judge's decision and remand for further consideration.

I.

Factual and Procedural Background

A. Initial Proceedings before the Commission

Eastern Ridge operates an underground limestone mine in Ripplemead, Virginia. 19 FMSHRC at 398. Limestone is extracted by the random room and pillar mining method. *Id.* at 399. By this process, rooms are created by blasting and removing the loose rock. 1998 WL 169213 at 1. Pillars are left in the rooms to provide roof support. *Id.* The tunnels and rooms are not set out in grid fashion because geological conditions at the mine are inconsistent. Tr. 1168.

Beginning in 1993, Eastern Ridge made several attempts to mine in the 200 entry section that had to be stopped because of poor roof conditions. 19 FMSHRC at 399-400. In December 1993, Eastern Ridge attempted to advance the 204E section. *Id.* at 399. However, mining in section 204E ceased after scalers working in the section[3] concluded that the roof was unsound and told Eastern Ridge management that it was unsafe to work in the section. *Id.* at 399-400, 404.

In May or June 1994, Eastern Ridge returned to the 204E section. *Id.* at 400. Scalers observed that the top of the heading was checkered with wide mud seams. Scaling could not be completed due to unsafe ground conditions. *Id.* at 400. Mine management was advised that the top was leaking mud, and the section was condemned. *Id.* at 404. After the 204E section was condemned, in late June or early July 1994, Eastern Ridge began development of the 11S section, which was to the right of the 204E heading. *Id.* at 400. Eastern Ridge supervisor Barry Snider marked the opening for the 11S heading on the right rib of the 204E section, about 15 feet away from its face. *Id.* at 404. The right rib of the 204E section was to form the left rib of the new 11S section. Tr. 219, 224-25.

[3] Scaling is a process of removing loose rock from roof or walls, usually with a long metal bar, which also allows the scaler to determine whether the roof is sound. 1998 WL 169213 at 1.

From July 21 through July 24, 1994, several miners observed seams in the 204E/11S sections. 19 FMSHRC at 401-02. On July 25, driller Milton Conley showed Snider the seam encircling the 204E section and told him that there was no support for the roof. *Id.* at 402. After the conversation, Snider instructed driller Jeffrey Morgan to bring the jumbo drill to scale down loose rock in the roof near the intersection of the right rib of section 204E and the left rib of section 11S. *Id.* Morgan extended the boom of the drill 40 feet out in front of the cab in which he was sitting. *Id.* Snider was standing approximately 15 to 20 feet to the left and in front of the cab. *Id.* Morgan placed the drill bit on the rock and allowed the drill to vibrate or "rattle" the rock in an effort to scale it down. As Morgan began to do so, the entire roof in the 204E and 11S sections collapsed burying Snider and partially crushing the drill cab in which Morgan was sitting. Tr. 989-90. As a result of the roof collapse, Snider was killed and Morgan was seriously injured. 19 FMSHRC at 402

Following an investigation, MSHA issued citations charging Eastern Ridge with violating section 57.3360, which requires ground support when ground conditions indicate that it is necessary, and section 57.3201, which requires that scaling shall be performed from a location which will not expose persons to injury from falling materials. 1998 WL 169213 at 1. Both violations were designated S&S, and were attributed to Eastern Ridge's unwarrantable failure. Gov't Exs. 7-8.

Eastern Ridge contested the proposed penalties, and a hearing was held before an administrative law judge. The judge concluded that Eastern Ridge violated section 57.3360 when it failed to install ground support, notwithstanding repeated warnings concerning conditions in the 204E/11S sections. 19 FMSHRC at 403-05. The judge credited the opinion of MSHA's expert witness, Joseph Cybulski, that conditions in the 204E/11S area prior to the fatal roof fall indicated that ground support was necessary. *Id.* at 404-05. In discrediting Eastern Ridge's expert, Jack Parker, who testified that ground support was not necessary, the judge noted that Parker's theory of the cause of the roof fall was not the issue before him; rather, the judge found that Parker did not dispute miner testimony concerning the conditions in sections 204E and 11S, noting in particular that scaler/blaster Marvin Wright opined that the pillar between the section 204E face and the 11S left rib was too small. *Id.* Therefore, the judge concluded that the record established that ground support was necessary. *Id.* He also affirmed the unwarrantable failure designation of the citation in light of the repeated concerns that miners had expressed to Snider. *Id.* at 407. In addressing the designation of the violation as S&S, the judge noted that Eastern Ridge's failure to provide ground support contributed to the hazard of roof fall. *Id.* at 406. The judge further concluded that, "considering the fact that a roof fall did occur in the area causing a fatality and seriously injuring another miner," the third and fourth elements of *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984), had been established. *Id.* at 406-07. In assessing a penalty, the judge noted that the gravity of the violation was high, as it contributed to a fatal roof fall. Further, he found the level of Eastern Ridge's negligence was aggravated. *Id.* at 407. Taking into account remaining section 110(i) penalty criteria, the judge imposed a $50,000 penalty. *Id.*

With regard to the citation charging a violation of section 57.3201, the judge relied on record evidence establishing that, prior to the accident, conditions indicated the need for ground support in the 240E/11S area, and that Morgan was exposed to the hazard of a roof fall even though he was located 40 feet from the rock that he was rattling. *Id.* at 408. Further, the judge held that the cab in which Morgan was sitting did not provide protection from the roof fall. *Id.* The judge also concluded that the violation occurred as a result of the operator's unwarrantable failure because management was aware that scaling was being performed in an area with no roof support; indeed, just prior to the roof fall a miner had pointed out the circular seam in the roof to Snider. *Id.* Finally, in addressing the S&S designation, the judge relied on the ground conditions indicating the need for support and that scaling was being performed in an area that had no ground support. *Id.* Noting that Eastern Ridge's negligence was aggravated and "the fact that the violation . . . contributed to a fatality," the judge imposed a penalty of $35,000 for the second violation.[4] *Id.* at 409. The Commission thereafter denied a petition for discretionary review filed by Eastern Ridge.

B. The Fourth Circuit's Decision

Following the Commission's denial of review, Eastern Ridge filed a petition for review in the Fourth Circuit, which affirmed in part and vacated and remanded in part the Commission's decision. The court upheld the findings of violation (1998 WL 169213 at 2-3), but on a 2-1 vote concluded that the S&S determinations were incorrectly based on factual findings which the judge did not make. In granting the petition for review in part and remanding the case, the court majority stated:

> In the case of the § 57.3360 violation, the ALJ appropriately found the first two *Mathies Coal* prongs satisfied, holding that "the essence of the violation, i.e., failure to provide ground support, contributed to the hazard of a roof fall." In making these findings on the third and fourth prongs, however, the ALJ considered the "combination of ground conditions . . . and . . . *the fact that a roof fall did occur in the area causing a fatality* and seriously injuring another miner." (Emphasis added). The ALJ's usage of the roof fall as a relevant event is unsupported. Because the ALJ never found whether the failure to provide roof support was the cause of the accident, [his] holding that the accident indicated that Eastern Ridge "significantly and substantially" violated § 57.3360 is a non sequitur. In order to rely on such a finding, the ALJ would need to have found that the failure to provide ground support caused the accident; otherwise, the actual

[4] The judge dismissed a third citation which alleged, in essence, that Eastern Ridge misused the jumbo drill by using the drill bit to rattle rock. *Id.* at 409-10.

> fact of a roof fall indicates nothing relevant about Eastern Ridge's actions.
>
> This logical error becomes most consequential in the ALJ's imposition of penalties. In assessing a penalty for the § 57.3360 violation, the ALJ noted that "the gravity of the violation was of a very high level as the *violation contributed to a fatal roof fall*." (Emphasis added). Similarly, in assessing a penalty under § 57.3201, the ALJ considered "the fact that the *violation herein contributed to a fatality*." (Emphasis added). . . . By relying on the fact that Eastern Ridge's actions contributed to the roof fall and the fatality in making [his] penalty assessments, the ALJ inappropriately took account of factors extrinsic to [his] own findings.
>
> For these reasons, we grant Eastern Ridge's petition for review and remand this case for further factfinding and analysis of the penalties to be assessed. Our ruling should not, however, be understood to imply that causation must be found in every case. The Commission may impose penalties without any reference to whether a roof fall or fatality occurred. But where an ALJ relies on the supposition that a mining company's failure to act was a contributing factor in a fatal roof fall, he must first find that the failure to act was actually a contributing factor.

Id. at 3-4.

C. Proceedings on Remand before the Commission

On July 2, 1998, we issued an order remanding the case to the judge. On remand, the judge's entire findings and analysis was as follows:

> I find that, in assessing a penalty, and evaluating the level of gravity of the cited violations, it is not necessary to make a specific finding of causation. The high level of gravity is based on the fact that the violation contributed to a fatal roof fall. Further, in evaluating a penalty, I place most weight on my finding that, for the reasons discussed in the original decision, the level of Respondent's negligence constituted aggravated conduct. Specifically, the record establishes that Respondent repeatedly ignored the warnings of its workers regarding observed unsafe conditions. Accordingly, I reiterate my initial findings regarding the penalty to be assessed.

20 FMSHRC at 758.

II.

Disposition

Eastern Ridge contends that by failing to make a finding of causation of the roof fall but, nevertheless, basing his S&S and unwarrantability determinations and enhanced civil penalties on the conclusion that the violations contributed to the roof fall, the judge repeated the same error contained in his initial decision, thereby ignoring the Fourth Circuit's remand instructions. ER PDR at 3-4; ER Br. at 16-17. Eastern Ridge further argues that substantial evidence does not support the judge's determination that its failure to provide ground support was either S&S or due to its unwarrantable failure. *Id.* at 17-25. Eastern Ridge also asserts that substantial evidence does not support the judge's finding that its failure to provide protection from falling material to miners was S&S and due to its unwarrantable failure. *Id.* at 26-31.

The Secretary contends that the determinations that the violation of section 57.3201 (location for performing scaling) was S&S and a result of the operator's unwarrantable failure and that the violation of section 57.3360 (inadequate roof support) resulted from the operator's unwarrantable failure, were briefed and argued before the Fourth Circuit without reversal and are now the law of the case. S. Br. at 19-21. She asserts that these determinations were "implicitly affirmed" and, therefore, the Commission cannot reconsider them. *Id.* at 21-24. Alternatively, the Secretary argues that those determinations are supported by substantial evidence. *Id.* at 25-34, 36-39. With regard to the S&S designation of section 57.3360, the Secretary contends that the judge failed to make a specific finding on remand, and therefore the Commission must either decide the issue or remand it to the judge for further analysis. *Id.* at 34. The Secretary argues that she does not have to prove that the violation caused the roof fall, but only that the violation was reasonably likely to result in an injury-causing event. *Id.* at 35. Finally, the Secretary asserts that in reviewing the penalty on remand, the judge declined to make a finding that the violation caused the roof fall but rather concluded the violation contributed to the hazard of a roof fall. *Id.* at 39-40. The Secretary suggests that if the Commission concludes that the judge did not follow the court's remand instructions, it should remand the case to the judge. *Id.* at 40.

"Law of the case rules have developed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Wright, Miller & Cooper, *Federal Practice and Procedure,* § 4478 at 874 (2d ed. Supp. 1999). "The 'law of the case' doctrine mandates, . . . , that where issues have been . . . decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court." *United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993). The law of the case applies to issues decided by implication, as well as to matters decided explicitly. *Id.; Hanna Boys Center v. Miller*, 853 F.2d 682, 686 (9th Cir. 1988).

We agree with the Secretary that the decision of the court of appeals established the law of the case and precludes us from reviewing the unwarrantable failure determinations of the

section 57.3201 and 57.3360 violations. The unwarrantable failure determinations were raised, briefed, and argued to the court. While the court did not specifically discuss those issues in its decision, it clearly addressed the underlying violations (19 WL 169213 at 2-3), the judge's S&S determinations (*id.* at 3), and his imposition of penalties as to both violations (*id.* at 3-4). Implicit in the court's decision, therefore, is affirmance of the unwarrantable failure determinations it did not explicitly address. Therefore, we cannot review these issues.[5]

With regard to the judge's S&S determinations, it is apparent from a careful reading of the court's decision that the S&S determinations as to both violations[6] were sent back to the judge because of inadequate factual findings, mainly with respect to the third and fourth elements of the S&S test set forth in *Mathies Coal Co.*[7] While the court majority saw those factual

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[5] Commission Riley disagrees with the majority holding that the circuit court's decision disposed of the unwarrantable failure determinations. He believes the court decision is much too vague and ambiguous on the question of unwarrantability to be held up as the "law of the case." Coupled with what he now regards as a less than precise remand order from the Commission to the judge and a seriously misguided decision on remand by the judge, Commissioner Riley opines that we have the ingredients for legal confusion, not good law. He believes that to gloss over this issue, merely guarantees protracted litigation of an important question in this case. He thinks it behooves the Commission to resolve this issue here so as not to leave it open as another avenue of appeal. Therefore, he would remand to the judge for further consideration the unwarrantable failure determinations, along with the S&S determinations and the assessment of penalties. Commissioner Verheggen concurs with Commissioner Riley in finding that the Fourth Circuit's decision did not dispose of the judge's unwarrantable failure determination, and that this issue should also be remanded.

[6] A close reading of the judge's decision on review before the court indicates that he relied on the lack of adequate ground support as a consideration in the S&S determinations involving the violations of both section 57.3360 (19 FMSHRC at 406-07) and section 57.3201 (*id.* at 408).

[7] The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on 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. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> 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)

findings as most directly impacting the level of penalties, those findings cannot be revisited without addressing the S&S determinations that provided the context in which the findings were initially made. Further, the Commission's remand decision states explicitly that the court decision held that "the judge's S&S determinations were inadequately supported because, while the judge did not make a finding that the violations caused the fatal accident, he relied on the contribution of the violations to the accident in reaching his S&S determination." 20 FMSHRC at 1133-34. Thus, the Commission's remand should have eliminated any confusion on the scope of issues before the judge.[8]

The judge's remand decision clearly does not address the issue of whether the violations of sections 57.3360 or 57.3201 were S&S. Nor does it address the record facts relevant to the judge's evaluation of the *Mathies* criteria that led to the court's remand. Further, in addressing the penalties assessed for the violations, the judge repeated virtually the same language that led the court majority to vacate and remand his prior decision. The court majority stated: "[T]he ALJ noted that 'the gravity of the violation was of a very high level as *the violation contributed to a fatal roof fall.*'" 1998 WL 169213 at 3 (emphasis in original). In the remand decision, while the judge stated that he was not making a finding of causation, he also stated: "The high level of gravity is based on the fact that *the violation contributed to a fatal roof fall.*" 20 FMSHRC at 758 (emphasis added). We conclude that the judge failed to conduct the additional "factfinding and analysis of the penalties to be assessed" (1998 WL 169213 at 4) that the Fourth Circuit required. Accordingly, we vacate the judge's decision and remand for further consideration.

On remand, we direct the judge to state whether he is relying on the failure to provide adequate ground support as a cause of the accident and as support for his S&S and penalty determinations and, if so, to indicate the basis in the record for doing so. We also remind the judge that he does not have to find that the violation led to the ground fall which caused a fatality in order to conclude that the violation was S&S. *See Arch of Kentucky,* 20 FMSHRC 1321, 1330 (Dec. 1998).

> 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.

Id. at 3-4 (footnote omitted); *accord Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

[8] Commissioner Marks agrees that the S&S as well as the penalty issues be remanded to the judge. However, for the reasons set forth in his concurring opinions in *United States Steel Mining Co.,* 18 FMSHRC 862, 868-75 (June 1996), and *Buffalo Crushed Stone, Inc.,* 19 FMSHRC 231, 240-41 (Feb. 1997), he believes that the ambiguous language of the Commission's *Mathies* test, 6 FMSHRC at 3-4, should be replaced with a clear test that is consistent with Congressional intent.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decision and remand the S&S determinations and penalty assessments for further consideration consistent with this decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET N.W., 6TH FLOOR
WASHINGTON, D.C. 20006

April 26, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 99-24-M
SPROULE CONSTRUCTION CO., INC.	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Marks, Riley, Verheggen, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On March 15, 1999, Chief Administrative Law Judge Paul Merlin issued an Order of Default to Sproule Construction Co., Inc. ("Sproule") for failing to answer the petition for assessment of penalty filed by the Secretary of Labor on December 11, 1998, or the judge's Order to Respondent to Show Cause issued on January 28, 1999. The judge assessed the civil penalties of $10,000.[1]

On March 25, 1999, the Commission received from counsel to Sproule a Motion to Vacate Any and All Defaults and for Leave to File Answer to Petition for Assessment. In the motion, counsel explains that Michael Sproule, Sproule's vice president, received a letter dated December 24, 1998, from the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding MSHA's policy on compliance assistance visits, and enclosing certain forms. Mot. at 2, ¶ 3. Counsel states that the operator mistakenly believed that the Show Cause Order and Order of Default were inapplicable in view of its response to the December 24 letter and involvement in the process of settling and resolving matters relating to the alleged violations. *Id.*, ¶ 4.

[1] The Secretary had proposed civil penalties in the amount of $10,600. The document setting forth the proposed penalties which was sent via facsimile to the Commission's Docket Office is nearly illegible.

On March 29, 1999, the Commission received an opposition to Sproule's motion from counsel in the Department of Labor's Regional Solicitor's Office in Chicago, Illinois. Counsel states that Sproule's motion should be denied because Sproule failed to show cause why the Default Order should be vacated. Resp. at 2. Counsel submits that the show cause order is written in plain language and the operator failed to follow the instructions. *Id.* at 1. On April 12, 1999, the Commission received a letter from the Appellate Litigation Division of the Office of the Solicitor confirming that the opposition filed by the Regional Solicitor's Office sets forth the Secretary's position.

The judge's jurisdiction in this matter terminated when his decision was issued on March 15, 1999. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). We deem Sproule's motion to be a timely filed petition for discretionary review, which we grant. *See, e.g.*, *Middle States Resources, Inc.*, 10 FMSHRC 1130 (Sept. 1988).

On the basis of the present record, we are unable to evaluate the merits of Sproule's position. This point is made abundantly clear in the Chairman's dissent when she states she is "frankly mystified as to what actions Sproule took upon receipt of [the December 24] letter." Slip op. at 4. We are unwilling to, on one hand, say that we are unable to understand what Sproule did, but on the other hand, rule against the company without giving it the opportunity to explain its actions.[2] In the interest of justice, we vacate the default order and remand this matter to the judge, who shall determine whether relief from default is warranted. *See General Road Trucking Corp.*, 17 FMSHRC 2165, 2166 (Dec. 1995) (deeming letter as timely filed petition for discretionary review, vacating default, and remanding to judge where pro se operator confused about Commission's procedural rules); *Amber Coal Co.*, 11 FMSHRC 131, 132-33 (Feb. 1989).

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

[2] Commissioner Marks finds the above comments regarding Chairman Jordan's dissent to be both unnecessary and superfluous. He, therefore, disassociates himself from them.

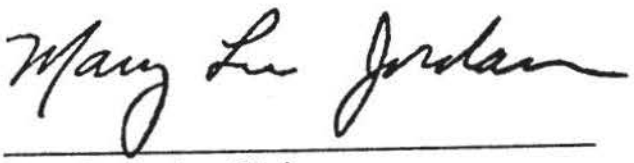
Chairman Jordan, dissenting:

I respectfully disagree with my colleagues that, based on the present record, we cannot evaluate the merits of Sproule's position. Rather, it is clear to me from my review of the record that Sproule does not warrant relief in this case. Accordingly, I would affirm the order of default in this proceeding.

Sproule attempts to excuse its lack of response to the Order to Show Cause by relying on its actions generated by MSHA's letter of December 24. However, I am frankly mystified as to what actions Sproule took upon receipt of that letter. Sproule has alluded to them in only the most general of terms. It refers to its "action in tending to the letter of December 24." Mot. at 2, ¶ 4. It mentions that it "had undertaken the appropriate action in addressing issues" raised by the letter. *Id.*, ¶ 5. It provides no further information whatsoever.[1]

Moreover, the Secretary is absolutely correct that the subsequent Order to Show Cause was clearly written, and that Sproule simply failed to follow the judge's instructions. Resp. at 1, ¶ 3. The Order explained the need for an Answer, described its content, and verified that no Answer had yet been received. The judge ordered Sproule to submit an Answer within 30 days or to show good reason why it had failed to do so. He made clear that if Sproule did not, it would be placed in default and ordered to pay the penalty.

The judge's Order was precise and unambiguous. It put Sproule on the alert that action on its part was necessary in order to avoid a default order. Sproule took no action. Consequently, it should pay the penalty ordered by the judge.



Mary Lu Jordan, Chairman

[1] Although my colleagues in the majority suggest that Sproule has not yet had the opportunity to explain its actions (slip op. at 3), I believe that is the very purpose of the motion to vacate which Sproule submitted to us. The majority's willingness to remand this matter to the judge on the basis of this motion, which is bereft of any substantive rationale, appears to transform this process into a mechanical one, in which all a party need do in similar circumstances is request relief.

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ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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April 8, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-153
Petitioner	:	A.C. No. 41-03164-03542
v.	:	
	:	Jewett Mine
NORTHWESTERN RESOURCES,	:	
Respondent	:	

DECISION

Appearances: Ned Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Charles C. High, Jr., Esq., Kemp, Smith, Duncan & Hammond, P.C., El Paso, Texas, for the Respondent.

Before: Judge Feldman

This proceeding concerns a petition for assessment of civil penalty filed by the Secretary of Labor against Northwestern Resources (the respondent) pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petition seeks to impose a total civil penalty of $734.00 for seven alleged violations of the mandatory safety standards in 30 C.F.R. Part 77 of the Secretary's regulations governing surface coal mines. Three of the seven cited conditions were designated as significant and substantial (S&S).[1] These matters were heard on January 20 and January 21, 1999, in Huntsville, Texas.

At the hearing, the parties agreed to settle one of the citations and they waived the filing of post-hearing briefs with respect to three of the citations so that a bench decision could be entered with respect to those citations. The settled citation and bench decisions, with non-substantive edits, will be addressed in the initial portion of this decision.

The parties have filed post-hearing proposed findings and replies with respect to the remaining citations that are contested by the respondent. These citations involve the issue of the

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[1] A violation of a mandatory safety standard is properly characterized as S&S if it is reasonably likely that the hazard contributed to by the violation will result in an event, *i.e.*, an accident, resulting in serious injury. *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984).

circumstances under which deposits of hydraulic or lubricating oils on engines, transmissions and frames of equipment operating at a surface mine constitute a prohibited accumulation of combustible materials under section 77.1104, 30 C.F.R. § 77.1104, of the Secretary's mandatory safety standards.[2]

I. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes an S&S violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining, Inc.*, 7 FMSHRC 1125, 1129, (August 1985), the Commission explained its *Mathies* criteria 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).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal*

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[2] As discussed *infra*, the Secretary concedes that petroleum deposits in engine compartments and on transmissions are unavoidable consequences of operating internal combustion equipment, and, that not all such deposits constitute violations of section 77.1104.

Company, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.,* 18 FMSHRC 508 (April 1996).

This decision also applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> . . . 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.

The parties stipulated that the respondent is a large operator that is subject to the jurisdiction of the Mine Act and that the small civil penalty sought to be imposed by the Secretary will not affect the respondent's ability to continue its business. The evidence further reflects that Northwestern abated the cited conditions in a timely manner. (Joint Ex. 1). Northwestern does not have a significant history of previous violations in that, during the two years preceding the issuance of the citations in issue, Northwestern was cited for only 14 violations, ten of which were designated as non S&S. (Ex G-8).

II. Findings of Fact and Bench Decisions

This matter concerns seven citations that were issued as a result of a regular Triple A inspection that was conducted during January and February 1998 by Mine Safety and Health Administration (MSHA) Inspector Alfonso Castaneda, Jr., at Northwestern's Jewett Mine, a surface coal facility located in Leon County, Texas. Although all of the citations were initially characterized as S&S, three of the citations were subsequently modified to delete the S&S designation following MSHA Health and Safety Conferences conducted on March 31 and April 28, 1998.

a. Citation No. 7599225

Citation No. 7599225 was issued by Inspector Castaneda on February 12, 1998, for accumulations of loose coal and fine coal dust, prohibited by section 77.1104, that were located under the No. 1 Belt that transports coal from the coal hopper to the coal transfer tower. The cited condition was designated as S&S and the Secretary proposed a civil penalty of $178.00. At the hearing, Northwestern agreed to accept the citation as issued, and it agreed to pay the $178.00 proposed civil penalty. (Tr. 340). Accordingly, the parties' settlement of Citation No. 7599225 was approved on the record and **Citation No. 7599225 shall be affirmed**.

b. Citation No. 7599226

Castaneda testified that, during the course of his inspection, he asked miners if they had any safety concerns. A miner expressed concern about the adequacy of the lights around the No. 28 dragline shoes. Consequently, Castaneda performed an evening shift light check at the No. 28 dragline. Each dragline has two sets of "star wars" type shoes that move approximately eight feet per step when it is necessary to maneuver the dragline. Castaneda observed a shadow area adjacent to the dragline shoes that he concluded was not adequately illuminated by the dragline lights. However, Castaneda did not take any objective measurements of the illumination in the area. (Tr. 39). Castaneda stated the shoe area is the location where the dragline oiler mounts and dismounts the dragline. Castaneda testified the oiler would have to step down a distance of approximately six inches to two feet depending on the terrain. Castaneda concluded it was reasonably likely that the oiler would sustain a serious slip and fall injury. Consequently, he issued Citation No. 7599226 alleging an S&S violation of the mandatory safety standard in section 77.207, 30 C.F.R. § 77.207. This mandatory standard requires, in pertinent part, "illumination sufficient to provide safe working conditions."

In defense of the citation, Northwestern elicited contradictory testimony from Castaneda with regard to whether Castaneda believed the illumination was inadequate or whether he was relying on the miner's complaint as the basis for issuing the citation. Moreover, Castaneda conceded that Northwestern had increased the wattage of the dragline lights from 400 watts each to 1,000 watts, and that Northwestern had added additional lights to the dragline to increase the number of lights from those that were initially installed.

The Secretary did not call any miners to testify that the illumination was inadequate. However, Northwestern called employee Terry Mosely, a dragline oiler, who opined that the light around the No. 28 dragline shoes was adequate. (Tr. 74). Mosely testified the lighting problem at the No. 28 dragline primarily was caused by lights on the adjacent No. 27 dragline that was operating in the same pit. Mosely testified the lights from the No. 27 dragline were "blinding" personnel at the No. 28 dragline.

At the hearing, the following bench decision was entered with respect to Citation No. 7599226:

Citation No. 7599226, which cites a violation of section 77.207, states:

> The dragline 28, Marion 8750, outside illumination was not sufficient to provide safe working conditions. The shadow cast alongside the propel, shoe walkway, and on the ground adjacent to the propel shoes made it difficult for a person to safely walk and mount the machine. The machine was in use at the D pit.

Section 77.207 provides:

> Illumination sufficient to provide safe working conditions shall be provided in surface structures, paths, walkways, stairways, switch panels, loading and dumping sites and working areas.

Thus, the operative phrase is "illumination sufficient to provide safe working conditions." Whether the illumination required by the mandatory standard is adequate to provide safe working conditions must be viewed in the context of the circumstances upon which personnel will be working in the area being illuminated. Here, the concern is for the oiler who is called upon to mount and dismount the dragline via a ladder of several steps that is installed adjacent to the shoes of the dragline. The uncontroverted testimony is the distance of descent from the bottom of the ladder to the surface varies between six inches and two feet depending on the terrain.

The dragline's initial 400 watt lights installed on the dragline were replaced with 1,000 watt lights. In addition, additional lights were installed. Although there was reference made to Terry Mason, a dragline oiler who reportedly complained to Castaneda about the lights, Mason was not called by the Secretary as a witness in support of the citation. On the other hand, the respondent presented testimony from Terry Mosely, another oiler employed by Northwestern, who opined the lighting was adequate.

The adequacy of lighting, in the absence of objective lumen measurements, is subjective. Although reasonable people may differ with regard to what constitutes adequate lighting conditions, Castaneda's opinion is unsupported by, and outweighed by Moseley's testimony. Given the Secretary's burden of proving the fact of a violation, the evidence is inadequate to support Citation No. 7599226. **Accordingly, Citation No. 7599226 shall be vacated**. (Tr. 342-45).

c. Citation No. 7599212

During the course of his inspection, Castaneda observed Northwestern's D106 Komatsu bulldozer in the D pit area. The bulldozer had a fire suppression system with discharge hoses and nozzles on the right and left sides of the dozer. The discharge hoses were connected to metal canisters containing fire suppression chemicals that were located on the right and left sides of the dozer. Castaneda noted the actuating line was disconnected from the right canister, thus disabling the right side discharge hoses and nozzles. Castaneda recalled the threads on the disengaged connection fitting were rusted which gave him reason to believe this condition had existed for a considerable period of time.

Consequently, Castaneda issued Citation No. 7599212 citing an alleged violation of section 77.1110, 30 C.F.R. § 77.1110. This mandatory standard requires firefighting equipment to be continuously maintained in a usable and operative condition. Although the cited condition was initially designated as S&S, it was subsequently modified to a non S&S citation.

The respondent does not dispute that the right actuator was disconnected and that the system was not fully functional. However, the respondent asserts that the right side canister system was redundant in that the left side canister and hoses, alone, constituted an effective fire suppression system. In addition, the respondent argues that the actuator connection had not been repaired because it recently had become disconnected as evidenced by the fact that the malfunction had not been noted in the preshift book. Thus, the respondent asserts, somewhat inconsistently, that although it believed the right side discharge hoses to be superfluous, it would have repaired the condition immediately had it been aware of the situation. Finally, the respondent argues that fire extinguishers, which were available to the dozer operator, are sufficient to satisfy the cited mandatory standard.

The following bench decision was issued for Citation No. 7599212:

Citation No. 7599212, citing a violation of section 77.1110, states:

> The fire suppression system provided on the Komatsu bulldozer, Model D375A, Company No. 106, was not maintained in an operative condition. The actuator line had come loose from the actuating cartridge. The bulldozer was in use at the D Pit.

Section 77.1110 requires that "firefighting equipment shall be continuously maintained in usable and operative condition." I am sensitive to the respondent's argument that the cited fire suppression system was not mandatory and that, ordinarily, fire extinguishers are adequate. However, once the respondent took it upon itself to install this fire suppression system, it had a continuing duty to maintain it. It is undisputed that, while the system was operative on the left side, it was inoperative on the right side. Whether or not the left side alone was sufficient to extinguish a fire, the malfunction on the right side undoubtedly would cause a diminution in effectiveness.

Turning to the respondent's assertion that the condition had just occurred, notwithstanding Castaneda's testimony concerning the corrosion on the actuator connection, the Commission has noted the failure to note a condition in a preshift book does not establish the condition occurred after the shift began. *See Peabody Coal Company* 14 FMSHRC 1258, 1262 (August 1992) *citing Eastern Associated Coal Company*, 13 FMSHRC 178, 187 (February 1991). To the contrary, the condition may have been overlooked, or, it may not have been considered hazardous in which case it would continue to be excluded from the preshift notations.

In any event, the evidence supports the cited violation. **Accordingly, Citation No. 7599212 is affirmed, and the $50.00 civil penalty proposed by the Secretary for this non S&S condition shall be assessed for this citation.** (Tr. 345-47).

d. Citation No. 7599214

On January 28, 1998, Castaneda inspected the auxiliary room of the Caterpillar backhoe, Model LS01. Although this area is referred to as "a room" it is more accurate to describe it as a very small tool shed that is located under the operator's compartment. (See photographs admitted as Exs. R-9A-9F). The area is accessed from a door that is located to the left of a ladder that is affixed to the side of the backhoe. The ladder is used to climb from the surface onto the backhoe catwalk structure. The dimensions of the subject "room" are 49 inches wide by 50 inches long. Upon opening the door to this area, Castaneda observed tool boxes, wrenches, sledge hammers and various machine parts lying on the floor.

Based on his observations, Castaneda issued Citation No. 7599214 citing the respondent for an alleged violation of section 77.208(a), 30 C.F.R. § 77.208(a), that provides, "materials shall be stored and stacked in a manner which minimizes stumbling or fall of material hazards." Although the citation was issued as S&S, it was subsequently modified to delete the S&S designation as a result of a Health and Safety Conference after MSHA conceded the cited area "was not a high traffic area" where exposure to serious injury was likely. Indeed.

At the hearing, the following bench decision was issued with respect to Citation No. 7599214:

> The subject area is approximately 4 feet by 4 feet. The cited standard requires that materials be stored and stacked in a manner so as to minimize stumbling and falling. The standard must be reasonably interpreted to require that tools and other materials be kept in a corner or along a wall so that mine personnel can traverse an area without tripping and falling. However, this area, which is analogous to a truck bed where tools are stored, is not a walk through area as the entire area can be reached by standing in place. Thus, MSHA's characterization of this space as "not a high traffic area" is disingenuous in that it is not a traffic area at all.
>
> To determine if a broadly worded mandatory standard applies to a given factual situation the Commission applies the reasonably prudent person test. *Ideal Cement Company*, 12 FMSHRC 2409, 2416 (November 1990). A reasonably prudent person familiar with the purposes of the cited mandatory standard would

not think the standard was applicable to this situation. MSHA's attempt in this instance to micro manage the placement of tools in this closeted area trivializes the Mine Act, and, in so doing, undermines its purpose. **Accordingly, Citation No. 7599214 shall be vacated**.

III. Further Findings and Conclusions

The remaining three citations concern alleged violations of section 77.1104 as a result of Castaneda's observations of fuels, oils, or lubricants on internal combustion engines, frames and transmissions of equipment used in the mining process. Section 77.1104 provides:

> Combustible materials, grease, lubricants, paints, or flammable liquids shall not be allowed to accumulate where they can create a fire hazard.

Thus, in considering whether violations of section 77.1104 have occurred the Secretary must demonstrate: (1) the presence of combustible material; (2) that the combustible material was "allowed" to accumulate; and (3) that the accumulations are located in an area "where they can create a fire hazard."

In evaluating the merits of the citations discussed below, the first element of a section 77.1104 violation is present in that it is undisputed that deposits of hydraulic and lubricating oils and diesel fuel are combustible. The third element requires an analysis of potential ignition sources and their proximity to the combustible material.

However, the second element of section 77.1104, namely whether the cited deposits are "accumulations," and, if so, whether they were "allowed" to accumulate, raise difficult issues that must be resolved on a case by case basis. For example, the Secretary's characterization of areas of oil deposits on engines, hoses and frames of heavy duty mining equipment as "accumulations" begs the question. In this regard, Inspector Castaneda conceded not all oil deposits on engines constitute violations of section 77.1104, stating that the issue is one of degree. (Tr. 208-09, 231-33). Moreover, Castaneda admitted internal combustion engines are designed to operate safely despite seepage from gaskets and hoses, and, that engine deposits are commonplace and not ignitable from engine heat. (Tr. 212). Specifically, Castaneda testified:

> COURT: The issue of oil, lubricants, hydraulic oil, in an engine compartment, in your experience, I assume you've frequently come into contact with oil on trucks; right?
>
> A. Yes.

COURT: If you looked at the engine[s] of . . . heavy duty truck[s], what percentage of them would be clean as opposed to engines with residue or oil deposits on them? Isn't it a common occurrence to have oil deposits on an engine particularly engines, backhoes, this type of equipment? Isn't it hard to keep it free of residue?

A. On all engines, yes.

COURT: So there was something about this condition that distinguishes normal residue; is that --

A. About the amount that I would normally expect to see.

COURT: Would the heat from the engine be a source of ignition?

A. Just the ambient heat?

COURT: Yes, from the engine itself.

A. No.

COURT: So the materials on the engine itself, the engine running, the engine wouldn't be an ignition source?

A. No. (Tr. 211-12).

Although the subject citations primarily concern "accumulations" of oil deposits, the citations dealing with the backhoe and coal hauler also concern deposits of fine coal dust. These pieces of equipment operate "knee deep" in outdoor, open coal pits. In this regard, a video was admitted depicting Jewett Mine heavy duty equipment operating in coal beds. *See* Ex. R-26. Castaneda repeatedly admitted it is impossible to prevent fine coal dust deposits on the frames and in the compartments of such equipment. (*See, e.g.*, Tr. 193-94, 236, 283-86). For example, Castaneda testified:

COURT: When we saw the video [Ex. R-26] on the general operations of the Jewett Mine, am I correct that these haulers sometimes actually ride in these coal pits; is that correct?

A. They always go to the coal pits.

COURT: That's what I'm saying. They're in the coal pit?

A. Yes, sir.

COURT: So they're basically riding through extensive areas of coal?

A. Yes, sir, they are.

COURT: How do you keep any degree of coal particles from "accumulating" underneath the underbelly of a hauler if it's riding through piles of coal?

A. You're not.

COURT: How do you determine when you're doing an inspection what is and what isn't a violation with regard to the coal that's on the equipment itself?

A. I have to make a decision on whether it is or [is] not when I'm looking.

COURT: Whether it's normal accumulations or over and above?

A. Whether it's normal accumulations or it's above and beyond. All these haulers, they haul coal. You're going to get some coal dust on them, but if you don't have the oil and something to make it stick to the frames or the equipment, then coal dust, whenever it's dry, it can blow off as soon as it gets on the road.

COURT: I see. Again these haulers, I think of a hauler as a dump truck that's loaded, but these particular haulers actually drive through mounds of coal in the pit; is that right?

A. Not in the pit.

COURT: I remember in the video that I saw areas where they seemed to be riding over --

A. They're riding on top of the solid coal, and then the backhoe or the . . . will rake the coal out and swing over and dump it into the bed of the truck.

COURT: Okay. So what I recall now was that it was riding on the areas of solid coal.

A. And then it goes on a dirt road to the coal stop light where, depending upon what the plant wants, they'll either go over to [inaudible] or they'll go over to the coal stock pile.

COURT: Let me ask you this question. This issue of transmission[s], I'm thinking in terms of [a] transmission mechanism, the rear end of a vehicle. In your opinion, is it common to have residue of let's say seepage of transmission fluids, oil, in and around the transmission boxes and the rear end of these vehicles, you know, the underbelly of the vehicle?

A. Yes.

COURT: If you look at the underbelly of such a vehicle, and you saw, as I said, that it was coated, not with measurable amounts, but just coated in the sense that there was a deposit of transmission fluid and hydraulic oils, again on the transmission and the rear end of a vehicle like this, do you consider that to be a violation of 77.1104?

A. This is a combination of coal dust and oil or coal dust without oil?

COURT: If you have any degree of residue, I would assume . . . in fact, that's the quandary that I have; if you have any degree of residue and you're riding through areas of coal, how do you prevent some dust from adhering to the coating that's not uncommon that forms on transmissions and rear ends of vehicles:

A. You will not prevent it. You're going to --

COURT: Is that a violation then, do you think?

A. It would depend upon the degree; I mean, the amount of accumulation; just merely having dry coal dust on a metal frame in its normal operations, I would not think that I would issue a citation on that.

COURT: What about the coating of coal dust and hydraulic fluids on the transmission and rear end, again the underbelly of the vehicle?

A. It would depend upon the degree.

COURT: But these are not easy decisions, are they?

A. Not to me they're not.

COURT: I appreciate that these are difficult calls, and that's what we're grappling with here today. (Tr. 283-86).

In the context of the above analysis and testimony, we now consider the subject section 77.1104 citations.

a. Citation No. 7599213 - Hitachi Backhoe B008

During the course of his inspection, Castaneda opened the door to the engine compartment of the Hitachi backhoe. Castaneda observed an area of hydraulic oil and lube oil about 3 feet by 3 feet in size "mostly on the surfaces of the hose and frame" along with some fine coal dust. The backhoe was in operation and had fine coal dust on it because it was loading haulers. (Tr. 193-4).

Castaneda considered the oil deposits in the engine compartment, and on and around the hydraulic pump motors that were located outside the engine compartment at the front of the backhoe, to be excessive and more than a "normal accumulation." (Tr. 232). Although Castaneda did not identify a specific leak in the engine compartment, Castaneda determined, based on information provided by Northwestern's maintenance supervisor, Ronald Carmichael, that the hydraulic pump at the front of the backhoe was leaking because an O-ring had been left off after the pump had been overhauled. (Tr. 194, 214-15).

Consequently, Castaneda issued Citation No. 7599213, alleging a violation of section 77.1104, because:

> Combustible materials were allowed to accumulate on the Hitachi Backhoe, B008, where they created a fire hazard. Hydraulic oil, lube oil and fine coal dust had accumulated on the engine, pumps, hoses, and frame of the backhoe. The backhoe was in use at the D Pit loading coal haulers.

Castaneda concluded the violation was S&S although he was unable to provide convincing testimony concerning any potential ignition sources in the vicinity of the cited accumulations. Flammable liquids have a flash point of less than 100 degrees Fahrenheit. Combustible materials, such as the cited oil lubricants, have flash points above 100 degrees Fahrenheit. As previously noted, Castaneda conceded the ambient heat from the engine was an insufficient ignition source. (Tr. 212). Although he relied on the exhaust manifold as a potential

source of ignition he did not explain why the exhaust heat source is more dangerous than the heat generated by the engine that is in direct contact with the cited deposits. Castaneda also stated that insulation on electrical wiring that could become damaged and create an ignition spark could be another ignition source although he admitted a defective spark plug wire was not a significant source of ignition. (Tr. 214).

i. Discussion and Evaluation

As a general proposition, not all combustible accumulations are prohibited accumulations, particularly at a surface mine where underground considerations of permissible equipment, coal dust suspension and propagation, are not safety concerns. (*See* 30 U.S.C. § 878(i) pertaining to permissible equipment in underground mines; *see also* Tr. 210, 301-02). For example, a coal stockpile or a wet oil spot on the ground are not prohibited accumulations.

Moreover, oil deposits on engines, hydraulic motors and transmissions on surface mine equipment must be viewed in context because they are not "accumulations" as that term is normally applied to coal dust accumulations. Unlike coal dust that can accumulate in depth over a period of time, oil "accumulations" drip off on the ground, or are vaporized from the heat of the engine. (Tr. 234-36).

The Commission has held that a violative "accumulation" exists "where the quantity of combustible materials is such that, in the judgement of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present." *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). The mine inspector's judgement is subject to a challenge before the administrative law judge. *Id.* at 2808 n.7. The inspector's judgement must be reviewed judicially by applying an objective test of whether a reasonably prudent person, familiar with the **surface mining industry** and the protective purpose of the cited mandatory safety standard, would have recognized the hazardous condition that the regulation seeks to prevent. *Utah Power & Light Company, Mining Division*, 12 FMSHRC 965, 968 (May 1990).

Having said that not all combustible accumulations are prohibited, we turn to the provisions of the cited mandatory standard in section 77.1104. As an initial matter, it is important to recognize the distinction between establishing the fact of occurrence of a section 77.1104 violation, and establishing that such a violation is S&S. To establish the fact of occurrence, the Secretary must show that an operator "allowed" combustible materials to accumulate at a location and in a manner that are ill advised. In other words, routine engine oil deposits, or other lubricating oil deposits and residues, that are a consequence of normal operations do not constitute a violation of section 77.1104. However, a discrete operational defect, manifest by excessive accumulations of leaking hydraulic oils and lubricants, constitutes a violation of section 77. 1104. Here, the evidence reflects combustible material was permitted to accumulate on the subject backhoe by virtue of a defective or missing O-ring on the hydraulic pump. Consequently, the Secretary has demonstrated a violation of section 77.1104.

Turning to the S&S issue, the Secretary bears the burden of proving the S&S nature of a violation. *Union Oil Co. Of Cal.*, 11 FMSHRC 289, 298 (March 1989); *U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). An S&S violation of section 77.1104 requires a demonstration of a "confluence of factors," such as presence of a fuel source in proximity to a potential ignition source, to establish a reasonable likelihood that ignitions or explosions will occur. See *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1988). As discussed above, Castaneda's testimony with regard to the likelihood of ignition sources was inconsistent and unconvincing. Given Castaneda's concession that not all oil deposits on engines and transmissions are violations, it is clear that such deposits are not significant risks of fire.[3] **Accordingly, Citation No. 7599213 shall be modified to delete the S&S designation.**[4]

The Secretary initially proposed a civil penalty of $178.00 for Citation No. 7599213. Although the S&S designation has been deleted, the degree of Northwestern's negligence was relatively high in view of its failure to replace the missing O-ring. Accordingly, consistent with the penalty provisions of section 110(i) of the Mine Act, **a civil penalty of $100.00 shall be imposed for this violation**.

b. Citation No. 7599215 - Light Plant No. 15

Northwestern uses light plants at various locations at the mine to provide additional lighting at night. A light plant consists of lights mounted on a small trailer-like device that can be moved from location to location as needed. (Exs. R-11A-E; Tr. 251). The lights are powered by a diesel engine which starts and stops automatically by a photocell. In the morning, when sufficient light appears, the photocell will cause the engine to stop and the lights to go out. As dusk appears and it becomes dark, the photocell causes the engine to start and the lights to come on. In addition, the light plant is equipped with two warning lights. An amber light comes on when the light plant is ready and could start at any time. When fuel becomes low, a blue light begins flashing to indicate that additional fuel is needed.

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[3] As discussed *infra*, the conclusion that Castaneda failed to provide persuasive testimony that an explosion or fire was reasonably likely to occur is consistent with MSHA's non S&S determination in Citation No. 7599216 that there were no "obvious ignition sources" near "hydraulic oil and coal dust . . . on the transmission, hoses and frame of [a Euclid] coal hauler." (Ex. G-5, p.3).

[4] In her post-hearing Proposed Findings, the Secretary refers to a Mine Safety and Health Administration Technical Support report that noted there were 106 mobile diesel equipment fires during the years between 1978 and 1983. (Sec.'s Br. at p.9-10). This information has not been considered because it was not presented at the hearing. Moreover, the circumstances behind these reported fires are unknown and they are, therefore, of little evidentiary value in determining whether the cited condition was likely to contribute to a fire and resulting injury.

Castaneda examined the light plant located on the highwall of the D Pit that was used at night to provide additional lighting to the pit floor below. The light plant was not operating at the time. No employee worked near the light plant. The nearest employee working was approximately 150 to 200 yards away. (Tr. 270).

Castaneda testified that he opened the engine door and saw evidence of diesel fuel running down the side of the engine. (Tr. 253). Castaneda determined there was a leak in a return line that recirculates excess diesel fuel that is not sprayed into the engine by the injectors. The respondent's safety coordinator, David Evans, admits there was a leak in the diesel fuel line that caused some diesel fuel to leak onto the side of the engine.

As a result of his observations, Castaneda issued Citation No. 7599215 citing a violation of section 77.1104 for allowing combustible material, including diesel fuel, to accumulate where it could cause a fire hazard on the Light Plant No. 15. In view of the fact that employees did not work in proximity to the light plant, Castaneda designated the violation as non S&S in nature. The Secretary proposes a civil penalty of $50.00 for this violation.

As discussed above, a violation of the mandatory safety standard in section 77.1104 occurs if the respondent allowed, by virtue of a discrete operational defect, combustible materials to accumulate. Here the respondent permitted diesel fuel leakage, albeit in small amounts, to run down the side of the engine. Operating the light plant in a state of disrepair, given the resultant diesel fuel accumulation, constitutes a violation of section 77.1104. **Accordingly, Citation No. 7599215 shall be affirmed and the $50.00 civil penalty proposed by the Secretary shall be assessed.**

c. Citation No. 7599216 - Coal Hauler

Castaneda and David Evans, Northwestern's safety coordinator, inspected coal hauler No. 001 at the D Pit and observed some oil dripping down the side of the transmission. Evans testified that occasional transmission oil discharge through the transmission's oil breather was a normal occurrence. Northwestern's maintenance supervisor, Ronald Carmichael opined it is impossible to operate Euclid coal haulers, because of their design, without getting some transmission oil through the breather onto the outside of the transmission. Tr. 333, 338. The Euclid transmission is designed to operate as a brake when going down a slope. Downshifting, as well as operating under a heavy load, causes heat buildup in the transmission. The heat causes the transmission fluid to expand which results in the release of "little burps" from the breather. Tr. 333-334.

As a result of his observations, Castaneda issued Citation No. 7599216 alleging a violation of section 77.1104 because:

> Combustible materials were allowed to accumulate on the Euclid coal hauler, Company No. 001, where they could create a fire hazard. Hydraulic oil and coal dust was present on the transmission, hoses and frame of the coal hauler. The coal hauler was in use at D Pit.

Although the citation was initially issued as S&S, it was modified to delete the S&S designation on May 4, 1998, as a result of a Health and Safety Conference. In modifying the citation, it was noted that, "the accumulation on this unit was not excessive nor was it in an area where there were obvious ignition sources." (Ex. G-5, p.3).

At the hearing Castaneda stated he inspected two Euclid haulers at the Jewett Mine. One Euclid was observed at the fuel station with hydraulic oil leaking out of a rear oil tank onto the ground in the nature of an overflow. Another Euclid was inspected at the D Pit located six miles from the fuel station. The Euclid at the D Pit had the transmission leak. The respondent contends Castaneda has confused the extensive oil leaking to the ground from the Euclid at the fuel station with the normal small amount of transmission fluid discharged from the breather on the cited Euclid at the D Pit. Although Castaneda insists the cited Euclid had an extensive transmission leak, Castaneda's recollection of his inspection that occurred approximately one year earlier is undermined by the results of the Health and Safety Conference that was conducted shortly after the subject inspection. Consequently, the evidence supports the testimony of Evans and Carmichael that the cited transmission discharge was "not excessive" or otherwise extraordinary.

As previously discussed, normal petroleum discharges and deposits through breathers, or seepage through hoses and gaskets, do not constitute violations of section 77.1104 because the operator has not "allowed" combustible accumulations to occur. It is also significant that MSHA concedes "there were no obvious ignition sources" in the vicinity of the cited "leak." The absence of a showing of a potential ignition source also precludes a finding of a section 77.1104 violation because the plain language of this standard requires a showing that the cited accumulations "can create a fire hazard." **Accordingly, Citation No. 7599216 shall be vacated.**

ORDER

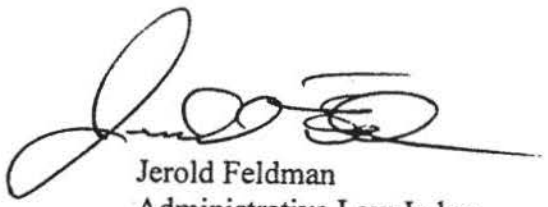
In view of the above, **IT IS ORDERED** that Citation Nos. 7599226, 7599214 and 7599216 **ARE VACATED**.

IT IS FURTHER ORDERED that, pursuant to the parties' settlement agreement, Citation No. 7599225 **IS AFFIRMED**.

IT IS FURTHER ORDERED that Citation Nos. 7599212 and 7599215 **ARE AFFIRMED.**

IT IS FURTHER ORDERED that Citation No. 7599213 **IS MODIFIED** to delete the significant and substantial designation.

ACCORDINGLY, IT IS ORDERED that Northwestern Resources pay a total civil penalty of $378.00 within 45 days of the date of this Decision. Upon timely receipt of payment, Docket No. CENT 98-153 **IS DISMISSED.**



Jerold Feldman
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Falls Church, Virginia 22041

April 19, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-159-M
Petitioner	:	A. C. No. 23-00746-05530
v.	:	
	:	Docket No. CENT 98-207-M
K.R. WILSON CONTRACTING, INC.,	:	A.C. No. 23-00746-05531
Respondent	:	
	:	Sullivan Plant

DECISION

Appearances: Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Michael O. McKown, Esq., Ziercher & Hocker, P.C., St. Louis, Missouri, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against K.R. Wilson Contracting, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege five violations of the Secretary's mandatory health and safety standards and seek penalties of $100,860.00. A hearing was held in St. Louis, Missouri. For the reasons set forth below, I vacate one citation, affirm four and assess penalties of $40,688.00.

Settled Citations

At the beginning of the hearing, counsel for the Secretary advised that the parties had agreed to settle the two citations in Docket No. CENT 98-207-M. The agreement provides that the penalty will be reduced from $860.00 to $688.00. Based on the representations of the parties, I concluded that the settlement was appropriate under the criteria set forth in section 110(i) of the Act, 30 U.S.C. § 820(i), and approved the agreement. (Tr. 16-18.) The provisions of the agreement will be carried out in the order at the end of this decision.

Background

The Respondent operates a small limestone quarry in Sullivan, Missouri, known as the "Sullivan Plant." At about 12:30 p.m., on June 20, 1997, Larry Bouse, the plant foreman, began replacing a brake expander tube on the left rear wheel of a 1966 Caterpillar, Model 988A, front-end loader. This required him to elevate and block the loader on stands. Since it was necessary to remove the wheel, one end of the fender over the wheel was disconnected and the fender, which weighed 425 pounds, was raised to an almost upright position by the boom hoist on a hoist truck. The fender was then secured by connecting a portable ratchet hoist, commonly called a "come-along,"[1] to the top step[2] on the fender and to an "eye piece" on the top of the roll-over protective structure of the loader.

By 4:30 p.m., Bouse had completed the brake repairs and was attempting to get the wheel back onto the loader. Ronald Haanpaa and Vernon Abney, who had completed work for the day, offered to assist Bouse in completing his work. Haanpaa got into the hoist truck to lift the wheel back into position with the boom hoist. Abney got in the wheel well to guide the wheel back onto the axle and Bouse got on the hood of the loader to communicate between Haanpaa and Abney. When they still could not get the wheel on, Abney suggested that they completely remove the fender. He was coming out of the wheel well when the "come-along" failed, releasing the fender. The fender struck Abney in the forehead near the hair line and pushed his head back into the frame of the loader. Abney, who was not wearing a hard hat at the time, suffered massive head injuries and died as a result.

MSHA began its investigation of the accident the next day. On July 21, 1997, three citations were issued to the operator as a result of the accident. Citation No. 7856213 alleges a violation of section 56.14211(b) of the regulations, 30 C.F.R. § 56.14211(b), because: "On June 20, 1997 an employee was fatally injured when a raised fender of a 988A Caterpillar front end loader fell striking him. The portable hoist, which was used to secure the hinged 425 pound fender, failed. (Govt. Ex. 1.) Citation No. 7856214 charges a violation of section 56.15002, 30 C.F.R. § 56.15002, in that: "When [the employee] left his truck to assist with the loader repairs, he did not put on a hard hat where there was a danger of falling objects." (Govt. Ex. 1.) Finally, Citation No. 7856515 asserts a violation of section 56.14100(b), 30 C.F.R. § 56.14100(b), since:

> The portable hoist, which was used to secure the hinged 425 pound fender failed when the cable compression clamp broke.

---

[1] A "come-along" is "a little drum that a cable wraps around." The drum is in a frame which has a ratcheting device operated by a handle. As the handle is ratcheted in one direction, it rotates the drum, causing the cable to wrap around it. As it is ratcheted in the other direction, the cable is played out. The frame has a hook on one end and the cable extends out from the frame and has a pulley with a hook attached to it. (Tr. 283-84.)

[2] The fender had steps on it to be used in climbing up on the loader.

> Additionally, it had loose bolts, the pulley bearing would not roll and the 3/16-inch cable was attached with a bolt marked "CAT." The cable had broken wires and the rating information was missing. The handle did contain a warning against unauthorized alteration. The foreman was directing a wheel assembly installation on the loader and allowed the defective equipment, which had been altered and not maintained, to be used. This constitutes more than ordinary negligence and is an unwarrantable failure to comply with the Standard.[3]

(Govt. Ex. 1.)

The "come-along" failed because a compression thimble, or aluminum swedge sleeve, catastrophically collapsed. "This thimble is a soft aluminum sleeve that slides over the doubled cable and is compressed by a special swedging tool to form a permanent loop in the end of the cable." (Resp. Ex. 2 at 2.) This allowed the pulley hook to become unattached from the cable, releasing the hook and the fender. The catastrophic failure was caused by an outside event, probably the tire on the hoist cable, or the hoist cable itself, striking the fender.

Findings of Fact and Conclusions of Law

Citation No. 7856213

This citation alleges a violation of section 56.14211(b) which provides that: "Persons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering." Section 56.14211(d), 30 C.F.R. § 56.14211(d), states that "a raised component of mobile equipment is considered to be blocked or mechanically secured if provided with a functional load-locking device or a device which prevents free and uncontrolled descent."

The regulation is clear and unambiguous that the raised component can either be "blocked" *or* "mechanically secured." The MSHA inspectors who testified were all of the opinion that the fender should have been blocked. Consequently, it is the Secretary's position that since the fender was not blocked, the standard was violated. Inasmuch as that position ignores the clear language of the rule, I find that argument without merit. On the other hand, the Respondent contends that the raised fender was mechanically secured by the "come-along." The evidence, however, demonstrates that the fender was not mechanically secured.

---

[3] This citation originally alleged a violation of section 56.14100(c). The citation was modified on November 13, 1997, to substitute the "Condition or Practice " set out above, to change the standard alleged to be violated and to charge that the violation was an "unwarrantable failure."

As section 56.14211(d) plainly states, if a functional load-locking device or a device which prevents free and uncontrolled descent is used the regulation is satisfied. In this case, such a device was not used. The "come-along" did not prevent free and uncontrolled descent of the fender when it struck Abney in the head. Since it failed, the "come-along" was obviously not functional. *Cf. Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 998 (June 1997) (requirement that conveyor belt be equipped with slippage and sequence switches means *functional* switches); *Fluor Daniel, Inc.*, 18 FMSHRC 1143, 1145-46 (July 1996) (requirement that self-propelled mobile equipment be equipped with a service brake system means *functioning* system); *Mettiki Coal Corp.*, 13 FMSHRC 760, 768 (May 1991) ("switches to be used to lock out electrical equipment must be equipped with *functioning* lockout devices") (emphasis added). Therefore, I conclude that the operator violated the regulation.

I reach this conclusion even though I accept the testimony of H. Boulter Kelsey, Wilson's mechanical engineering expert, that the "come-along" failed because of the unforseen, catastrophic collapse of a thimble on the cable. The Act imposes strict liability on mine operators for violation of the mandatory standards regardless of fault. *Western Fuels-Utah v. Fed. Mine Safety & Health*, 870 F.2d 711, 716 (D.C. Cir. 1989); *Rock of Ages Corp.*, 20 FMSHRC 106, 114 (February 1998); *Wyoming Fuel Co.*, 16 FMSHRC 19, 21 (January 1994). As the Commission has stated, "the principle of liability without fault requires a finding of liability even in instances where the violation resulted from unpreventable employee misconduct." *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 261 (March 1998). Likewise, the principle of liability without fault requires a finding of liability in this case even though the failure of the "come-along" was unforeseeable.

Significant and Substantial

The Inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the 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." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature.

In view of Abney's fatal injuries, there can be little doubt that this violation satisfies the *Mathies* criteria. "Clearly, it was a significant contributing cause to the fatal accident." *Walker Stone Co., Inc.*, 19 FMSHRC 48, 53 (January 1997). Consequently, I conclude that the violation was "significant and substantial."

Citation No. 7856214

Section 56.15002, which this citation alleges to have been violated, requires that: "All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." The evidence is undisputed, and, indeed, the Respondent concedes, that Abney was not wearing his hard hat when he was struck by the fender. It is also undisputed that this was an area where hard hats were supposed to be worn. Accordingly, I conclude that the company violated this regulation.

Significant and Substantial

This violation is alleged to be "significant and substantial." The operator argues that Abney would have been killed even if he had been wearing a hard hat. The evidence to support this claim is the speculation of Mr. Kelsey based on his calculation of the force of the blow suffered by Abney. Mr. Kelsey, however, did not see the accident, or pictures of the accident, nor did he see the type of hard hat Abney was not wearing or even know what brand it was.

On the other hand, Abney was not wearing a hard hat and he was killed by a blow to the head. There is no way to know what would have happened to him if he had been wearing a hard hat. Under those circumstances, I conclude that his failure to wear a hard hat reasonably contributed to his death and that the violation was, therefore, "significant and substantial."

Citation No. 7856215

This citation alleges a violation of section 56.14100(b), which states: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The citation lists the following defects in the "come-along": (1) loose bolts; (2) pulley bearing would not roll; (3) the cable was attached with a bolt labeled "cat"; and (4) the cable had broken wires. As it turns out, none of these defects caused the accident. Despite that, if the defects affected safety, the standard was violated. In this case, the Secretary has not proved that the defects affected safety.

The Commission has stated that: "The phrase 'affecting safety' . . . has a wide reach and the 'safety effect on an uncorrected equipment defect need not be major or immediate to come

within that reach.'" *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (citations omitted). While the Secretary's witnesses characterized the "come-along" as a "piece of junk" and reported that Bouse and Mr. Wilson had similarly described it, the Secretary has failed to demonstrate how the defects affected safety.

Conversely, the Respondent has rebutted any inferences to be derived from the descriptions of the "come-along" with the testimony of Mr. Kelsey. He stated that the "Cat" bolt "enhanced the capacity" of the "come-along. (Tr. 296.) With regard to the broken wires, he said: "I looked at the frame at the cable and about three or four strands were broken. It had nothing to do with the failure in this circumstance. . . . You can break probably half of the wires in this cable and still have it lift the 4,000 [pound] capacity." (Tr. 296-97.) In reply to a question about the pulley not rolling, he testified:

> It has no effect because the pulley was standing still for four and a half hours. This come-along was in a static loaded condition. There is no movement of the fender. There is no rolling back and forth. There is nobody cranking the handle. It is holding the fender in a locked, secured position for the time period prior to the catastrophic failure. There is no influence whatsoever by the pulley under those circumstances.

(Tr. 297-98.) Finally, in answer to whether the "come-along" was a "piece of junk," he responded:

> Yeah, it's a piece of junk but it's usable junk. It's usable junk like this that we have around in virtually every kind of shop in this country that people use all the time. *It is not unsafe*. It is not something that when you pick it up and look at it and say ["]oh, this thing could fail any minute["] because that just isn't the case. It is a piece of pretty well worn equipment. A lot of folks consider it junk but it's still usable.

(Tr. 318-19.) (Emphasis added.)

Clearly, the only defect affecting safety was the defect in the thimble. However, that defect was not visible. As Mr. Kelsey stated:

> The normal visualization of the surface would show some s[cr]atching on the surface but nothing to indicate that a catastrophic failure was imminent by just looking at it. There is no evidence of that. Even after the fact the only way we can tell it's a catastrophic failure is by looking at it under a microscope. You still can't tell with just the naked eye.

(Tr. 306-07.) Since the defect was not apparent, the company cannot be faulted for not correcting it.

The Secretary did not present any evidence on how the defects affected safety. At best, the testimony of the MSHA inspectors created an inference that the defects affected safety. The Respondent, however, has effectively rebutted this inference with the expert opinion of Mr. Kelsey. Because of his expertise, Mr. Kelsey's testimony is entitled to much greater weight than the opinions of the inspectors. Accordingly, I conclude that the company did not violate section 56.14100(b) and will vacate the citation.

Civil Penalty Assessment

The Secretary has proposed penalties of $40,000.00 for the violation of section 56.14211(b) and $25,000.00 for the violation of section 56.15002. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties stipulated that K.R. Wilson was a small company and that the operator demonstrated good faith in abating the violations. (Tr. 14-15.) The company's Assessed Violation History Report shows that it was only assessed four $50.00 violations during the two years preceding the violations in this case. Based on this, I find that the operator has a good history of violations. Finally, since the violations in this case resulted in a death, I find that both violations are of high gravity.

In an attempt to show that its ability to remain in business will be adversely affected by the proposed penalties, the company has put into evidence an Accountants Review Report with attached financial statements. (Resp. Ex. 3.) The cover letter contains the following disclaimer:

> All information included in these financial statements is the representation of the management of **K.R. Wilson Contracting, Inc.**
>
> A review consists principally of inquiries of Company personnel and analytical procedures applied to financial data. It is substantially less in scope than an audit in accordance with generally accepted auditing standards, the objective of which is the expression of an opinion regarding the financial statements taken as a whole. Accordingly, we do not express such an opinion.

(*Id.* at 1.) This disclaimer is precisely the reason that unaudited financial statements are not sufficient to carry the operator's burden of establishing that a penalty will adversely affect the company's ability to remain in business. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994). Consequently, I conclude that the penalties in this case will not have a detrimental effect on K.R. Wilson's ability to remain in business.

The last penalty criterion is negligence. The Secretary has alleged a "high" level of negligence with regard to Citation No. 7856213. This is presumably based on the defects found in the "come-along." However, in view of the fact that the apparent defects did not affect safety and that the defect which caused the accident was neither discernible nor foreseeable, I conclude that the level of negligence should be "low."

The Secretary has asserted that the violation in Citation No. 7856214 resulted from "moderate" negligence. The evidence in this case indicates that Larry Bouse, the foreman in charge of the repairs to the loader, did not "like" hard hats and was "occasionally" lax in demanding that employees wear them. (Tr. 143, 371.) Therefore, I conclude that this violation was caused by "high" negligence.

Taking all of the penalty criteria into consideration, I assess a penalty of $15,000.00 for Citation No. 7856213 and $25,000.00 for Citation No. 7856214.

Order

Accordingly, Citation Nos. 7856213 and 7856214 are modified with regard to the level of negligence as set out above, and are **AFFIRMED** as modified, and Citation No. 7856215 is **VACATED** in Docket No. CENT 98-159-M. Citation Nos. 7855877 and 7855909 are **AFFIRMED** in Docket No. CENT 98-207-M.

K.R. Wilson Contracting, Inc., is **ORDERED TO PAY** civil penalties of **$40,688.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 29, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : : :	CIVIL PENALTY PROCEEDING Docket No. WEST 99-89-M A.C. No. 48-00533-05545
v.	:	Basins Mill
GEORGIA MARBLE COMPANY, formerly BASINS INCORPORATED, Respondent	: : :	

DECISION

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Georgia Marble Company ("Georgia Marble"), formerly "Basins Incorporated," pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petition alleges three violations of MSHA's safety standards.

The parties filed a joint motion requesting that I assess civil penalties for the three alleged violations based on their joint stipulation of facts and the existing record in this case. Georgia Marble does not dispute that the conditions described in the three citations existed and that these conditions violated the cited safety standards. It contends, however, that the proposed penalties for the violations are too high, taking into consideration the six penalty criteria in section 110(i) of the Mine Act. Determination of the amount of the penalty that should be assessed for a particular violation is committed to a judge's discretion, bounded by proper consideration of the penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

I. STIPULATED FACTS

The parties stipulated to the following facts:

1. The Assessed Violation History Report attached to the motion is accurate. This report shows that 26 citations were issued at the Basins Mill in the 24 months preceding November 3, 1998. All of the citations were issued under section 104(a) of the Mine Act; 9 of them were designated as being of a significant and substantial nature ("S&S"), and 17 were not S&S.

2. Georgia Marble stipulates to the facts set forth in the three citations, including but not limited to the MSHA inspector's designations as to the nature of the violation and gravity.

3. For the purpose of this case only, the Secretary stipulates to all the statements set forth in Georgia Marble's answer dated March 9, 1999, except to the extent that any statement may contradict the citations at issue.

4. Georgia Marble is subject to the jurisdiction of the Mine Act.

5. The administrative law judge has jurisdiction in this case.

6. Georgia Marble demonstrated good faith in abating the violations.

7. Georgia Marble operates a non-coal mine. The number of hours worked at the mine in calendar year 1997 was 90,847 and the number of hours worked by the controlling entity in calendar year 1997 was 1,090,900.

8. The payment of the penalties proposed by the Secretary in this case would not impair Georgia Marble's ability to continue in business.

The answer filed by Georgia Marble provides some general information about this case as well as specific information about each of the violations. In pertinent part, the general information is as follows:

> Georgia Marble has made a concerted effort to focus on safety at the Basins Mill. Significant changes to the management structure have been made, most significantly with the replacement of Mr. ... with the writer [Howard Scotland]. The receipt of twenty-one citations during the course of the February 1998 inspection indicated not only that greater attention to safety was required but that the administration of the safety program needed improvement. As the new plant manager, I have enjoyed the complete support of Georgia Marble's upper management in this regard and I have been able to substantially improve the safety program at the Basins Mill. I believe that my assertion is not hollow but in fact [is] illustrated by the results of the 11/4/98 inspection. The receipt of three citations in lieu of a repetition of past events demonstrates that tangible change has occurred.
>
> [T]he improvement made to better the cited condition has extended well beyond those noted by the [MSHA] inspector upon the close of his inspection. Each item has been reviewed and actions taken, which in two cases involved costs more than three times the amount of the proposed assessment.

In summary, Georgia Marble has made a considerable effort at the Basins Mill to improve the administration of the safety program and to eliminate conditions that might lead to future citations. Cited deficiencies were promptly corrected, but more importantly additional funds have been spent to preclude their re-occurrence and facilitate better protection. In keeping with our demonstrated effort and visible reduction in the quantity of citations received during our last inspection, Georgia Marble requests that the proposed penalties be reduced to reflect a clear and conscious safety effort.

II. STIPULATED FACTS CONCERNING THE CITATIONS

Georgia Marble operates the Basins Mill in Platte County, Wyoming. On November 4, 1998, the mill was inspected by MSHA and three citations were issued under section 104(a) of the Mine Act.

A. Citation No. 4338681

Citation No. 4338681 alleges a violation of 30 C.F.R.§ 56.12013(b), as follows:

> At the south bagger area stairway, a cable tray. In this tray are electric cables that the outer jacket that is pulled back exposing the inner wires. Outer jackets are designed to provide damage protection for electric cables. No exposed copper observed.

Under gravity, the inspector determined that an injury was unlikely, that if an injury occurred it would likely be fatal for one person, and that the violation was not S&S. He also determined that Georgia Marble's negligence was moderate. Section 56.12013(b) provides, in part, that "[p]ermanent splices and repairs made in power cables ... shall be: insulated to a degree at least equal to that of the original, and sealed to exclude moisture." The citation indicates that Georgia Marble abated the violation by taping up the cables and providing damage protection where needed. The Secretary proposes a penalty of $1,122 for the violation.

In its answer, Georgia Marble states:

> The subsequent action document states that the cables were taped and protected from damage. I would like to note that the trays in question have been removed completely and replaced with [a] new tray and protected wires. The cables in question no longer exist and the new installation provides for the protection of the wiring from dust, dirt, and any impacts that might damage the conductor insulation. The approximate cost of the new installation was

$4,000 and I believe it illustrates our desire to not only correct the deficiency but also take the extra step to preclude a re-occurrence.

B. Citation No. 4338682

Citation No. 4338682 alleges a violation of 30 C.F.R.§ 56.12016, as follows:

> Upon inspection of the south feed belt. This belt is under repairs at this time the guards on the head are removed. When checked at the mcc it was found that the belt was not locked out to prevent an unwanted start up.

Under gravity, the inspector determined that an injury was reasonably likely, that if an injury occurred it would likely be fatal for two people, and that the violation was S&S. He also determined that Georgia Marble's negligence was moderate. Section 56.12016 provides, in part, that "[e]lectrically powered equipment shall be deenergized before mechanical work is done on such equipment" and that "[p]ower switches shall be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it." The citation indicates that Georgia Marble abated the violation by locking out the power switch. The Secretary proposes a penalty of $1,771 for the violation.

In its answer, Georgia Marble states:

> The citation ... has been followed up with a thorough review of proper lock out and tag out procedures with all hourly and salaried employees. This review has been incorporated into multiple Part 48 training sessions and documented. Additionally, this procedure is thoroughly reviewed with any contractors doing work on our site.

C. Citation No. 4338683

Citation No. 4338683 alleges a violation of 30 C.F.R.§ 56.12008, as follows:

> At dust area the platform scale. This scale when inspected it was found that the 110v power cable was not properly entered into the electrical compartment of the scale.

Under gravity, the inspector determined that an injury was unlikely, that if an injury occurred it would likely be fatal for one person, and that the violation was not S&S. He also determined that Georgia Marble's negligence was moderate. Section 56.12008 provides, in part, that "[p]ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments" and that "[c]ables shall enter metal frames of ... electrical compartments

only through proper fittings." The citation indicates that Georgia Marble abated the violation by taking the scale out of service. The Secretary proposes a penalty of $1,122 for the violation.

In its answer, Georgia Marble states:

> The scale in question is in the process of being replaced. The new installation has been designed to better protect the connection cited by the inspector. The cost of the new scale and welded structure [is] approximately $3,500.

III. APPROPRIATE CIVIL PENALTIES

In assessing appropriate penalties in this case, I assume that the violations of the Secretary's safety standards occurred as set forth in the citations. Although the citations were not drafted using complete sentences, they are clear enough to understand what conditions were cited by the MSHA inspector. I also accept the inspector's gravity and negligence determinations, as well as his S&S characterizations. Finally, based on the parties' stipulation, I accept as fact the information presented by Georgia Marble, as set forth above. I find that this information does not contradict the conditions described in the citations.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The penalties proposed by the Secretary in this case are higher than the penalties proposed for previous violations at the Basins Mill in 1998 as evidenced by the Assessed Violation History Report. The Secretary's proposed assessment attached to her petition for assessment of penalty shows that MSHA assigned the maximum number of points for history of previous violations under her penalty formula at 30 C.F.R.§ 100.3(c) for the three violations in this case. The penalties are higher in this case because of the relatively high history of violations at the Basins Mill. In essence, Georgia Marble is asking that I give more weight to the other penalty criteria, including the good faith criterion, when I assess penalties in this case.

Under the Mine Act, the Secretary's penalty proposals are not binding on the Commission's administrative law judges. Penalties assessed by a Commission judge can be greater than, less than, or the same as those proposed by the Secretary so long as the judge properly considers all of the penalty criteria. The criteria need not be given equal weight. My analysis of the penalty criteria is as follows:

A. The Operator's History of Previous Violations

As stipulated, Georgia Marble was issued 9 S&S citations and 17 non-S&S citations during the 24 months preceding the issuance of the citations in this case. This history is high given the size of the Basins Mill.

B. The Appropriateness of the Penalty to the Size of the Business

As stipulated, the number of hours worked at the Basins Mill in calendar year 1997 was 90,847 and the number of hours worked by all employees of the controlling entity in calendar year 1997 was 1,090,900. The mine and the controlling entity are moderate in size.

C. Whether the Operator was Negligent

As stipulated, Georgia Marble's negligence was moderate for all citations.

D. The Effect on the Operator's Ability to Continue in Business

As stipulated, the penalties proposed by the Secretary will not adversely affect Georgia Marble's ability to continue in business.

E. The Gravity of the Violation

Based on the stipulations, I find that Citation No. 4338682 was serious and was S&S. The other violations were not S&S and were not as serious.

F. Demonstrated Good Faith in Attempting to Achieve Rapid Compliance

Based on the stipulations, I find that Georgia Marble demonstrated good faith in achieving rapid compliance with the cited safety standards after issuance of the citations.

G. Determination of Appropriate Civil Penalties

In determining appropriate penalties, I take into consideration all of the penalty criteria, as discussed above. The assessed penalties are lower than those proposed by the Secretary because I gave more weight to the gravity of the violations, Georgia Marble's negligence, and Georgia Marble's efforts to abate the underlying conditions cited by the inspector. I gave less weight to the history of previous violations criterion. As stated in the stipulations, the Basins Mill was under new management at the time of the inspection and management was taking steps to improve the safety conditions at the facility. As a consequence, I believe that it is appropriate to place less emphasis on the history of previous violations criterion than would normally be the case.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
4338681	56.12013(b)	$400.00
4338682	56.12016	800.00
4338683	56.12008	400.00

Accordingly, the parties' motion to assess appropriate civil penalties for the citations in this case based on stipulated facts and the existing record without a hearing on the merits is **GRANTED**. The citations listed above are **AFFIRMED** as issued and Georgia Marble Company is **ORDERED TO PAY** the Secretary of Labor the sum of $1,600 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Howard Scotland, Plant Manager, Georgia Marble Co., P.O. Box 845, Wheatland, WY 82201 (Certified Mail)

RWM

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D. C. 20006-3868

April 7, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-30-M
Petitioner	:	A. C. No. 30-03138-05511
	:	
v.	:	Wingdale Mine
PATTERSON MATERIALS	:	
CORPORATION,	:	
Respondent	:	

ORDER ACCEPTING LATE FILING
ORDER DIRECTING OPERATOR TO ANSWER

On March 17, 1999, an order was issued directing the Secretary to show cause why this case should not be dismissed for failure to timely file the penalty petition.

On March 22, 1999, the Commission received the Solicitor's penalty petition for the one violation involved in this case. The Solicitor also filed a motion to accept late filing together with a sworn statement. According to the Solicitor, this case and another civil penalty proceeding involving this operator, Docket No. YORK 98-43-M, were assigned to her. The Solicitor states that she confused this matter with YORK 98-43-M and inadvertently filed this case in the file folder for YORK 98-43-M. On the evening of March 18, 1999, in the course of a routine review of her files, the Solicitor discovered the error, and mailed the petition and motion on the next day, March 19, 1999.

Commission Rule 2700.28(a), 29 C.F.R. § 2700.28(a), requires that a penalty petition be filed within 45 days from receipt of the operator's penalty contest. The contest in this case was received on January 26, 1999, and the petition was due on March 12, 1999. Filing is effective upon mailing and the petition was mailed on March 19, 1999. 29 C.F.R. § 2700.5(d). Therefore, the petition was 7 days late.

On March 26, 1999, the operator filed a motion to dismiss. The operator asserts that the reasons offered by the Solicitor do not constitute adequate cause for the late filing of the penalty petition. According to the operator, some sort of inevitable outside force rather than a self-created problem, such as misfiling, can constitute adequate cause. The operator further contends that the Solicitor would not have been aware of the late filing were it not for the show cause order. Finally, the operator asserts that it will be prejudiced, along with all other similarly situated operators, if the motion is granted because the Secretary will be able to justify any late filing by claiming clerical lapses or other manner of inadvertence or inattention.

The Commission permits late filing of penalty petitions where the Secretary demonstrates

adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause apart from any consideration of whether the operator was prejudiced. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

A determination of adequate cause is based upon the reasons offered and the extent of the delay. I have accepted late filings where the Solicitor has claimed that delays were caused by clerical errors in handling cases. In Apac Oklahoma, Docket No. CENT 97-187-M, unpublished (December 16, 1997) (attached), a petition that was 24 days late was accepted where the case was inadvertently placed with another file and overlooked. In M. Jamieson Company, 12 FMSHRC 901 (March 1990), a late petition was permitted where the delay was relatively short and the file had been erroneously placed in with another matter involving the same operator. However, I have not permitted late filings based on mishandling of cases where the delay was lengthy. Phelps Dodge Morenci Inc., 1993 WL 395589 (June 1993); Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (Feb 1984). Nor I have accepted a late penalty petition where the Solicitor claimed that the case was mishandled when he had referred the matter to MSHA under the Alternate Case Resolution Initiative (ACRI). Swenson Granite Company, LLC, 20 FMSHRC 859 (August 1998). In Swenson, I held that sending the case to MSHA did not excuse the Solicitor from his responsibility of filing required pleadings.

The circumstances in this case are similar to those cited above where late filing was permitted. The delay here was very short and the error was discovered by the Solicitor herself. The operator's assertion that the show cause order alerted the Solicitor to the delay is unfounded. The Solicitor's sworn statement that she discovered the error upon her own review of her files is supported by the return receipt card in the Commission's file showing that the Solicitor did not receive the show cause order until March 24, 1999. Under these limited circumstances, I find that the Solicitor has demonstrated adequate cause for the short delay. In addition, I find there is no prejudice from the seven day delay.

In light of the foregoing, it is **ORDERED** that the Solicitor's late filed penalty petition is **ACCEPTED**.

It is further **ORDERED** that the operator filed its answer to the penalty petition within 30 days of the date of this order.

Paul Merlin
Chief Administrative Law Judge

Attachment

Distribution: (Certified Mail)

Suzanne Demitrio, Esq., Office of the Solicitor, U. S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014

John F. Klucsik, Esq., Devorsetz, Stinziano, Gilberti, Heintz & Smith, P.C., 555 East Genesee Street, Syracuse, NY 13202-2159

/gl

attachment

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON D.C. 20006-3868

December 16, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 97-187-M
Petitioner	:	A. C. No. 34-00050-05551
	:	
v.	:	East Quarry
APAC OKLAHOMA, INCORPORATED,	:	
Respondent	:	

ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

On November 10, 1997, the Commission received the Solicitor's penalty petition for the two violations involved in this case. The Solicitor also filed a motion to accept late filing setting forth the reason for the delay. According to the Solicitor, the operator's penalty contest was forwarded to the Solicitor's office on September 10, 1997. However due to a clerical error, the case was inadvertently placed with another file and overlooked. The Solicitor further states that the enormous number of files handled by the Solicitor's office also contributed to the untimely filing.

Commission Rule 2700.28(a), 29 C.F.R. § 2700.28(a), requires that the penalty petition be filed within 45 days from receipt of the operator's penalty contest. The contest was received on August 28, 1997, and the petition was due on October 14, 1997. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition was sent on November 7, 1997. 29 C.F.R. § 2700.5(d). Therefore, the petition was 24 days late.

On December 4, 1997, the operator filed an answer along with an opposition to the Solicitor's motion to accept late filing. The operator asserts that the Solicitor 's motion should be denied and the case dismissed because the Solicitor failed to comply with Commission rules for filing a petition. The operator further states that it has not been prejudiced by the delay but that it will be prejudiced if the Solicitor is allowed to proceed without consequences for his untimely filing. Counsel does not allege actual prejudice from the delay.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981);

Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). There has been no showing of prejudice in this case. I find the Solicitor's representations as to the inadvertent mishandling of this case constitute adequate cause for the relatively short delay in the filing of the penalty petition which should not prejudice the operator's presentation of its case. However, I take note that the Solicitor's statement with respect to a heavy caseload is not supported by the Commission's own records which show that the number of new cases filed has decreased.

In light of the foregoing, it is **ORDERED** that the Solicitor's late filed penalty petition is **ACCEPTED**.

It is further **ORDERED** that this case be assigned to Administrative Law Judge David Barbour.

All future communications regarding this case should be addressed to Judge Barbour at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Two Skyline Place, Suite 1000
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-5232
Telephone No. 703-756-6201 (Fax)

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

David Rivela, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Timothy E. Bixler, Esq., APAC, Inc., Law Department, 900 Ashwood Parkway, Suite 700, Atlanta, GA 30338

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., 6TH FLOOR
WASHINGTON, D.C. 20006-3868

April 26, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-268-M
Petitioner	:	A. C. No. 29-01882-05502 LUO
	:	
v.	:	
BOWEN INDUSTRIES	:	
INCORPORATED,	:	Ivanhoe Concentrator
Respondent	:	

ORDER LIFTING STAY
DECISION DISAPPROVING SETTLEMENT
ORDER TO SUBMIT INFORMATION

Before: Judge Merlin

On December 8, 1998, this case was stayed pending a final determination by the Secretary whether to pursue actions under Section 110(c). The parties have now filed a joint motion to approve settlement. Therefore, the stay previously entered is hereby **LIFTED**.

The parties' settlement motion seeks a penalty reduction for the one violation involved from $1,600 to $188.

Aside from the substantive deficiencies discussed infra, I would not approve this motion. The motion was signed and filed by an individual who styles herself as a law clerk. Although the motion contains the names of three Solicitors in ascending degrees of responsibility, none of them has signed the motion. Commission Rule 2700.3, 29 C.F.R. § 2700.3, sets forth the individuals and categories of individuals who are permitted to practice before the Commission. Under subparagraph (a) attorneys are permitted to practice and under subparagraph (b) a non attorney may practice if he is a party, a representative of miners or certain designated individuals associated with specified entities. The individual who signed and filed the settlement motion in this case is not an attorney and is not one of the described non attorneys allowed to appear before the Commission. Subparagraph (c) permits any other person to practice with the approval of the presiding judge or the Commission. My approval has not been sought for the appearance of the individual in question.

This purported filing from the Dallas Office of the Solicitor is in contrast to procedures previously followed by the national Office of the Solicitor in seeking permission for non attorneys to appear before the Commission. In 1994, when the Office of the Solicitor wished to have Conference and Litigation Representatives (CLR) appear on behalf of the Secretary in mine safety cases, information was furnished regarding the training and credentials of these individu-

als. Cyprus Emerald Resources Corp., 16 FMSHRC 2359 (November 1994). Thereafter, in every case where a CLR wishes to represent the Secretary, he has filed a motion for permission to appear. When a supplemental settlement motion is filed in this case, as ordered infra, it must be signed by an attorney in the Office of the Solicitor or it will not be approved.

The subject citation was issued under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 56.11027 which provides:

> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

The citation describes the alleged violation as follows:

> Bowen Industries, Inc. a sub-contractor at the plant failed to provide adequate scaffolds for employees to use when installing a iron beam on a wall at the maint-shop. Employee was observed standing on top of scaffold railing trying to reach the iron beam to weld on. The employee did have his safety wear, but was secured 4/5 foot below him for security, exposing the employee to a potential fall hazard if accidentally slipping and falling. The company inspector Lillian Medina had warned the employees on 4-9-98 of them not using the proper scaffolding and stopped operations until proper scaffolding was erected to continue the operations.
>
> Employees admitted that Ms. Medina had warned them of not following company safety policies and needed to erect a proper platform.

The inspector subsequently modified the citation to add the following information to the condition or practice:

> Supervisor and employees knew of inadequate scaffold, the company safety inspector on 04-09-1998 stopped the operation on welding informing employee that they needed an adequate work platform to work off or to extend scaffolding. Employee elected not to fix work platform. This violation is an unwarrantable failure.

The standard sets forth requirements for the construction of scaffolds and working platforms, mandating that they be of substantial construction with handrails and properly laid floor boards and where necessary, with toeboards. Also they must not be overloaded. The citation, however, does not find that the scaffold was improperly constructed, lacked any of the items described, or was overloaded. Rather, it found the scaffold was inadequate because the employee was standing on top of the scaffold's railing trying to reach an I-beam. The condition described by the inspector therefore, had nothing to do with the scaffold itself but with its location. The problem was one of safe access to the I-beam and not any deficiencies in the

characteristics of the scaffold. Accordingly, it does not appear that the standard cited applies to the situation set forth in the citation. The parties must address this issue in the supplemental motion.

Even assuming the cited standard applies, the settlement motion is deficient. The motion merely states that further investigation reveals the degree of negligence and likelihood of injury should be modified. It alleges that upon further investigation the Secretary has determined there is insufficient evidence to support the conclusion that the operator knew of the violation. This allegation is contrary to the citation and its modification which expressly state that just a few days previously the company inspector found employees using scaffolding that did not reach and told them the scaffolding should be extended. If true, this prior misconduct by employees called for heightened supervision by the operator. In any event, the representations in the motion must be reconciled with the statements in the citation and if the citation is in error, the motion must say so.

The motion also represents that gravity should be less than originally found because the employee was wearing a safety harness. But the citation recognizes that although a harness was worn, it was tied off at the wrong place. The motion must identify those factors which justify a finding of reduced gravity.

Finally, the motion seeks a penalty reduction of 85% and a modification of the citation to one issued under section 104(a) citation, but the generalized and unsupported statements in the motion do not justify such actions. The motion states that the operator's size, history and good faith have been reviewed and are set forth in Exhibit A to the penalty petition. A printout attached to the assessment sheet indicates that the operator had two violations in July and one violation in September, but the number of inspection days is not given so I do not know whether this is a good, average or bad history. Also, there is no information about size and ability to continue in business. The Commission has held that the judge must consider all six criteria when assessing a penalty. Sec. of Labor on behalf of James Hyles, et al. v. All American Asphalt, 21 FMSHRC 34, 56-57 (Jan. 1999); Sec. Labor on behalf of Kenneth Hannah, et al. v. Consolidation Coal Co., 20 FMSHRC 1293, 1302-1303 (Dec. 1998); Sec. Labor on behalf of Richard Glover v. Consolidation Coal Co., 19 FMSHRC 1529, 1539 (Sept 1997).

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the Solicitor and the operator submit appropriate information to support their settlement request. Otherwise, this case will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Tom Mascolino, Esq., Office of the Solicitor, U. S. Department of Labor, Room 420, 4015 Wilson Boulevard, Arlington, VA 22203

Raquel Tamez, Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Mr. Alfredo Ontiveros, Safety Director, Bowen Industries Incorporated, 9801 Carnegie Avenue, El Paso, TX 79925

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W. 6TH FLOOR
WASHINGTON D.C. 20006-3868

April 29, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 99-77
Petitioner	:	A. C. No. 36-00930-03603
	:	
v.	:	
RAYNE ENERGY INCORPORATED,	:	Rayne No. 1
Respondent	:	

DECISION DISAPPROVING SETTLEMENT
ORDER TO RESUBMIT SETTLEMENT MOTION

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. On March 15, 1999, I issued a prehearing order directing the parties to discuss settlement. On April 12, 1999, a settlement motion was filed by the Secretary.

I cannot approve this motion. The motion was signed and filed by an individual who describes herself as a paralegal. Although the motion contains the names of three Solicitors in ascending degrees of responsibility, none of them has signed the motion. Commission Rule 2700.3, 29 C.F.R. § 2700.3, sets forth the individuals and categories of individuals who are permitted to practice before the Commission. Under subparagraph (a) attorneys are permitted to practice and under subparagraph (b) a non attorney may practice if he is a party, a representative of miners or certain designated individuals associated with specified entities. The individual who signed and filed the settlement motion in this case is not an attorney and is not one of the described non attorneys allowed to appear before the Commission. Subparagraph (c) permits any other person to practice with the approval of the presiding judge or the Commission. My approval has not been sought for the appearance of the individual in question. I know nothing of the qualifications and training of this person. The settlement motion filed in this case must be signed by an attorney in the Office of the Solicitor or it will not be approved.

This purported filing from the Philadelphia Office of the Solicitor is in contrast to procedures previously followed by the national Office of the Solicitor in seeking permission for non attorneys to appear before the Commission. In 1994, when the Office of the Solicitor wished to have Conference and Litigation Representatives (CLR) appear on behalf of the Secretary in mine safety cases, information was furnished regarding the training and credentials of these individuals. Cyprus Emerald Resources Corp., 16 FMSHRC 2359 (November 1994). Thereafter, in every case where a CLR wishes to represent the Secretary, he has filed a motion for permission to appear. The Regional Solicitor is well aware of the procedures followed with respect to CLRs.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the settlement motion be resubmitted and signed by an attorney in the Office of the Solicitor.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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