FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 31, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-19-M
Petitioner	:	A.C. No. 35-02969-05506
v.	:	
	:	Docket No. WEST 99-105-M
WEATHERS CRUSHING, INC.,	:	A.C. No. 35-02969-05508
Respondent	:	
	:	Weathers Portable
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 99-361-M
Petitioner	:	A.C. No. 35-02969-05509 A
v.	:	
	:	Weathers Portable
DARWIN WEATHERS, employed	:	
by WEATHERS CRUSHING, INC.,	:	
Respondent	:	

DECISION

Appearances: William Kates, Eq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington for Petitioner;
Roger Luedtke, Esq., Schwabe Williamson & Wyatt P.C., Portland, Oregon, for Respondent.

Before: Judge Bulluck

These cases are before me upon Petitions for Assessment of Penalty filed by the Secretary of Labor, through the Mine Safety and Health Administration ("MSHA"), against Weathers Crushing, Incorporated ("Weathers Crushing") and Darwin Weathers, president of Weathers Crushing, pursuant to sections 105(d) and 110(c), respectively, of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 801 *et seq*., as a result of a fatality that occurred at the Weathers Portable mine facility on April 30, 1998.

A hearing was held in Medford, Oregon. The post-hearing briefs are of record. For the reasons set forth below, Citation Nos. 4135307, 4135310 and Order No. 4135308 shall be AFFIRMED, as issued, Order No. 4135309 shall be DISMISSED, and Darwin Weathers, as corporate officer, shall be ordered to pay a civil penalty.

I. Stipulations

The parties stipulated to the following facts:

1. The Respondent, Weathers Crushing, Incorporated, is and at all times material hereto, was a corporation with a mailing address of 6070 Rock Way, Central Point, Oregon 97502.

2. The Respondent, Weathers Crushing, Incorporated, is and at all times material hereto, was the owner and operator of certain portable crushing machinery and equipment used at various mine sites in Oregon and several years ago, in Northern California.

3. On or about April 30, 1998, the Respondent, Weathers Crushing, Incorporated, was operating such portable crushing machinery and equipment on a temporary basis at the mine facility known as the Weathers Portable and located at the pit known as the Brick Pile Quarry in the Rogue River National Forrest, approximately 25 miles southeast of Central Point, Oregon.

4. The Weathers Portable facility, identified above, was, on April 30, 1998, a mine subject to the Mine Act, in that its operations and products enter of affect commerce.

5. The site of the alleged violations at issue in these cases is the aforesaid Weathers Portable mine facility.

6. The Respondent, Darwin Weathers, an individual, is and at all times material hereto, was the president of Weathers Crushing, Incorporated.

7. The Respondent, Weathers Crushing, Incorporated, has a history of two assessed violations, having two inspection days in the 24 months prior to the violations at issue herein.

8. At the aforesaid Weathers Portable mine facility, there were approximately 5,973 hours worked in the calendar year prior to the violations at issue herein.

II. Factual Background

Weathers Crushing began operating the cited portable jaw crusher at its Weathers Portable mine facility on or about April 21, 1998 (Tr. 44-45). On the morning of April 30, 1998, when the

fatality occurred, Darwin Weathers, Dan Berkey and Richard Nelson were working at the mine site (Tr. 25-26). Weathers had hired Nelson to operate the rock crusher, as a replacement for his son, Jeff Weathers, who had recently broken his ankle, and this was Nelson's first day on the job (Tr. 57, 85). Jeff Weathers and Dan Berkey had both worked with Nelson previously, and Nelson had talked to Darwin Weathers on a few occasions about coming to work for him, indicating that he had worked on a rock crusher and around other heavy equipment on another job (Tr. 58, 85-86, 123). The record is vague as to the extent of Nelson's experience on rock crushers, except that he had worked in Susanville, California and New Mexico (Tr. 57, 79). Prior to being hired by Weathers, Nelson had been an automobile mechanic (Tr. 58).

Dan Berkey had driven himself and Richard Nelson to the job site (Tr. 108, 122). Weathers spent ten to thirty minutes with Nelson on the operator's platform, instructing him on the operation of the jaw crusher and watching him perform, and ultimately instructed Nelson to get his attention on the front-end loader, should any problems occur that would require his assistance (Tr. 78, 82, 86-87, 101, 122). Following Weathers' instruction, Berkey went up on the platform with Nelson and showed him how to operate the crusher (Tr. 122-23). In response to Nelson's mention of using a pry bar to clear blockages in the crusher, Berkey told Nelson that "that wouldn't be a good idea," because "if you stick it in there and everything breaks loose, it's going to take that pry bar and slam it back at you and hit you with it (Tr. 82-82, 123)." Before he left the platform, however, Berkey did instruct Nelson on methods of clearing obstructions with a running crusher, including breaking off corners of rocks with a sledge hammer and, like Weathers, advised Nelson that 'if he had any problems, to let [him] know so [he] could go over there and show him (Tr. 79-81, 124)."

At approximately 9:45 a.m., 2 ½ hours after Nelson had begun working, Weathers was operating the front-end loader supplying rock to the jaw crusher, Berkey was removing sticks and other foreign objects from the conveyor belt to the cone crusher, and Nelson was operating the jaw crusher (Tr. 25-26, 35, 56-57, 79, 91, 124). Weathers became concerned when he lost view of Nelson, and rushed to the jaw crusher, closely followed by Berkey, who had seen Nelson's hat fly up in the air (Tr. 66, 95-96, 125-26). Weathers and Berkey found Nelson injured, lying in the right side of the feeder, just in front of the jaw crusher (Tr. 25, 30-32, 119; Ex. P-4). The jaw crusher was still running, but the feeder had been turned off (Tr. 64, 94-95, 109). Weathers directed Berkey to administer first aid to Nelson, while he radioed for help in his pick-up truck (Tr. 64). The sledge hammer head had been hurled 37 ½ feet from the jaw crusher into a pile of muck, and its badly splintered handle was found on one of the conveyor belts, having passed through the cone crusher (Tr. 58-60; Exs. P-10, P-11). Neither Weathers nor Berkey actually witnessed the accident.

The Jackson County Sheriff's Department was dispatched and took photographs of the accident scene, and Fire and Rescue emergency medical personnel attempted to resuscitate Nelson for approximately one hour, after which he was transported by ambulance to Rogue Valley Medical Center, where he was pronounced dead (Tr. 60-62; Exs. P-4, P-5, P-6, P-12, P-13, P-14). At the Medical Center, marijuana in a plastic bag and a marijuana pipe were found in

Nelson's jeans pocket by an emergency room nurse, and Nelson tested "presumptive positive" for benzodiazephines and cannabinoids (Tr. 68; Ex.P-15).

MSHA Inspector Randy Cardwell and Darwin Weathers met at Weathers' home in Medford at 7:00 that evening, discussed the accident and traveled to the mine together, so that Cardwell could secure the site (Tr. 12-15). Cardwell observed that the feeder was empty, and was told by Weathers that, after the accident, they had run the remainder of the rock through the crusher, before shutting down the plant and leaving the mine (Tr. 28-30). Weathers expressed his opinion to Cardwell that Nelson had been hit in the face with the head of a sledge hammer, and showed him where Nelson had fallen in the feeder (Tr.13,15, 24-25).

On the following morning, May 1st, MSHA accident investigation team members Collin Galloway, David Brabank and Randy Cardwell, accompanied by Jackson County Medical Examiner Sherman Spencer, Weathers and Berkey conducted an investigation of the fatality at the mine site (Tr. 30, 35-36, 77-78). Galloway climbed up onto the operator's platform, took several photographs, and noticed the absence of a pair of guard chains, intended as a barrier between the operator's platform and the pan feeder (Tr. 41-44; Exs. P-1, P-2, P-3). Weathers looked for the chains after the inspector brought the matter to his attention, but was unable to find them (Tr. 43-44, 91, 102-04).

As a result of the investigation, Galloway issued two citations and two orders.

III. Findings of Fact and Conclusions of Law

A. Citation No. 4135307

1. Fact of Violation

104(d)(1) Citation No. 4135307 charges a violation of 30 C.F.R. § 56.14105, describing the condition or practice as follows:

> A fatal accident occurred at this mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. The crusher operator was using a 12-pound sledge hammer to dislodge the rocks, and was struck in the face when the head of the hammer was forcibly ejected from the crusher. The crusher had not been shut off and blocked against hazardous motion. Darwin Weathers, owner, knew or had reason to know the procedure was used to clear blockages while the crusher was operating. This is an unwarrantable failure to comply with a mandatory safety standard.

30 C.F.R. § 56.14105 provides that: "Repairs or maintenance of machinery or equipment shall be performed only after the power is off, and the machinery or equipment blocked against hazardous motion. Machinery or equipment motion or activation is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons

are effectively protected from hazardous motion."

The Commission broadly interprets "repairs or maintenance of machinery or equipment" to encompass activities of breaking up and removing rocks clogging a crusher. *Walker Stone Company, Inc.*, 19 FMSHRC 48, 51 (January 1997), *aff'd* 156 F.3d 1076 (10th Cir. 1998). It is undisputed that the crusher was running and the feeder had been turned off by Nelson when he was fatally injured. One of the Jackson County Sheriff Department photographs, taken contemporaneous with the accident and before the feeder had been "run out," depicts large rocks lying flat at the end of the feeder just above the jaw crusher, establishing the likelihood of a jammed feeder (Ex. P-13; Tr. 61-63). This photograph supports Weathers Crushing's position that Nelson had been attempting to loosen rock blockage in the feeder with the sledge hammer, rather than in the crusher, itself (Tr. 65-66, 118-120; Resp. Br. at 4). A "bridge" or blockage in the feeder prevents rock from falling into the jaws of the crusher, but does not impede the actual motion of the crusher (Tr. 94, 114-15).

Weathers Crushing argues, therefore, that if Nelson is found to have been "repairing or maintaining" the feeder, it follows that he had complied with the standard, because he had turned it off. It is this reasoning, however, that totally frustrates the safety promoting purpose of the standard. The fault in Weathers Crushing's position lies in considering the feeder and crusher as two separate entities, operating independent of each other. On the contrary, they operate as a unit, wherein the walls of the feeder are angled and its plates vibrate to jog rock down into the jaws of the crusher, which reduces the rock to the size to which the dies have been adjusted (Tr. 49-51). In effect, the feeder is the gateway to the crusher, such that objects in the feeder are openly exposed to the crusher's jaws.

Although speculation, since there were no eyewitnesses to the accident, it is likely that Nelson entered the feeder after he had turned it off, and in attempting to clear the obstruction in the feeder, dropped the sledge hammer, or somehow put it in contact with the running jaw crusher, which spit the hammerhead back at him, resulting in the fatal blow to his face. It is abundantly evident that had the crusher been turned off and blocked against hazardous motion, the accident would have been avoided. When considering that Nelson, himself, could have slipped and fallen into the moving jaws, it is clear that both feeder and crusher must be turned off and blocked against motion when working in either component.

Accordingly, having found that Nelson was required to turn off both jaw crusher and feeder, and block them against hazardous motion when he was unblocking the feeder, I conclude that Weathers Crushing violated section 56.14105.

2. Significant and Substantial

Section 104(d) of the Act designates a violation "significant and substantial" ("S&S") when it is "of such a 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 the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth the four criteria that the Secretary must establish in order to prove that a violation is S&S under *National Gypsum*: 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. 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* 9 FMSHRC 2015, 2021 (December 1987)(*approving Mathies criteria*). Evaluation of the third criterion, the reasonable likelihood of injury, should be made in the context of "continued mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). Moreover, resolution of whether a violation is S&S must be based "on the particular facts surrounding the violation." *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (April 1998).

Inspector Galloway determined that the violation was S&S. Clearly, the hazard of working in and around the feeder and jaw crusher, without turning off the power and blocking the hazardous motion of both components, was a significant contributing cause of Nelson's fatal accident. Therefore, I conclude that the violation was S&S.

3. Unwarrantable Failure

"Unwarrantable failure" is aggravated conduct consisting of more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a serious lack of reasonable care. *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

The Commission has provided a practical framework in which to analyze whether a violation resulted from unwarrantable failure. Among the factors to be considered are "the extensiveness of the violation, the length of time the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether the operator has been placed on notice that greater efforts are necessary for compliance." *Mullins and Sons Coal Co.*, 16 FMSHRC 192, 195 (February 1994). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test. *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (October 1993).

The practice of using a sledge hammer to break off corners of obstructive rocks in feeders was standard operating procedure at Weathers Crushing, and demonstrated by Berkey to Nelson during Nelson's new employee indoctrination. Indeed, Weathers testified that he had been in the rock crushing business for 23 years, had routinely engaged in the practice that ultimately killed

Nelson, and had taught his son, a company employee of 15 years, to employ the same technique (Tr. 88-90, 93, 99-100, 108-09, 111-12). The danger of working in and around the jaw crusher while it is running is, or should be, visibly evident. Tragically, Nelson performed as he had been instructed, to the extent that he worked in the feeder with the sledge hammer, in close proximity to the running crusher. It is irrelevant whether negligence or inadvertence on Nelson's part caused the sledge hammer to make contact with the crusher, because the danger arose from exposure to the moving machinery, rather than the activity in or around it. It is my finding, therefore, that Weathers Crushing's conduct in instructing Nelson to place himself in and around heavy, running equipment demonstrated a serious lack of reasonable care that was more than ordinary negligence. Consequently, I find that the Secretary has proven that the violation was the result of Weathers Crushing's unwarrantable failure to comply with the standard.

5. Penalty

While the Secretary has proposed a civil penalty of $25,000.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(j). *See Sellesburg Co.*, 5 FMSHRC 287, 291-92 (March 1993), *aff'd*, 763 F. 2d 1147 (7th Cir. 1984).

Weathers Crushing is a small operator, with an overall history of violations that is not an aggravating factor in assessing an appropriate penalty (Tr. 6). As stipulated, the proposed civil penalty will not affect Weathers Crushing's ability to continue in business (Tr. 127-28).

The remaining criteria involve consideration of the gravity of the violation and the negligence of Weathers Crushing in causing it. Considering that Nelson was fatally injured, I find the gravity of the violation to be very serious. In assessing the level of negligence attributable to Weathers Crushing, since Nelson was a rank-and-file employee, I have considered the operator's supervision and training of Nelson, and have determined that the operator not only failed to take reasonable steps to prevent Nelson's violative conduct, but encouraged it. *See Secretary of Labor v. Southern Ohio Coal Co.*, 4 FMSHRC 1458, 1464 (1982). Accordingly, and consistent with my conclusion that the violation resulted from Weathers Crushing's unwarrantable failure to comply with the standard, I ascribe high negligence to the operator. Therefore, having considered Weathers Crushing's small size, seriousness of violation, high degree of negligence, good faith abatement and no other mitigating factors, I conclude that the $25,000.00 penalty, as proposed by the Secretary, is appropriate.

The Secretary has charged Darwin Weathers under section 110(c) for a violation of 30 C.F.R. § 56.14105, and has proposed a civil of penalty of $250.00. Section 110(c) of the Mine Act provides that whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the

existence of a violative condition." *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983). Section 110(c) liability is predicated on aggravated conduct that constitutes more than ordinary negligence. *Bethenergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (August 1992).

Darwin Weathers, as president and owner of Weathers Crushing, had been in the rock crushing business for 23 years, and despite assertions that using sledge hammers to clear obstructions, with crushers running, had been a longstanding practice in his company, without incident, the danger that the standard is intended to avoid and the standard of care required should have been evident to him (Tr. 88-91, 92-93, 96-101). It is equally clear that Weathers knowingly authorized Berkey to indoctrinate Nelson in dangerous work procedures (Tr.122-24). Weathers' lack of due care was aggravated by the fact that he had hired Nelson without taking steps to ascertain his level of experience on rock crushers (Tr. 57-58, 78-80). Consequently, the Secretary has established that Darwin Weathers engaged in aggravated conduct constituting more than ordinary negligence, and a civil penalty is warranted. The parties have stipulated that the proposed penalty will not adversely affect Weathers' personal financial status (Tr. 130). Accordingly, the Secretary's proposed penalty of $250.00 is appropriate.

B. Order No. 4135308

1. Fact of Violation

104(d)(1) Order No. 4135308 charges a violation of 30 C.F.R. § 56.18006, describing the condition or practice as follows:

> A fatal accident occurred at the mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. The crusher operator was using a 12-pound sledge hammer to dislodge the rocks and was struck in the face when the head of the hammer was forcibly ejected from the crusher. The crusher had not been shut off and blocked against hazardous motion. The crusher operator had been on the job for about 2 ½ hours and had not been indoctrinated in safety rules and safe working procedures. This is an unwarrantable failure to comply with a mandatory safety standard.

30 C.F.R. § 56.18006 provides that "New employees shall be indoctrinated in safety rules and safe work procedures."

It is abundantly clear form the record that Weathers hired Nelson with insufficient knowledge of Nelson's experience in operating rock crushers and other heavy equipment, and that little time was spent training him to operate the jaw crusher, based on the assumption that Nelson knew what he was doing. Moreover, what indoctrination Nelson was given familiarized him with unsafe work procedures, after which he was essentially cast adrift. The fact that Weathers and Berkey made themselves available to Nelson in the event of a problem, presumed that Nelson had the experience to recognize when he needed help. It would appear that Nelson did not view the

blockage as a problem requiring assistance, since he had been instructed on how to resolve it himself with the sledge hammer. Unfortunately, to the extent that Nelson exposed himself to the hazardous motion of the jaw crusher when he moved about the feeder, he was performing his duties precisely as he had been instructed . Consequently, it is my finding that Nelson's indoctrination in safety rules and safe work procedures was sorely lacking, and I conclude, therefore, that Weathers Crushing violated section 56.18006.

2. Significant and Substantial

Inspector Galloway found this violation to be S&S. In view of Nelson's fatal injuries, this violation satisfies the *Mathies* criteria. "Clearly, it was a significant contributing cause to the fatal accident." 156 F. 3d. at 1084-85. Consequently, I conclude that the violation was S&S.

3. Unwarrantable Failure

Referring to the unwarrantable failure analysis respecting the previous citation, and having found that the operator demonstrated a serious lack of reasonable care in supervising and training Nelson to perform his duties safely, I conclude that the Secretary has proven that the violation was the result of Weathers Crushing's unwarrantable failure to comply with the standard.

4. Penalty

I have considered the six penalty criteria set forth in section 110(i) of the Act, and have discussed my analysis under the previous citation. Accordingly, I find that the $20,000.00 penalty proposed by the Secretary is appropriate.

C. Order No. 4135309

1. Fact of Violation

104(d)(2) Order No. 4135309 charges a violation of 30 C.F.R. § 56.11012, and describes the condition or practice as follows:

> A fatal accident occurred at this mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. The chains used as railing or barriers around the elevated work deck on the jaw crusher were not in place. Hooks were welded to the vertical supports, but the chains were missing, which created an opening approximately 40 inches high and 40 inches wide through which a person could fall either on the feed ramp, a distance of 10 feet, or into the jaw crusher. This is an unwarrantable failure to comply with a mandatory standard.

30 C.F.R. § 56.11012 provides that "Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

When MSHA's accident investigation team arrived at the mine site the morning of May 1st, no mining was being conducted, having ceased on April 30th subsequent to the accident, and after the material remaining in the feeder had been run through the crusher (Tr. 16-17, 28-30). Weathers testified credibly that he was aware that he was required to have the guard chains in place, that he was unaware that they were missing while the jaw crusher was operating, and that he was unable to locate them at the mine site when Inspector Galloway informed him that they were missing (Tr. 91, 102-03).

The Secretary raises several questions as to why the chains were never found, if they had existed when the portable crusher was set up in the first place (Sec. Br. at 10). The questions lose most of their significance in light of the activity that took place on the portable crusher immediately following the accident. Numerous personnel had been dispatched to the site, county deputy sheriffs and emergency medical technicians, who had climbed up onto the operator's platform and into the feeder attempting to save Nelson's life, and had left behind a substantial amount of medical debris (Tr. 91, 103-04; Exs. P-4, P-5, P-12, P-13). Moreover, the evidence indicates that the guard chains were not a contributing factor to this accident--Nelson deliberately entered the feeder from the operator's platform. Crediting Weathers' testimony that the guard chains were in place prior to the accident, I find that intervening variables, beyond the operator's control, contaminated the accident scene, so as to make a determination of what happened to the chains, without further investigation, virtually impossible. It is my conclusion, therefore, that the Secretary has failed to prove, by a preponderance of the evidence, that Weathers Crushing violated section 56.11012.

D. Citation No. 4135310

1. Fact of Violation

104(a) Citation No. 4135310 charges a violation of 30 C.F.R. § 56.20001, describing the condition or practice as follows:

> A fatal accident occurred at this mine on April 30, 1998, when the crusher operator attempted to dislodge rocks which would not go through the jaw crusher. He was using a 12-pound sledge hammer to dislodge the rocks, and was struck in the face when the head of the hammer was forcibly ejected from the crusher, which had not been shut off and blocked against hazardous motion. The Jackson County, Oregon Chief Deputy Medical Examiner reported that a marijuana pipe and a plastic bag containing marijuana were found on the victim's person upon arrival at

the hospital. This information was obtained from the Medical Examiner's Report received on June 22, 1998. The citation is issued 7/16/98.

30 C.F.R. § 56.20001 requires that "Intoxicating beverages and narcotics shall not be permitted or used in or around mines. Persons under the influence of alcohol or narcotics shall not be permitted on the job." The evidence establishes that Nelson brought marijuana and a marijuana pipe to the mine site and that he tested positive for drug usage. There is no evidence that Weathers Crushing knew of Nelson's conduct. The Mine Act imposes strict liability on mine operators for violation of standards, irrespective of fault. *Western Fuels-Utah v. Fed. Mine Safety & Health*, 870 F.2d 711 (D.C. Cir. 1989); *Rock of Ages Corp*., 20 FMSHRC 106, 114 (February 1998); *Wyoming Fuel Co*., 16 FMSHRC 19, 21 (January 1994). As the Commission has stated, "the principle of liability without fault requires a finding of liability even in instances where the violation resulted from unpreventable employee misconduct." *Western Fuels-Utah, Inc*., 10 FMSHRC 256, 261 (March 1998). Consequently, I conclude that the Secretary has met her burden of establishing a violation of section 56.20001, despite my finding that Nelson's drug possession and use were unknown to Weathers Crushing.

2. Penalty

I have considered the six penalty criteria set forth in section 110(i) of the Mine Act, including the evidence that Weathers Crushing had a written drug policy that it had given to Nelson as a new employee, and that there was no indication that Nelson was under the influence of drugs while he was working at the mine (Tr. 104-05; Ex. R-1). I, therefore, ascribe no negligence to the operator, and conclude that the $50.00 penalty, as proposed by the Secretary, is appropriate.

ORDER

Accordingly, it is **ORDERED** that Citation Nos. 4135307, 4135310 and Order No. 4135308 are **AFFIRMED**, Order No. 4135309 is **DISMISSED**, and Darwin Weathers is **ORDERED TO PAY** a penalty of $250.00, and Weathers Crushing is **ORDERED TO PAY** a penalty of $45,050.00 within 30 days of the date of this decision. Upon receipt of payment, these cases are **DISMISSED**.

Jacqueline R. Bulluck
Administrative Law Judge

Distribution: (Certified Mail)

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