

## SEPTEMBER 2002

### THERE WERE NO COMMISSION DECISIONS OR ORDERS

#### ADMINISTRATIVE LAW JUDGE DECISIONS

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**SEPTEMBER 2002**

No cases were filed in which Review was granted during the month of September:

No cases were filed in which Review was denied during the month of September:



ADMINISTRATIVE LAW JUDGE DECISIONS



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 4, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-61-M
Petitioner	:	A.C. No. 04-01299-05541
	:	
v.	:	
	:	Original Sixteen to One
ORIGINAL SIXTEEN TO ONE MINE,	:	
INCORPORATED	:	
Respondent	:	

**DECISION**

Appearances: Isabella M. Del Santo, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of Petitioner.  
Michael M. Miller, President and Chief Operating Officer, Original Sixteen to One Mine, Inc., Alleghany, California, on behalf of Respondent.

**Before:           Judge Cetti**

This case is before me upon a petition for assessment of civil penalty filed by the Secretary of Labor (Secretary) alleging violations by Original Sixteen to One Mine, Inc. of various mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. Pursuant to notice a hearing was held in Nevada City, California. The parties filed post-hearing briefs.

Jurisdiction

Preliminarily, Respondent filed a motion for dismissal of this matter on grounds Petitioner did not have jurisdiction. Respondent states that the Securities and Exchange Commission (SEC) determined that its mining operation had insufficient reserves to hold itself out as a mine to shareholders. The respondent argues that if its operation isn't a mine for SEC purposes, this operation also cannot be considered a mine under the Federal Mine Safety and Health Act (Mine Act), 30 U.S.C. §801. The SEC does not purport to regulate the health and safety of miners, and whatever purpose a definition of the term "mine" has in the SEC's regulatory scheme, that definition is there for a purpose other than the protection of the health and safety of miners. Since the facility at issue herein was actively engaged in the extraction of ore from the ground, with approximately nine miners actively engaged in extraction-related

activities, the mine is subject to the Mine Act. Respondent's facility certainly comes within the definition of a mine set forth in Section 3(h)(1) of the Mine Act.

"Coal or other mine" means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such areas, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Respondent's request for dismissal for lack of jurisdiction is DENIED.

#### Citations at Issue At the Hearing

There are eight citations in this docket of which only five were at issue at the hearing. At the commencement of the hearing, the Respondent advised that it withdraws its notice of contest of the following three citations: Citation No. 7987874, Citation No. 7987879 and Citation No. 7987880. At issue at the hearing were Citation No. 798785, Citation No. 7987876, Citation No. 7987977, Citation No. 7987878 and Citation No. 7987883. These citations were issued by MSHA Inspector James Weisbeck who inspected the mine in August of 2000.

For reasons discussed below, I modify two of the citations at issue and as modified I affirm all eight citations and assess a total civil penalty of \$651.00.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

##### Citation No. 7987875

Citation No. 7987875 states as follows:

An area of restricted clearance at the ore chute on the 800 level behind 49 Winze, which created a hazard to persons who operate rail equipment, did not have warning devices or signs on either approach nor was the restricted clearance clearly marked. The metal chute gate and bang-board were measured at fifty-five inches above the rail. The motorman's head was measured at sixty inches while seated in the locomotive. The motorman could receive serious injuries if his head were to strike the chute parts. The locomotive travels under the chute on a regular basis.

The cited regulation provides as follows:

§56.9306 Where restricted clearance creates a hazard to persons on mobile equipment, warning devices shall be installed in advance of the restricted area and the restricted area shall be conspicuously marked.

Inspector Weisbeck testified that at the 800 foot level of the mine, he observed a "center of track" ore chute through which locomotives traveled on a regular basis. The inspector observed a restricted opening through the chute. He observed no warning devices in advance of the restricted area. He took measurements. The clearance measured 55 inches above the rail and the motor man's head measured 60 inches above the rail while he sat in the locomotive. The restricted area was not "conspicuously marked."

The locomotive had lights. The motor man was aware of the overhead restrictions and ducked his head down to the side to avoid injury. The inspector was concerned that someday there would be a time when the motor operator would be distracted and inadvertently not duck in time to avoid a very serious injury. The violation was abated by painting a bright red "low head room" sign and by hanging conspicuous streamers in the appropriate area TR-25, Res. Ex. 12.

Respondent contends that there was light in the area and sufficient marking to comply with the cited standard. That flagging that existed before abatement was dirty and on the side of the ore chute.

I credit the testimony of Inspector Weisbeck that the restriction was not conspicuously marked. and find the evidence established a violation of 30 CFR §56.9306.

Citation No. 7987876

Citation No. 7987876 reads as follows:

An area of unsupported rock beside the slusher at 848 Stope had not been tested by a supervisor or designated person

prior to work commencing in the area. The rock had several large cracks which started about ten feet from and propagated towards the slusher operators station. The supervisor and miner both stated that they knew about the cracks and that neither one had done any testing to determine how loose the rock was. The ground was partially supported at the operators station by the stalls which held the slusher down. A fall of ground could cause fatal injuries to the slusher operator who works in the area on a regular basis.

Respondent's response to the citation is as follows:

As required by 30 CFR 57.3401 persons experienced in examining and testing for loose ground are designated by the mine operator. Appropriate persons examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways are examined weekly or more often if changing ground conditions warrant.

The lead miner has extensive underground experience, including rock mechanics and the specific nature of this mine. His statements were taken out of context or misinterpreted by the MSHA agent. The miner was aware of the crack and determined that alleged hazard posed no risk of an unsafe situation. Furthermore, the crack itself does not constitute a hazard.

The cited standard provides as follows:

§57.3401 Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Underground haulageways and travelways and surface area highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

Inspector Weisbeck testified to the facts set forth in Citation No. 7987876. He was of the opinion that the horizontal crack in the rock depicted in P. Exs. 13 and 14 should have been tested because of vibration of the slusher being used in the area. The crack propagated toward

the slusher operator's station and the ground was only partially supported by the operator's station. The fall of loose ground that could result from the crack and its vibration from the slusher motor could cause fatalities. A fall of the rock could cause serious and fatal injuries.

Respondent's lead man was aware of the crack but on visual examination alone was of the opinion the alleged hazard presented no risk. No testing was done.

I credit the testimony of Inspector Weisbeck and find the cited standard was violated. I affirm the Solicitor's findings in the citation and based on the statutory criteria in Section 110(i) of the Act, I agree with the MSHA's assessment of the \$55 proposed penalty for this violation of the standard and accordingly assess a penalty of \$55.00.

Citation No. 7987877

Citation No. 7987877 alleges a significant and substantial (S&S) violation of 30 CFR §57.3360. The citation reads as follows:

Ground support was not installed in the area of 848 Stope which was being slushed out. A bowed and split timber, and two badly cracked pillars indicated that the hanging wall was taking weight. A large area beyond the two pillars had caved in at some time in the past. One of the pillars had several large vertical cracks. The other was badly cracked and appeared loose. The grain shift across a diagonal crack indicated that about one third of the pillar had subsided about three inches. An old timber near the pillar was partially rotten and had bowed out about one foot in the middle. Many old timbers in other areas of the stope had rotted out or showed signs of crushing. Mine management stated that the stope had been mined for about three weeks at this time and was last mined in 1994. A fall of ground could cause fatal injuries to the two miners.

The cited standard, 30 CFR §57.3360 provides as follows:

Ground support shall be used where ground conditions, or mining experience in similar ground conditions in the mine, indicate that it is necessary. When ground support is necessary, the support system shall be designed, installed, and maintained to control the ground in places where persons work or travel in performing their assigned tasks. Damaged, loosened, or dislodged timber use for ground support which creates a hazard to persons shall be repaired or replaced prior to any work or travel in the affected area.

I find the Secretary established an S&S violation of the cited standard. Inspector Weisbeck inspected the work area of the 848 Stope and found inadequate ground support. He testified as to his observations as set forth in the citation quoted above. He took photographs showing the bowed and cracked vertical ground support timbers. Petitioner's Exhibits P-15, P-16 and P-17. Respondent's response to the facts alleged in the citation was that "[T]he timber cited was cracked from weight of itself and was not utilized as current ground support. Had there been rock weight on the timber the timber would not of [sic] held and rock would have fallen."

Respondents contention was not persuasive in view of the photographs and the inspector's testimony. Two of the damaged timbers in the immediate working area of the slusher and the portable lighting were replaced with new timber in order to abate the violation.

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 Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

In *Mathis Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also, *Buck Creek Coal, Inc. v. MSHA*, 53 F.3d 133, 135 (7<sup>th</sup> Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff'g*, *Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.* 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 Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

The contribution of the violation to the cause and effect of a hazard is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

The inspector properly made findings noted in the citation “reasonably likely,” “fatal,” and S&S. If the roof were to collapse and strike a miner working in the area the injury to the miner would most likely be fatal.

Citation No. 7987878.

This citation charges a 104(a) violation of 30 CFR §57.16005. The citation reads as follows:

At the electrical shop of the lower shop area there was a unsecured acetylene cylinder setting on the floor in the work area. Exposing persons who enter area to the hazards of the cylinder falling creating potential injuries. Persons enter on a as needed basis.

In the lower shop area the Inspector saw an upright acetylene cylinder sitting on the floor. The cylinder was not secured in any way. The Inspector testified that there was not a lot of exposure. The cylinder was sitting back toward a wall, so it was not out in the center of the work area. The Inspector testified that, even though empty, it weighed 40 pounds and if it fell it could result in severe bruising and possibly break a bone in a person’s foot.

The facts clearly establish a violation of the cited standard 30 CFR §57.16005 which provides that “compressed and liquid gas cylinders shall be secured in a safe manner.” The gravity was somewhat less than if the cylinder had been taller and full of gas and left in an area where there was greater exposure. Everything considered, I find the “negligence” factor in this citation is “low” rather than “moderate” and the citation is so modified. In view of the small size of the operator and the very limited exposure and all the other statutory criteria in Section 110(i) of the Act, I assess a penalty of \$25.00.

Citation No. 7987883

This citation charges a 104(a) violation of 30 CFR §57.12032 and reads as follows:

The cover plate on the 240 volt electric hot water heater in the store room between the office and the dry was not in place. The top screw was missing and the cover was turned to the side exposing the bare energized components to possible contact by persons who use the cleaning equipment stored in the room. An electrocution could result.

The cited safety standard 30 CFR §57.12032 provides as follows:

**§57.12032 Inspection and cover plates.**

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs.

Inspector Weisbeck testified that the cover plate of the 240 volt electric hot water heater had its top screw missing and the cover plate was turned to one side exposing the bare energized components to inadvertent contact.

Respondent asserts:

The top screw had worked itself loose. This was a very recent occurrence and no one had been in that area to detect it. It is certain that at the time a miner entered this area and upon inspection of the workplace, the plate would have been notice [sic] and the screw put in place.

The Inspector testified that inadvertent contact with an energized part could potentially cause defibrillation of the heart causing death.

The hot water heater was in a storeroom at the office dry area where people do not work constantly. There was exposure to persons who go in and out to remove cleaning products and tools. In Petitioner's Exhibit P-11, the Inspector notes "persons enter only as needed."

Respondent contends that it was unaware that one of the screws holding the cover plate in place was missing or that any energized component was exposed. Respondent contends the loss of the screw and exposure of energized parts occurred very recently before management had an opportunity to see the problem and make the needed correction. TR 321-22.

On review of the evidence, I find the negligence of Respondent was "low" rather than "moderate" and I would accordingly modify the citation to reflect "low" negligence. In view of the potential gravity of the violation, I would not reduce the proposed \$55.00 penalty.

### Appropriate Civil Penalties

Under section 110(i) of the Act the Commission and its judges must consider the following criteria in assessing a civil penalty: 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.

Respondent demonstrated good faith with respect to all the cited violations in the timely abatement of each citation by compliance with the proper standard after notification of the violation. The penalties assessed below are modest penalties and appropriate for this small operator. I find these penalties will not affect the operator's ability to continue in business. The Secretary has submitted the Assessed Violation History Report for the relevant period prior to the inspection that resulted in the citations. The report indicates the number of paid citations is 16 and the number of assessed violations is 71 for the period beginning August 16, 1998 to August 15, 2000. I affirm all the citations including the inspector's finding except for the negligence factor in Citation Nos. 7987878 and 7987883 where I find the negligence on the basis of the evidence presented to be "low." The negligence in all the other citations is properly charged by the Inspector as "moderate." Citations 7987877 was properly charged as significant and substantial as set forth above in my discussion of that citation.

### **ORDER**

Based on the criteria in section 110(i) of the Mine Act, 30 USC §830(i), particularly the small size of the operator and the good faith prompt abatement, I assess the following civil penalties:

<u>Citation No.</u>	<u>30 CFR §</u>	<u>Penalty</u>
7987875	56.9306	\$55.00
7987876	57.3401	55.00
7987877	57.3360	131.00
7987878	57.16005	25.00
7987883	57.12032	55.00
7987874	57.12025	55.00
7987879	57.20003(a)	55.00
7987880	57.12019	55.00
7987874	57.12025	55.00
7987879	57.20003(a)	55.00
7987880	57.12019	<u>55.00</u>
TOTAL		\$651.00

Accordingly, the citations in this docket are AFFIRMED, Citation Nos. 7987878 and 7987883 were modified to reduce the negligence from "moderate" to "low" and as so modified were affirmed.

Respondent is Ordered to PAY the sum of \$651.00 within 40 days of the date of the decision unless the parties agree upon a different payment schedule. Upon payment of this penalty, the proceedings is DISMISSED.



August F. Cetti  
Administrative Law Judge

Distribution:

Ms. Isabella M. Del Santo, Office of the Solicitor, U.S. Department of Labor, 71 Stevenson Street, Suite 1110, San Francisco, CA 94105-2937

Michael M. Miller, President, Original Sixteen to One Mine, Inc., P.O. Box 909, 527 Miners Street, Alleghany, CA 95910

/atc

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

September 11, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
v.	:	Docket No. CENT 2002-171-M
	:	A.C. No. 41-04063-05504
	:	
LATTIMORE MATERIALS CO., L.P., Respondent	:	CLEBURNE PLANT #65

## DECISION

Appearances: Thao Pham, Esq., Office of the Solicitor, U.S. Department of Labor,  
Dallas, Texas, on behalf of the Petitioner;  
Trenton Horner, Safety Manager, Lattimore Materials, McKinney, Texas,  
on behalf of the Respondent.

Before: Judge Schroeder

## Introduction

This case is before me on a Petition by the Secretary alleging a violation of a mine safety regulation. The Petition alleged a single violation for which the Secretary proposed a Civil Penalty of \$207.00. After notice, a hearing was scheduled on August 27, 2002, in McKinney, Texas. Respondent was offered the opportunity for a continuance of that hearing if witnesses essential to presentation of Respondent's case were unavailable on that date. Respondent declined the continuance. The hearing was held as scheduled and evidence in the form of both testimony and documents was received. Both parties were afforded the opportunity for closing arguments.

## Background

This case involves a very basic mine safety regulation, 30 C.F.R. § 56.11001, that requires "safe access" be provided to all work sites. The Secretary alleged Lattimore Materials failed to provide "safe access" for its employees to reach a site from which certain roller bearings needed to be lubricated on a frequent basis. It is my task to evaluate whether the record demonstrates that regulation was violated and, if so, what should be the appropriate sanction.

## Analysis

Lattimore Materials Company operates a sand and gravel processing plant near Cleburne, Texas. The plant has operated in this location since at least 1998. The plant uses a sorting system in which material is dumped into a shaker/sorter and then in various sizes onto conveyor belts to stockpiles. The conveyor belts meet the shaker/sorter in pulleys which require lubrication on approximately weekly intervals. The pulleys are located more than 10 feet in the air within a tower structure constructed of steel beams. Resp. Exh. 1. At the time of the alleged violation, lubrication of the pulley bearings was done by a Lattimore employee who climbed into the tower structure with a grease gun. The employee wore a safety harness with a lanyard to tie-off on the tower while he used the grease gun. He walked on the steel beams of the structure to get the the various work sites. The beams had holes at numerous points to clip the lanyard to while working or moving. While using the grease gun it was necessary to use both hands on the gun and rely exclusively on the lanyard to reduce the fall hazard.

The allegations by the Secretary are based on an inspection by Mr. Fred Gatewood, a special agent employed by the Mine Safety and Health Administration, conducted on April 24, 2001. Tr. 11. Mr. Gatewood is a trained and experienced mine inspector familiar with the kind of equipment used at the Cleburne Plant. Soon after his arrival at the Cleburne Plant he identified what he believed to be a fall hazard in the pulley lubrication activity. He questioned the Plant Manager concerning the hazard. He was told the hazard had been identified several weeks before by management and a means of eliminating the danger had been ordered. The proposed solution was to install rubber hose on the pulley bearings so that lubrication could be performed from the ground. The hoses had been ordered. In Mr. Gatewood's opinion the hoses would eliminate the hazard. He was not able to identify any other method of pulley bearing lubrication in use at the Cleburne Plant that would eliminate the hazard. He did not believe a portable ladder to reach the lubrication sites was feasible or in use because of the accumulation of loose stone and mud on the concrete pad below the tower. He testified that he gave the Plant Manager ample opportunity to explain how the lubrication was done safely and he failed to provide an explanation.

Without rebuttal the testimony by Mr. Gatewood establishes a violation of 30 C.F.R. § 56.11001. Lattimore Materials argued that at least for the several weeks prior to the inspection by Mr. Gatewood, lubrication had been performed using an extension ladder to provide a solid platform for a worker to use the grease gun. No witness was offered to support this argument and the only photographs including a ladder were taken long after Mr. Gatewood's visit. Resp. Exh. 4. The record is insufficient to rebut the testimony by Mr. Gatewood.

Having found a violation of the regulation, I am required to evaluate the appropriate sanction. The Cleburne Plant is a small operation, often operated with one or two employees. The violation had been identified by management before Mr. Gatewood's visit and remedies developed, albeit without a sense of urgency. Existing safety steps (harness and lanyard) offered some degree of protection, albeit less than fully desirable. No actual injury was suffered at the

plant for lack of sufficient safety measures. I conclude that the violation warrants a Civil Penalty of \$100.00.

Order

For the reasons given above, I find Respondent violated 30 C.F.R. § 56.11001 and a Civil Penalty of \$100.00 is the appropriate sanction. Respondent is directed to pay a Civil Penalty of \$100.00 within 40 days of the date of this Order.

A handwritten signature in black ink, appearing to read "Irwin Schroeder". The signature is fluid and cursive, with a large initial "I" and a long, sweeping underline.

Irwin Schroeder  
Administrative Law Judge

Distribution

Thao Pham, Esq., Office of the Regional Solicitor, U.S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202 (Certified Mail)

Trenton Horner, Safety Manager, Lattimore Materials Company, 1700 Redbud Blvd, Suite 200, McKinney, TX 75069 (Certified Mail)

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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September 16, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-108-M
Petitioner	:	A.C. No. 23-00252-05517
	:	
v.	:	Docket No. CENT 2002-129-M
	:	A.C. No. 23-00252-05518
	:	
BAILEY QUARRIES INCORPORATED,	:	Chesapeake Quarry
Respondent	:	

## DECISION

Appearances: Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Randall D. Bailey, Vice President, Bailey Quarries, Inc., Republic, Missouri, *pro se*, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Bailey Quarries, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege six violations of the Secretary's mandatory health and safety standards and seek penalties of \$2,562.00. A hearing was held in Springfield, Missouri. For the reasons set forth below, I affirm the citations and assess penalties of \$1,559.00.

## Background

The Chesapeake Quarry is one of six limestone quarries operated by Bailey Quarries, Inc., in southwest Missouri. Limestone is removed from the quarry and crushed, broken and sized into several types of stone for sale to the public.

The quarry was inspected by MSHA Inspector Wesley L. Hackworth on July 25 and September 11, 2001. The inspections resulted in the issuance of six citations which were contested by the company at the hearing. In contesting the citations, the operator was more concerned with the amount of the penalties, then the fact of violation. (Tr. 14.)

## Findings of Fact and Conclusions of Law

### Citation No. 6211041

This citation alleges a violation of section 56.14101(a)(2) of the Secretary's regulations, 30 C.F.R. § 56.14101(a)(2), on July 25, 2001, because:

The park brake on the Euclid R50 haul truck would not hold when tested. The brake was tested on the inclined road up to the crusher feed hopper. The truck was loaded and would roll backward freely when the brake was independently applied. The truck was being used to haul material from the pit to the plant for crushing. This condition created a hazard of an employee being injured should the truck roll from a parked position.

(Govt. Ex. 4.) Section 56.14101(a)(2) requires that: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

The inspector testified that the haul truck was equipped with parking brakes. He said that the truck was loaded with limestone and that both the service brakes and parking brakes were tested on the road from the pit to the crusher, which was the steepest road it traveled. After the truck was brought to a complete stop on the hill, the driver was instructed to engage the parking brakes and take his foot off of the service brake. When he did that, the truck rolled backwards.

Based on the inspector's testimony I find that the Euclid R50 haul truck was equipped with parking brakes, but that they were not capable of holding the truck with its typical load on the maximum grade it traveled. Therefore, I conclude that the company violated the regulation as alleged.

### Citation No. 6211042

This citation charges a violation of section 62.120, 30 C.F.R. § 62.120, on July 25, 2001, in that:

On July 25, 2001, the plant laborer/ground man performing cleanup around the plant area was exposed to mixed noise levels of 78.04% as measured with a noise dosimeter for a full shift using a lower threshold limit of 80 dBA. The amount exceeded the noise action level of 50% times the instrument error factor (1.32) for dosimeter noise sampling. This is equivalent to an 8-hour exposure at 88.2 dBA. No hearing conservation program had been established meeting the requirements of 30 C.F.R. § 62.150.

(Govt. Ex. 5.)

Section 62.120 requires that: "If during any work shift a miner's noise level exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part." *Action level* is defined in the regulations as: "An 8-hour time-weighted average sound level (TWA<sub>8</sub>) of 85 dBA, or equivalently a dose of 50% integrating all sound levels from 80 dBA to at least 130 dBA." 30 C.F.R. § 62.101. Section 62.150, 30 C.F.R. § 62.150, requires that a hearing conservation program include: (a) a system of monitoring; (b) the provision and use of hearing protectors; (c) audiometric testing; (d) training; and (e) record keeping.

Inspector Hackworth testified that he had Tom McDonald, the ground man, wear a calibrated dosimeter from 10:25 a.m. to 6:00 p.m. At the end of that period, the dosimeter indicated that McDonald had been exposed to a time-weighted average sound level of 88.2 dBA and a noise dose of 78.04 percent. Thus, it is apparent that McDonald's noise level exposure exceeded the action level both as a time-weighted average and as a noise dose.

The inspector testified that the company's hearing conservation program did not meet the requirements of the regulation because it "hadn't notified the miner in writing, had not provided him two types of muffs and earplugs to choose from . . . ." (Tr. 47.) With regard to the hearing protection, the operator had offered the miner two types of earplugs, one of which he was wearing on the day of the inspection, but had not offered him the choice of two types of earmuffs.

There is no specific requirement in section 62.150 that the miner be notified in writing that he is enrolled in a hearing conservation program. There is, however, a requirement in section 62.110(d), 30 C.F.R. § 62.110(d), that if a miner's exposure exceeds the action level, "[t]he mine operator must notify the miner in writing within 15 calendar days of: (1) the exposure determination; and (2) the corrective action being taken." Since section 62.150 refers to section 62.110 concerning a system of monitoring, it is arguable that this written notification is incorporated in section 62.150.

Nonetheless, it is apparent that the operator at least minimally violated the hearing conservation program requirement by only offering the miner the choice between two types of earplugs, rather than two types of earplugs and two types of ear muffs. Consequently, I conclude that the Respondent violated section 62.120 by not having enrolled McDonald in a hearing conservation program that complied with section 62.150.

Citation No. 6211053

This citation is for a September 11, 2002, violation of section 56.12032, 30 C.F.R. § 56.12032, because:

The cover plate for the motor termination box on the drive motor of the 3/16 conveyor was not secured properly in place. The cover had come loose and was hanging down only being held in place on one corner. The 480 volt wire nut splice connections and insulated inner conductors were exposed. There was no apparent damage to the wiring or connections. This condition created a hazard of the connections being damaged to physical and environmental conditions and causing a shock hazard.

(Govt. Ex. 8.) Section 56.12032 provides that: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Inspector Hackworth testified that during his inspection he observed the cover plate hanging from one corner of the motor termination box. The picture that he took of it clearly shows that the cover plate is normally held on by a screw at each corner of the box, but was attached only by one screw, exposing the inside of the box to the elements. (Govt. Ex. 12.) Accordingly, I conclude that the company violated the regulation as alleged.

Citation No. 6211054

This citation alleges a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), on September 11, 2001, because:

The fan and V-belt drive assembly on the engine of the International Harvester haul truck #105 were not guarded to prevent employee contact. The side engine guards/panels were off/missing. The truck was hauling waste from the west pit to the waste stockpile area. This condition created an entanglement hazard to employees.

(Govt. Ex. 9.) Section 56.14107(a) requires that: "Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

As the picture taken by the inspector plainly demonstrates, there were no coverings on either side of the motor compartment of the haul truck. (Govt. Ex. 12.) There were two bolts located on the side of the engine compartment which indicated that at one time there may have been side covers. However, no one remembered seeing such coverings, nor was anyone able to testify that the truck, which had been owned by the company since 1984, originally came with such coverings.

The evidence adduced at the hearing was that if anyone were working on the motor in the vicinity of the fan and belt assembly the engine would more than likely be off. Furthermore, if work had to be performed on the engine while the engine was on, any side coverings would have

to be removed, thus offering no protection. Therefore, it appears that the only way that a miner could have a hand or arm caught in the belt system would be if the person stumbled when walking by the truck, while the motor was running, and stuck his arm into the motor.

While such an accident would appear to be a highly unlikely occurrence, it is, nevertheless, possible. Consequently, I conclude that the Respondent violated section 56.14107(a) as charged.

Citation No. 6211055

This citation charges a September 11, 2001, violation of section 56.14132(a), 30 C.F.R. § 56.14132(a), because:

The backup alarm on the Euclid R50 haul truck was not maintained in functional condition. The truck was hauling waste rock from the west pit to the waste rock stockpile area. There was no foot traffic in the area. The alarm would not sound when tested. This condition created a hazard of an employee being injured should they not realize or be warned of the truck backing up.

(Govt. Ex. 10.) Section 56.14132(a) provides that: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

Inspector Hackworth testified that the Euclid truck was equipped with a backup alarm, but that when he had the driver put the truck in reverse and backup, the alarm did not sound. Therefore, I conclude that the operator violated this regulation.

Citation No. 6211056

This citation also alleges a September 11, 2001, violation of section 56.14132(a) because:

The backup alarm on the Fiat Allis FR130.2 front end loader, serial #54226, would not function when tested. The loader was operating in the stockpile yard area loading customer trucks. This condition created a hazard of an employee or customer truck driver being backed over due to not being warned of the loader backing up.

(Govt. Ex. 11.)

Inspector Hackworth testified that the front end loader was equipped with a backup alarm, but that when he had the driver put the loader in reverse and backup, the alarm did not sound. Accordingly, I conclude that the company violated section 56.14132(a).

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, 30 U.S.C. § 814(d)(1), 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 2007 (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. *Mathies*, 6 FMSHRC at 3-4.

Considering the criteria in order, I have already concluded that (1) there was a violation of a safety standard. I also find (2) that the violation created a distinct safety hazard, backing over employees or truck drivers walking in the vicinity of the loader. With regard to (3), the company argues that there were signs admonishing truck drivers not to get out of their trucks, so that it was not reasonably likely that they would be on the ground around the loader. However, this argument does not take into account the operator's employees working in the area as well as presuming that truckers are not going to get out of their trucks because a sign tells them not to. I find that there was a reasonable likelihood of injury in this instance and that (4) any injury would be reasonably serious.

Accordingly, I conclude that the violation was "significant and substantial."

### Civil Penalty Assessment

The Secretary has proposed penalties of \$2,562.00 for these violations. 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, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated, and I so find, that Bailey Quarries is a small operator and that it demonstrated good faith in abating the violations. (Jt. Ex. 1.) No evidence was presented at the hearing to indicate that payment of the proposed penalties would adversely affect the company's ability to remain in business, so I find that they will not affect the company to such an extent.

The evidence is that the company has a poor history of previous violations, indeed so poor that it comes within MSHA's excessive history provisions for assessing penalties. 30 C.F.R. §§ 100.4(a)(2) and 100.4(b); (Govt. Exs. 1, 2, 13 & 14.) It appears, however, that this history arose from one inspection in September 2000, which resulted in 36 citations, a number, by all accounts, surpassing the number of citations received by the company for previous and subsequent inspections. Thus, while I find that the company has a poor history of previous violations, it does not appear that it is a habitual violator.

Turning now to the specific citations and penalties, I find, as did the inspector, that Citation No. 6201141 was not of serious gravity and that the Respondent's negligence was "low." The Secretary has proposed a penalty of \$317.00 for the violation and I find that appropriate.

The Secretary has proposed a penalty of \$399.00 for Citation No. 6211042. I agree with the inspector that the gravity of the violation was not serious, but disagree with his finding of negligence. While the company had not complied with all of the requirements of enrolling the employee in a hearing conservation program, it was attempting to do so, and had, in fact, accomplished the most important parts, having the employee's hearing tested and furnishing him hearing protection. Not having notified the employee in writing that he was enrolled in a program or offering him four choices of hearing protection is not that significant in this case. Accordingly, I find that the company's negligence was "low" and assess a penalty of \$100.00.

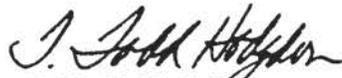
While the gravity of the violation in Citation No. 6211053 was not serious, the operator was "moderately" negligent in allowing the cover plate to be in such a condition. As the company's witness admitted, an onshift inspector "should notice something like this." (Tr. 146.) However, I find that the Secretary's proposed penalty of \$655.00, \$600.00 more than it would be if the excessive history provisions were not in effect and \$180.00 more than the penalty proposed for the only S&S violation in these cases, is too high. Consequently, I assess a penalty of \$300.00

I find the guarding violation on the motor of the haul truck in Citation No. 6211054 to be the least serious one in these cases. The possibility of injury from this violation is extremely remote. While the evidence suggests that the truck has been like this since the company acquired it in 1984, there is no evidence that it has been cited for this violation before. Therefore, I find that the operator's negligence with regard to this violation was very "low" and assess a penalty of \$50.00 instead of the \$399.00 proposed by the Secretary.

Finally, for the two backup alarm violations in Citation Nos. 6211055 and 6211056 the Secretary has proposed penalties of \$317.00 and \$475.00, respectively. I concur with the inspector's finding that the Respondent's negligence in both cases was "low," as well as his characterizations of gravity as being fairly serious for Citation No. 6211056 and not so serious for Citation No. 6211055. Accordingly, I find that the penalties proposed by the Secretary are appropriate.

### Order

In accordance with the above findings, Citation No. 6211042, in Docket No. CENT 2002-108-M, is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and is **AFFIRMED** as modified and Citation No. 6211041 in that docket is **AFFIRMED**; Citation No. 6211054, in Docket No. CENT 2002-129-M, is **MODIFIED** by reducing the level of negligence from "moderate" to "low" and is **AFFIRMED** as modified and Citation Nos. 6211053, 6211055 and 6211056 in that docket are **AFFIRMED**. Bailey Quarries, Inc., is **ORDERED TO PAY** a civil penalty of **\$1,559.00** within 30 days of the date of this decision.



T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

Kristi L. Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550,  
Denver, CO 80201-6550

Randall D. Bailey, Vice President, Bailey Quarries, Inc., P.O. Box 430, Republic, MO 65738

/hs

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 Skyline, Suite 1000  
5203 Leesburg Pike  
Falls Church, Virginia 22041

September 16, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-65-M
Petitioner	:	A. C. No. 43-00196-05521
	:	
v.	:	Docket No. YORK 2000-66-M
	:	A. C. No. 43-00196-05522
	:	
VT UNFADING GREEN SLATE CO., INC.,	:	
Respondent	:	Blissville Quarry & Mill

## DECISION ON REMAND

These cases are before me on remand from the Commission. *Vermont Unfading Green Slate Co., Inc.*, 24 FMSHRC 439 (May 2002). The Commission instructed that the record be reopened and the company be permitted “to present [Inspector] Tango’s testimony relating to the guarding hazard on the trimmer [Citation No. 7720771].” *Id.* at 443. The Commission also directed the judge to “reconcile any conflicting evidence and determine if the guarding was adequate to protect a miner standing or working on the platform next to the trimmer.” *Id.* at 443-44. For the reasons set forth below, I affirm the citation and reassess a penalty of \$55.00.

In accordance with the Commission’s instructions, a hearing was scheduled for September 19, 2002, for the purpose of taking Inspector Tango’s testimony. Notice of Hearing, June 27, 2002. However, because Inspector Tango no longer worked in the New England area, but instead had been reassigned to Iowa, the parties were “directed to confer and attempt to arrive at [a] method of presenting Mr. Tango’s testimony” that would not require his presence at a hearing. *Id.* The parties were ordered to inform the judge on or before August 2, 2002, whether an agreement had been reached on the testimony. *Id.*

On August 2, the Secretary, by counsel, filed a Motion to Cancel Hearing and Close the Record because the company had not responded to counsel’s July 18, 2002, letter concerning methods of presenting Tango’s testimony. The Respondent did not file anything in response to the Notice of Hearing, nor did it respond to the Secretary’s motion.

## Order to Show Cause

Commission Rule 66(a), 29 C.F.R. § 2700.66(a), provides that: “When a party fails to comply with an order of a Judge or these rules . . . an order to show cause shall be directed to the

party before the entry of any order of default or dismissal. The order shall be mailed by registered or certified mail, return receipt requested.” Accordingly, since the operator did not respond to the Notice of Hearing or the Secretary’s motion, an Order to Show cause was mailed by certified mail, return receipt requested, to the operator on August 16, 2002. It Ordered the company to show cause, within 21 days of the date of the order, why the “hearing should not be canceled and a remand decision rendered based on the record evidence, for the company’s failure to prosecute.” It warned that: **“Failure to respond to this order within the time provided will result in the above actions being taken.”**

The return receipt card, signed by “Ranae Wood,” shows that the order was received by the operator on August 19, 2002. As of the date of this decision, no response to the order has been received. Therefore, it is **ORDERED** that the hearing scheduled for September 19 to take Inspector Tango’s testimony is **CANCELED** and the record is **CLOSED**.

### **Reconsideration of Citation No. 7720771**

This case involved an inspection by MSHA Inspector Brett Budd and Robert Tango, at the time, an MSHA Inspector-trainee. Budd testified at the hearing that the citations were written by Tango, but signed by him. Budd testified at the hearing; Tango was not present.

Citation No. 7720771 alleges a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), because: “A machine guard was not provided to prevent accidental contact with the V-belt drive system, exposing pinch points that are about 5 feet from ground level, located on the left side of the slate trimmer in the garage building and was not in use at the time of this inspection, but is used daily.” (Govt. Ex. 5.) Section 56.14107(a) requires that: “Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.”

Inspector Budd testified that the area of concern was:

[T]he V-belt that’s used to drive or make this trimmer move. The V-belt areas are not guarded, where there was a potential to, for someone, mainly the operator of the trimmer, to stick their hand into the V-belt drive or get drawn in from clothing, and potentially maybe have their fingers cut off or an amputated hand.

(Tr. 64.) He further testified that the machine operator would be standing “within a foot” of the unguarded V-belt. (Tr. 67.)

Budd related that there were two pinch points on the V-belt, “you would have the top exposure where the V-belt drive contacts the upper drive pulley, plus the lower electrical pinch point hazard where the V-belt comes in contact with the drive pulley onto that system.” (Tr. 67.)

He said that the lower pinch point was “between ankle and knee high” and the upper one was “from shoulder-high to waist-high” of the operator. (Tr. 69.)

Finally, Budd testified with regard to whether Respondent’s Exhibit A, a sketch of the trimmer, was a true and accurate description, that: “He marked there was an existing guard on this there, and there was no guard, that’s why the violation was cited.” (Tr. 77.)

While a great deal of the operator, Shawn Camara’s, testimony had to do with whether someone standing on the ground could be caught in the pinch points, he did testify as follows concerning the V-belt drive:

THE COURT: Is the pulley guarded?

MR. CAMARA: The pulley was certainly guarded. There was a guard that came from – see?

THE COURT: Here’s the diagram [Resp. Ex. A.] of it.

MR. CAMARA: I know, but it’s hard for me to explain this. Only that here’s a building here, let’s say this is the building, just pretend there’s a big wall right here. When a trimmer sits in there, it’s guarded from the top of the wheel to the bottom. Where the guy sits or where the guy stands, that’s where it’s guarded. It’s guarded from clothing getting caught in the wheel. It’s guarded from a pinch into the wheel.

Normally what happens is, why they don’t want – if a shirt gets caught, you put your hand in the trimmer, and it gets chopped off if you get pulled down. That’s why they are talking about that.

(Tr. 165.)

On cross examination, Camara admitted that a person operating the trimmer would be standing on the pallets on which the trimmer was placed. (Tr. 167.) When specifically asked: “Are you saying the V-belt he cited was in fact guarded?” He responded: “I’m a little unclear. When you are talking about the V-belt, you are saying the belt is on top like this, and curved like this?” Then he said: “If a guard was there, there was no possible way – trimming the chips, there’s no possible way he could have gotten caught.” (Tr. 167-68.)

Finally, the following colloquy took place:

A: There’s that wheel, it comes down the front. The front part where the motor is, is guarded.

Q: What about the V-belt?

A: *Was not guarded.* But again, there's only one way a person could get caught there, and that's by taking a stick and trying to – the trimmer wheel is not a V. It's a solid piece that's two inches wide. And the wheel is a big wheel that's about the size of a tire, and it's wide like this. The V-belt runs the wheel like this. This trimmer used to be run by a foot, and it's weighted so the trimmer blade comes round like this.

Q: Why does someone have to use a stick to get in the area you are talking about?

A: Eight feet above the ground, do you think you could get your hand up there?

(Tr. 169, emphasis added.)

As Commissioner Jordan noted in her dissent, Camara's testimony can best be characterized as "muddled and inconsistent." 24 FMSHRC at 449. Even when talking about the pulleys, he continually returned to having to be nine feet tall, or having to use a stick to reach it, which clearly was directed towards coming in contact with the pinch points from the ground. He talked about the trimmer blade being guarded, the pulley being guarded on the front and the pulleys being guarded on the outside by walls or benches, but he never directly addressed the concerns expressed by the inspector, that of the V-belt and the pulleys being guarded on the inside where the operator would be sitting or standing. In fact, he appeared to admit that it was not guarded there. (Tr. 169.)

In view of Camara's disjointed, ambiguous testimony, I credit the testimony of Inspector Budd on this citation. Accordingly, I again conclude that the operator violated section 56.14107(a).

### Order

Citation No. 7720771 is **AFFIRMED** as modified in my original decision. *VT Unfading Green Slate Co., Inc.*, 23 FMSHRC 310, 315, 320 ( March 2001). Vermont Unfading Green Slate Co., Inc., is **ORDERED TO PAY** a civil penalty of **\$55.00**, for this violation, within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, E-375, John F. Kennedy Federal Bldg., Boston, MA 02203

Shawn Camara, Esq., Vermont Unfading Green Slate Company, P.O. Box 210, Poultney, VT 05764

/hs

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

September 17, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. WEVA 2001-66
	:	A.C. No. 46-05437-03621
	:	
DAY MINING INCORPORATED, Respondent	:	Day Mining Inc.

**DECISION**

Appearances: M. Yusuf M. Mohamed, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, for the Petitioner;  
David J. Hardy, Esq., Heenan, Althen & Roles, LLP, Charleston, West Virginia, for the Respondent.

Before: Judge Schroeder

**Introduction**

This case is before me on a Petition by the Secretary of Labor for the assessment of a Civil Penalty for the alleged violation of mine safety regulations. The Petition alleged two violations for which the Secretary proposed a total Civil Penalty of \$60,000.00. After prehearing development, a hearing was held in Charleston, West Virginia, on March 5 and 6, 2002. Following the hearing, both sides filed written arguments. The entire record has been carefully considered. Finding of fact and conclusions of law appear below.

The regulatory provisions at issue in this case are the following:

30 CFR § 77.501

**Electric distribution circuits and equipment; repair.**

No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. Opened and suitably tagged by such persons.

### **Required Protective Equipment**

(d) A suitable hard hat or hard cap when in or around a mine or plant where falling objects may create a hazard. If a hard hat or hard cap is painted, nonmetallic based paint shall be used.

My task is to determine whether either or both of these regulations was violated and, if so, what the appropriate penalty should be under the circumstances.

There appear to be two critical issues which drive the major conclusions to be drawn; (1) was "electrical work" being performed at the time in question, and (2) were either of the persons involved in any "electrical work" required to wear hard hats. The factual findings below are directed primarily at those questions.

### **Factual Findings**

During January 2000, Day Mining experienced difficulties with one of its electric transformers. Tr. 361. The transformer was part of the Wet Branch substation. Tr. 28. Management decided to ship the transformer to a service facility for repairs. A trucking company was hired to haul the transformer; a crane operator was hired to lift the transformer out of the substation onto the truck; and an electrical company was hired to disconnect the transformer from the electric power network to allow the transformer to be hoisted. Power to the malfunctioning transformer was terminated but the remainder of the substation continued to be energized. Removal of the transformed was scheduled for February 21, 2000, a Monday.

Day Mining management took the form of Richard Busick, Project Manager, whose office was located a short drive from the Wet Branch substation. He made arrangements for the several contractors required for removal and repair of the transformer. Tr. 414. Of particular importance to this case, Mr. Busick decided to use Williams Electric for the disassembly of the transformer and assistance to the crane operator in the hoisting process. Steve Williams was the active employee for Williams Electric, in fact had been the owner of Williams Electric until a short time prior to the events of interest in this case. Williams Electric was chosen for this job by Mr. Busick because of Mr. Williams' reputation in the area for quality electrical work. There is no suggestion in this case that Mr. Williams was anything other than a highly competent and knowledgeable electrical contractor. In fact, however, he had allowed his certification as a mine electrician lapse because of his failure to renew by taking continuing education. He had not been certified for almost 20 years prior to the accident which gave rise to this claim. Tr. 48. Sec. Ex. 20. Mr. Busick, likewise, had been certified as a mine electrician and had allowed his certification to lapse.

The weight of the testimony suggests that for the 20 years since his certification was allowed to lapse, Mr. Williams had been employed in the construction and repair of electrical systems that were not energized and for which a certification under the regulations of the Mine Safety and Health Administration was not required. Work on or around an energized electrical system is a very different challenge from work on an electrical system that will be energized by someone else. The Wet Branch substation is surrounded by metal fencing topped by barbed wire and covered with signs warning of “High Voltage” in case anyone failed to notice the distinct hum associated with high voltage transformers. Tr. 92. Mr. Busick never asked Mr. Williams for evidence of mine electrical certification and Mr. Williams never offered a certification or asked if certification would be required. Mr. Busick testified he was shocked later to discover that Mr. Williams had allowed his certification to lapse so long before this work.

On the Friday morning before the scheduled removal of the Wet Branch transformer, Mr. Williams paid a visit to Mr. Busick at his office. They discussed a number of subjects, including the upcoming transformer removal, until Mr. Williams asked Mr. Busick to drive him up to the substation to take a look at the equipment. Mr. Williams had identified several potential work problems which might confront him on Monday and he wanted to satisfy himself as to the condition of the site. He expressed particular concern with the fastenings which connect the top of the transformer to the overhead wires. Tr. 235, 370.

Mr. Busick drove his truck out to the substation with Mr. Williams. Neither of them took any tools or plans concerning the work. Tr. 491. Neither of them wore a hard hat. They observed the substation from the outside for a few minutes and discussed the wooden cross-arms which carried wires to the various transformers. Some of the cross-arms were to be disassembled and removed to facilitate the crane lift of the transformer. Mr. Williams argued for a while that the transformer could be removed without removing the cross-arms but Mr. Busick was firm that the crane operator needed the cross-arms removed.

Mr. Williams then asked Mr. Busick to open the gate to the substation so he could enter and look more closely at the details of the equipment. Mr. Busick initially stayed out of the substation while Mr. Williams entered and walked around the equipment. Tr. 379. Mr. Williams continued to look up at the cross-arms and the wire connection points. Finally, Mr. Busick entered the substation to point out to Mr. Williams some small parts which earlier had been removed from the transformer by other workers. Mr. Williams by this time was out of sight further into the substation. Mr. Busick then heard “a sizzle, hard sound, and a grunt.” Tr. 382 He moved around the transformer in time to see Mr. Williams fall to the ground on the other side of the transformer. Tr. 432. Mr. Busick attempted first aid but without success. Subsequent examination showed that Mr. Williams died as a result of a high voltage contact to the back of his head. A photograph of his baseball cap showed a burn to the back of the head.

Neither Mr. Williams nor Mr. Busick were wearing hard hats when they entered the substation although both had such hats available without inconvenience. Use of a hard hat in the mine industry is typical and not considered burdensome.

The electrical line which more likely than not was the source of injury to Mr. Williams was located about 13 feet above ground. Mr. Williams was just over 6 feet tall. The only way he could have contacted the wire would have been to climb the transformer on cooling fins on the outside of the transformer. The first step in climbing the fins would have been over 30 inches from the ground. The wire was located in compliance with the applicable industry standard. Tr. 129, 263. The fins were not designed to serve as a ladder but would not be damaged by climbing and were accessible by a reasonably agile person. Tr. 33. The wire was not hidden or concealed. It would have been visible to Mr. Williams as he looked at the overhead cross-arms. Mr. Williams climbed the transformer without tools and without an intent to perform current physical work. His apparent intent was to take a closer look at the upper connections between the transformer and power wires.

An expert witness employed by the Mine Safety and Health Administration testified in his opinion if Mr. Williams had been wearing an ordinary hard hat when he contacted the wire, he would not have received a serious injury. I accept this opinion as reasonably supported by scientific evidence and analysis.

## Analysis

### Electrical Work in the Substation

The Secretary has the initial burden of showing evidence of each of the elements of the claims alleged. The jurisdictional facts are not in dispute. It is also undisputed that neither Mr. Williams nor Mr. Busick satisfied the requirements for a “qualified person” as that phrase is used in 30 C.F.R. §77.501 that requires annual recertification under 30 C.F.R. §77.103(g). The issue is whether the activities conducted by Mr. Williams and Mr. Busick within the Wet Branch substation on the morning of February 18, 2000, constituted “electrical work” within the meaning of the regulation. If “electrical work” was performed, the required qualified persons were not present and the regulation was violated.

The words used in 30 C.F.R. §77.501, and the context of the regulation in a subpart entitled Electrical Equipment, imply technical meanings which the Secretary is entitled to interpret. That interpretation must be given deference in this forum unless it is patently unrealistic. *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123 (D.C. Cir. 2001). The Secretary has made only limited use of this authority to supply useful interpretations of this regulation. Exhibits 14 and 18 supplied by the Secretary contain almost the same words in describing the intention of the Secretary in applying this regulation. What can be gleaned from these interpretations is the intention to apply the regulation broadly to separate insufficiently trained persons from a substantial hazard. I find it particularly significant that the interpretation includes design work as part of electrical work. I interpret design work to include activities like measurement, inspection, comparison, simulation and similar activities with very limited use of tools other than the hands and the brain. Respondent’s argument that no work was contemplated by Mr. Williams and Mr. Busick because they did not bring tools with them is overly simplistic.

That Mr. Williams died without a tool in his hand is very hard evidence of the hazard involved even without tools.

I conclude that Mr. Williams went to the Wet Branch substation to perform electrical work within the meaning of 30 C.F.R. § 77.501 in the form of inspection, measuring, planning, simulation, and alternative analysis. The substation was energized at the time of his visit and constituted a work site subject to the regulation. In the course of performing this electrical work he climbed the transformer as he would have done many times in working on nonenergized facilities. During that climb his head contacted a hot wire and he died.

Mr. Busick argued in his testimony with some force that there was no way he could be expected to have anticipated that Mr. Williams would climb the transformer out of a safe area and into danger. But his argument misses the point of designating an area as requiring special qualifications to enter. The area is so hazardous there are only in two ways can it properly be entered; (1) by a qualified person or people performing under the direct supervision of the qualified person, or (2) by a person who has a specific, narrowly defined job to do in a safe zone and then withdraw. A person entering an electric substation must either know in detail what is safe or must act very specifically on the instructions of someone who does know what is safe. Mr. Williams, by definition under the regulation, did not know what was safe in an energized substation. He should not have been permitted to walk around the inside of the substation as though he did know.

#### Hard Hat Use

It is not seriously disputed that the Wet Branch substation was free of dangers from falling objects. There was some testimony as to the possibility that a cracked wooden overhead cross-arm might constitute a falling hazard, but no solid conclusions can be reached. There was also testimony speculating as to the hazards from an unanticipated electrical explosion, as in the event of a massive power surge. The issue as to hard hats is whether an energized substation constitutes an area of electrical hazard that would require the use of hard hats, without regard to overhead risks. That it is likely that Mr. Williams might be alive today if he had worn a hard hat on February 18, 2000, does not affect the legal question of whether a hard hat was required.

In applying a regulation to a particular set of facts, I am required to apply the plain meaning of the words used rather than to attempt to imply intended meanings imperfectly expressed. On the other hand, I am required to use all of the language of the regulation that can be reasonably applied rather than to pick and chose language to reach a particular result. I am required to give purpose and meaning to the entire regulation to the extent possible. The words should be given their natural meaning rather than a meaning known only to regulation writers. *McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1<sup>st</sup> Cir. 1987)

In this context it is important to note the words used in the second sentence of the regulation; “If a hard hat or hard cap is painted, nonmetallic based paint shall be used.” The

conjunction of hat and nonmetallic paint cries out a concern with electrical hazards of some sort. The second sentence has no reasonable function in the regulation if it does not relate to electrical hazards. A falling rock does not care about the kind of paint used on the hard hat it hits. A reasonable person reading this regulation would be prompted to ask the question, "Does this also apply to solely electrical hazards?"

The answer to this question is readily found in the Mine Safety and Health Administration's Policy and Procedure Manual (PPM) as it relates to 30 C.F.R. §77.17010(d). G. Exh. 15. The PPM very unequivocally says the purpose of the regulation includes "to protect miners against electrical shock or burn." This clear interpretation of the inartful language of the regulation is entitled to deference from the Commission. The effect of this interpretation is not avoided by the rules requiring fair notice of prohibited conduct. Comparison of the hard hat regulation with the regulation at issue in *Morton International, Inc. v. Secretary of Labor*, 18 FMSHRC 533 (April 1996) illustrates the principal of fair notice. In *Morton, supra*, the Commission was dealing with a regulation on mine ventilation. The Secretary argued that the regulation limiting methane levels applied to abandoned areas of a mine. This interpretation was contrary to express language of the regulation as amended. The contrary interpretation of the regulation attempted by the Secretary depended on a reader understanding an error expressed by the Secretary in the preamble to the regulation that amended the original regulation. The Commission found this to not constitute fair notice of the prohibited conduct, i.e., the failure to ventilate the abandoned mine.

In *Morton* the Commission held only that "fair notice" cannot be implied from the possibility that a person might notice an error in a preamble which would infer an intent contrary to the expressed intent in a regulation. No such convoluted search for meaning is necessary here. The regulation, by its express terms, is concerned with electrical hazards and a publication generally available to the public (now accessible through the MSHA Internet Web Site) makes the required (or prohibited) conduct crystal clear.

I find that 30 C.F.R. §77.17010(d) applies to persons performing electrical work in an energized substation of a coal mine. The regulation requires the use of a hard hat. That regulation was violated at the time Mr. Williams and Mr. Busick stepped inside the Wet Branch substation.

#### Appropriate Penalty

My task now is to apply the statutory criteria for penalty amounts to the facts as I have found them above. It is undisputed that the mine was in an active but unproductive status. The Secretary made no effort to show a significant history of safety regulation violations. There was no evidence produced to suggest that a Civil Penalty in the amount proposed by the Secretary would compromise the ability of the Respondent to continue in business.

This leaves three factors to be considered; degree of negligence, gravity of the risks, and efforts to abate or mitigate the violations. The principles established by the Commission for consideration of these factors are well known. See, for example, Secretary of Labor v. Gunther-Nash Mining, 20 FMSHRC 1205 (Oct. 1998)

### Negligence

The key to analysis of negligence is the standard of care demanded of a coal mine operator. The mining business is considered hazardous. People engaged in the business of mining must be constantly alert for risks of injury. Actions which might be considered merely careless elsewhere are significant negligence in a mining context.

Day Mining made at least two mistakes in connection with the visit by Mr. Williams to the Wet Branch substation. First, there was a failure to verify the qualifications of Mr. Williams to be in the substation while it was energized. Because this failure began a cascade of consequences, what would otherwise seem mere careless in light of Mr. Williams long history of electrical work was really negligence. Since the circumstance of spur-of-the-moment planning by an assumed expert is a highly unusual event, I find the negligence is low rather than moderate.

### Gravity

A violation of a mine safety regulation is “significant and substantial” if the violation creates a situation in which there is a reasonable likelihood of an injury of a reasonably serious nature. In my judgement, an energized substation is a place where only serious injuries are experienced, i.e., the knowledge or luck of the person in the substation either results in no injury at all or in a serious injury with real risk of death. The injury suffered here, obviously, was quick and fatal.

### Abatement or Mitigation

Because electrical transformers do not need replacement on regular intervals, abatement or mitigation specific to the Wet Branch substation is difficult to identify. The record is empty of any suggestion that Day Mining has implemented any generic mitigation measures to give greater assurance that the qualifications of contractors will be more closely examined in the future. The record is likewise empty of any suggestion that hard hats will be required in electrical Day Mining substations. It is sufficient to say that the Respondent received no credit at all from this issue.

### Penalty Amounts

While the conduct of Day Mining certainly resulted in a violation of mine safety regulations, the combination of unique circumstances and benign motivation makes the amounts proposed by the Secretary seem excessive. The Secretary offered nothing but oratorical outrage

to support the amounts. The purpose of a Civil Penalty is to focus management attention on hazard prevention by economic coercion. The amount of the Civil Penalty should not be related in any way to the extent or character of the injury which resulted from the violation. In my judgement that purpose would be best served by a Civil Penalty of \$5,000.00 for each of the two violations.

**ORDER**

For the reasons given above, it is ORDERED that the Respondent pay a Civil Penalty of \$10,000.00 within 60 days of the date of this Order. The parties are each to bear their own costs.

A handwritten signature in black ink, appearing to read "Irwin Schroeder", written in a cursive style.

**Irwin Schroeder**  
Administrative Law Judge

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**ADMINISTRATIVE LAW JUDGE ORDERS**



**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

September 4, 2002

AGGREGATE INDUSTRIES, WEST	:	CONTEST PROCEEDINGS
CENTRAL REGION, INC.,	:	
Contestant	:	Docket No. WEST 2002-317-RM
	:	Citation No. 7914271; 01/22/2002
v.	:	
	:	Docket No. WEST 2002-318-RM
	:	Citation No. 7914268; 01/24/2002
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2002-319-RM
ADMINISTRATION (MSHA),	:	Citation No. 7914269; 01/24/2002
Respondent	:	
	:	Docket No. WEST 2002-320-RM
	:	Citation No. 7943951; 01/31/2002
	:	
	:	Fort Collins Plant
	:	Id. No. 05-04733

**ORDER DENYING CONTESTANT’S MOTION TO COMPEL**

Aggregate Industries West Central Region, Inc., (“Aggregate Industries”) filed a motion to compel and for other appropriate relief. Aggregate Industries served requests for the production of documents on the Secretary. The Secretary responded to the requests, but Aggregate Industries alleged that she did not fully comply with Requests No. 3, 4, and 5.

In reply, the Secretary stated that she provided 307 pages of documents to Aggregate Industries and provided 170 additional pages relating to Request Nos. 3 through 5, after discussing the matter with counsel for Aggregate Industries. She also stated that, as a consequence, the only matter in dispute is the Secretary’s response to Request No. 5. The Secretary asks that the motion to compel be denied because Request No. 5 seeks irrelevant information.

In response, Aggregate Industries contends that it is entitled to the documents listed in Request No. 5 because the request is reasonably calculated to lead to the discovery of information relevant to these proceedings. Aggregate Industries argues that the Secretary is not proceeding in good faith and asks for attorney’s fees.

Request No. 5 states as follows: “Produce for inspection and copying all citations issued by MSHA in the Rocky Mountain District alleging violations of 30 C.F.R. §§ 56.12016, 56.11001, 56.12008, and/or 56.18014.” Aggregate Industries believes that it is entitled to these

documents in order to determine whether the Secretary has been consistently enforcing these standards. In the alternative, it asks for a statistically reliable sample of citations for each safety standard. The Secretary contends that the citations sought by Aggregate Industries were issued under a wide variety of factual situations that have no relevance to the log washer accident that gave rise to the citations in these cases. She also objects because it seeks thousands of pages of documents that will require hundreds of personnel hours to locate. Thus, she contends that the request is overly burdensome.

For the reasons set forth below, I deny Aggregate Industries' motion to compel the production of documents. The documents in question have little or no relevance in these proceedings. Whether the Secretary has enforced the cited safety standards in exactly the same manner at every mine throughout MSHA's Rocky Mountain Region is not relevant. Inconsistent enforcement of a safety standard at a particular mine may mitigate the negligence of that operator with respect to an alleged violation. In some situations, inconsistent enforcement of a safety standard at a mine can be the basis for vacating a citation at that mine. But the fact that a safety standard was applied differently at another mine is not a defense to an otherwise valid citation.

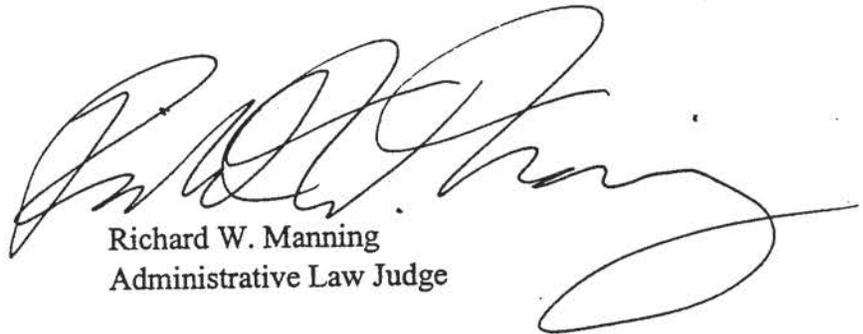
When the Commission determines whether an operator violated a safety standard, it first considers whether the language of the standard is plain or ambiguous. If it is ambiguous, the Commission decides whether the Secretary's interpretation is reasonable. The Commission must defer to the Secretary's interpretation of a standard as long as it is reasonable, consistent with the statutory purpose, and not in conflict with the statute's plain language. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The Commission also looks to see if the operator received fair notice of the Secretary's interpretation of the standard by asking "whether a reasonably prudent person familiar with the mining industry and the protective purpose of the standard would have recognized the specific prohibition or requirement of the standard." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). Prior decisions of the Commission, including the decisions of administrative law judges, provide notice of the proper interpretation of a safety standard. The Commission does not analyze whether the Secretary has applied a safety standard in exactly the same manner throughout the country or in an MSHA region when determining whether an operator violated the standard.

It appears from the parties' filings that there were about 2,230 citations issued in MSHA's Rocky Mountain Region under these four safety standards. The Secretary provided Aggregate Industries with a computer printout listing these citations, which included such information as the mine identification number, whether the violation was significant and substantial, and the date of the citation. Although providing this printout was relatively easy for the Secretary, searching through MSHA's records for these citations will be an immense task. I credit the Secretary's representations in this regard. (S. Statement in Opposition, 8-10).

I find that the burden of providing these documents far outweighs any benefit to Aggregate Industries or the Commission under Fed. R. Civ. P. 26(b)(2)(iii). Under this rule, a judge can determine that a discovery request is unduly burdensome if "the burden or expense of

the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." The advisory committee notes to the 1983 amendments to Rule 26 state that this provision was added to "encourage judges to be more aggressive in identifying and discouraging discovery overuse." The proposed discovery request will not help resolve any of the issues in these cases and is highly unlikely to lead to evidence that will.

Consequently, Aggregate Industries' motion to compel and for other appropriate relief is **DENIED** in all respects because the documents sought are not relevant to these proceedings, the document request is unlikely to lead to the discovery of relevant evidence, and the burden of providing the documents far outweighs any benefit to Aggregate Industries.



Richard W. Manning  
Administrative Law Judge

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

September 6, 2002

THOMAS P. DYE II,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-408-DM
	:	RM MD 02-11
	:	
v.	:	Mine I.D. 05-01732
	:	Cotter Mill
MINERAL RECOVERY SPECIALISTS, INC.,	:	
Respondent	:	

**PREHEARING ORDER**

This proceeding was brought by Thomas P. Dye against Mineral Recovery Specialists, Inc., ("MRSI") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.40 *et seq.* The complaint alleges, in part, that MRSI violated section 105(c) of the Mine Act when it did not hire Dye as a permanent employee because he insisted that a recently repaired piece of equipment be fully safety-tested before it was put back into service. MRSI has retained counsel who states that he will be filing a more complete response to Mr. Dye's complaint. Section 105(c)(3) of the Mine Act provides that proceedings under section 105(c) shall be "expedited by the ... Commission."

It is important for Mr. Dye and MRSI to understand the limits of my jurisdiction. I do not have authority to determine whether any actions taken against Mr. Dye by MRSI were unfair and unreasonable unless such actions violated the anti-discrimination provisions of the Mine Act at 30 U.S.C. § 815(c). Under that provision, a mine operator is prohibited from discriminating against a miner or applicant for employment because he complained about safety or health conditions at the mine or refused to perform a task that he reasonably and in good faith believed presented a hazard to his safety or health. A miner's safety complaints or actions are known as "protected activity." A mine operator may not take adverse action against a miner for such protected activity.

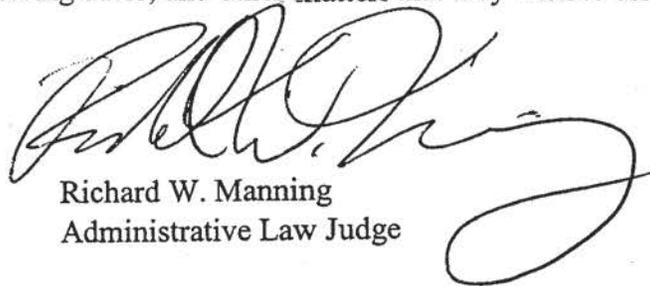
If the parties are unable to settle the case and if the case is not otherwise dismissed, a formal hearing will be held. The issues at the hearing will include whether MRSI discriminated against Mr. Dye. At a hearing, Mr. Dye will be required to present evidence that he engaged in protected activity and that MRSI's adverse actions were motivated at least in part by that protected activity. MRSI may attempt to rebut Mr. Dye's case at the hearing by presenting evidence that either no protected activity occurred or that the actions taken with respect to Mr. Dye were in no part motivated by the protected activity. If MRSI is unable to present such

evidence, it may present evidence that the actions it took with respect to Mr. Dye were also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

The Federal Mine Safety and Health Review Commission is not part of the Department of Labor's Mine Safety and Health Administration (MSHA). Section 105(c)(3) of the Mine Act authorized Mr. Dye to file this case on his own behalf. This provision provides him with an opportunity to try to establish that he was discriminated against. Consequently, this case is not an appeal of MSHA's decision not to file a discrimination complaint on behalf of Mr. Dye, but it is a new, independent proceeding brought by Mr. Dye on his own behalf. I do not have the authority to review MSHA's investigation to determine whether it was competent or to determine whether MSHA's decision to not bring a case was defensible. Neither MSHA nor the Secretary of Labor is a party in this proceeding. If Mr. Dye and MRSI are not able to settle this case, Mr. Dye will be required to present evidence at a hearing to establish that MRSI discriminated against him in violation of section 105(c) of the Mine Act, as described above.

1. MRSI shall file its answer in this case on or before **September 20, 2002**. In order to encourage the parties to settle this case, counsel for MRSI shall contact Mr. Dye to discuss settlement. The parties shall confer as often as necessary to negotiate a settlement. If the parties are unable to settle the case, they shall attempt to narrow the issues, enter into stipulations, and discuss proposed hearing dates.

2. On or before **October 18, 2002**, the parties shall initiate a conference call with me to discuss the status of the case, potential hearing dates, and other matters that they wish to discuss.



Richard W. Manning  
Administrative Law Judge

Distribution:

Mr. Thomas P. Dye, 1428 S 4<sup>th</sup> Street, Canon City, CO 81212-9664

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 9, 2002

BECON CONSTRUCTION, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 2001-204-RM Citation No. 7994802; 01/02/2001
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA Respondent	:	Lebec Cement Plant Mine ID 04-00213 AF6
MORTON ENGINEERING AND CONTRACTING, INC., Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEST 2001-226-RM Citation No. 7994802; 01/02/2001
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA Respondent	:	Lebec Cement Plant Mine ID 04-00213 8FQ
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA Petitioner	:	CIVIL PENALTY PROCEEDING
v.	:	Docket No. WEST 2002-147-M A.C. No. 04-00213-05502 AF6
BECON CONSTRUCTION COMPANY, Respondent	:	Lebec Cement Plant
SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION, MSHA v.	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 2002-164-M A.C. No. 04-00213-05504 8FQ
MORTON ENGINEERING & CONSTRUCTION, INC., Respondent	:	Lebec Cement Plant

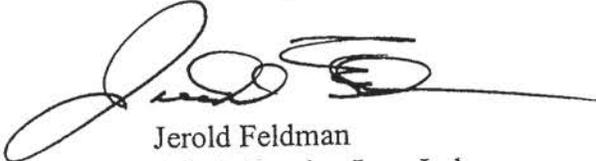
## ORDER DENYING AUTOMATIC STAY

These consolidated contest and civil penalty proceedings have been stayed to permit the parties to complete discovery on or before October 8, 2002. The parties have agreed that November 19, 2002, is a satisfactory hearing date.

On August 15, 2002, Morton Engineering & Construction, Inc.(Morton), citing 11 U.S.C. § 362, filed a motion for an automatic stay because of its voluntary bankruptcy petition filed under Chapter 11 of the Bankruptcy Act. The Secretary opposed Morton's motion on August 27, 2002.

As noted by the Secretary, although 11 U.S.C. § 362(a) provides that the filing of a bankruptcy petition under 11 U.S.C. § 301 operates as an automatic stay of specified proceedings against a bankruptcy petitioner, section 362(b)(4) of the Bankruptcy Act exempts the continuation of a proceeding involving governmental regulatory enforcement from the automatic stay provisions. The Mine Safety and Health Administration (MSHA), the petitioner in the instant proceedings brought pursuant to the regulatory powers delegated to it under the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994), is a "governmental unit" as defined by section 101(27) of the Bankruptcy Act, 11 U.S.C. § 101(27).

Consistent with the above statutory analysis, this Commission has consistently held that MSHA proceedings are not subject to the automatic stay bankruptcy provisions of section 362. *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1528-30 (August 1990); *Sec'y v. L. Kenneth Teel*, 13 FMSHRC 1915, 1916-17 (December 1991) (ALJ). Accordingly, Morton Engineering & Construction, Inc.'s motion for an indefinite automatic stay as a consequence of its bankruptcy filing **IS DENIED**. Although the stay of these matters shall continue to permit completion of discovery, the anticipated hearing date of November 19, 2002, remains in effect.



Jerold Feldman  
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 11, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-127-M
Petitioner	:	A.C. No. 13-02194-05501
	:	
v.	:	Docket No. CENT 2002-193-M
	:	A.C. No. 13-02194-05502
KNAAK SAND,	:	
Respondent	:	Knaak Sand

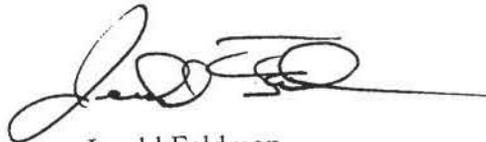
**ORDER DENYING REQUEST FOR RECUSAL**

On June 6, 2002, I conducted a telephone conference with James V. Knaak, sole proprietor of Knaak Sand, and Thomas J. Pavlat, a Conference & Litigation Representative of the Mine Safety and Health Administration. During the telephone conference Mr. Knaak raised jurisdictional questions. Consistent with this Commission's decision and the longstanding Federal appellate case law cited in *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994), I informed Mr. Knaak that sand and gravel facilities generally are subject to Mine Act jurisdiction.

In correspondence dated August 23, 2002, Mr. Knaak, citing the June 6 telephone conference that addressed the issue of jurisdiction, stated "[i]n fairness to me, I believe I should have a different judge, that will at least listen to me before he finds in favor of the government." I construe the August 23 letter as a request for recusal.

In response to Mr. Knaak's August 23 letter, on September 11, 2002, I initiated a telephone conference with Mr. Knaak and the Secretary's counsel Edward Falkowski. I again explained the case law concerning Mr. Knaak's jurisdictional objections. I requested Mr. Falkowski to provide a copy of the Commission's *Harless* decision for Mr. Knaak's information. I assured Mr. Knaak that I had not prejudged his case. However, I also emphasized that, in deciding this matter, I was bound by statutory law and case precedent.

Commission Rule 55(f), 29 C.F.R. § 2700.55(f), authorizes the presiding judge to hold conferences in an effort to simplify issues. Mr. Knaak's apparent disappointment with regard to the case law as it relates to his jurisdictional objections does not provide a basis for my recusal. Accordingly, the request for recusal **IS DENIED**. Consequently, the hearing will convene as scheduled at **9:00 a.m. on Wednesday, October 16, 2002**. The hearing location will be specified in a subsequent Order.



Jerold Feldman  
Administrative Law Judge

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James V. Knaak, Knaak Sand, Box 1, Eldon, IA 52554

/hs

