

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 9, 2001

SECRETARY OF LABOR,	:	<b>CIVIL PENALTY PROCEEDING</b>
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2000-75
<b>Petitioner</b>	:	A. C. No. 46-01437-04052
	:	
v.	:	
	:	
McELROY COAL COMPANY,	:	
<b>Respondent.</b>	:	Mine: McElroy Mine

**DECISION**

Appearances: Lynn A. Workley, Conference and Litigation Representative, Mine Safety and Health Administration, Morgantown, West Virginia on behalf of the Secretary of Labor;  
Bryant J. Warren, Esq., Phillips, Gardill, Kaiser & Altmeyer, Wheeling, West Virginia on behalf of McElroy Coal Company

Before: Judge David F. Barbour

This civil penalty proceeding arises under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ((30 U.S.C. §§815, 820) (Mine Act or Act)). The case involves an alleged violation of 30 C.F.R. §75.1403, a mandatory safety standard for underground coal mines that authorizes the Secretary’s inspectors to require an operator to provide specific duly authorized safeguards minimizing hazards with respect to the transportation of men and materials.<sup>1</sup> The citation in which the violation of section 75.1403 is alleged further charges the

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<sup>1</sup> 30 C.F.R. §75.1403 repeats section §314(b) of the Mine Act and states:

Other safeguards adequate, in the judgement of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided (30 U.S.C. §874(b)).

The procedure by which an inspector issues a citation pursuant to section 75. 1403 is described in 30 C.F.R. §75.1403-1(b):

violation was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary seeks the assessment of a civil penalty of \$277.00. The company does not contest the citation rather it denies that the underlying safeguard was properly issued in accordance with section 75.1403 (Resp. Br. 1).

A hearing was conducted in Wheeling, West Virginia, after which the representative of the Secretary and counsel for the operator submitted helpful briefs. The issues are whether the underlying safeguard is valid, and if so, the amount of any penalty that must be assessed.

### **STIPULATIONS**

Prior to the hearing the Secretary's representative and counsel for McElroy agreed on ten stipulations. When the hearing convened the Secretary's representative read them into the record:

1. [T]he McElroy [m]ine is a large underground coal mine located near Moundsville, West Virginia, [and the mine is] owned and operated by McElroy Coal Company. [<sup>2</sup>] The mine produced over two million tons [of coal] and a controlling entity produced over ten million tons [of coal] during the relevant period.

2. [T]he history of violations for the McElroy Mine indicated 932 total number of assessed violations during the preceding twenty-four months and 737 total number of inspection days during the preceding twenty-four months. This is an average of 1.2[6] violations per inspection day.

3. [T]he operator demonstrated good faith in abating the alleged violation [of section 75.1403] within the time set . . . [by] the inspector.

4. [T]he proposed fine . . . of \$277.00 will not effect the

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The . . . [inspector] shall in writing advise the operator of a specified safeguard which is required pursuant to §75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

<sup>2</sup> McElroy Coal Co. is an affiliate of Consolidation Coal Co (Consol). Prior to the events immediately at issue, the McElroy Mine was owned outright by Consol (Tr. 157-158).

operating ability [of the company] to continue in business.

5. [T]he operation of the McElroy Mine . . . is subject to the jurisdiction of the . . . Act.

6. [T]he Administrative Law Judge has jurisdiction to hear and decide this matter.

7. The Mine Safety and Health Administration [(MSHA)] Inspector was acting in his official capacity as a federal coal mine inspector on the day . . . Citation [No.] 7130337 was issued.

8. The [MSHA] Inspector was acting in his official capacity as a federal coal mine inspector on the date when . . . Safeguard [No.] 7128775 [(safeguard)] was issued.

9. [T]he citation and safeguard . . . are authentic and may be admitted into evidence for the purpose of establishing their issuance and not for the purpose of establishing the accuracy of any statement[s] asserted therein.

10. [T]he citation and safeguard . . . have not been the subject of . . . previous review proceedings (Tr. 11-12).

## **THE FACTS**

### **THE MINE, ITS ELEVATORS, AND THE CITATION**

Ronald Taylor is a federal coal mine inspector. He has worked for MSHA and its predecessor the Mining Enforcement and Safety Administration for the past 25 years (Tr. 14). During the last five and one-half years Taylor has been inspecting coal mines in northern West Virginia, including the McElroy Mine (Tr. 16). On March 2, 2000, Taylor went to the mine to conduct a regular inspection. He reached the mine around 11:00 p.m. The oncoming shift started at 12:00 a.m. (March 3), and Taylor prepared to go underground with the crew of that shift. Accompanying Taylor was a company safety inspector and a union representative of the miners (Tr. 16-17).

There are two elevators at the mine, the Fish Creek elevator and the Blakes Ridge elevator. The Blakes Ridge elevator is the main elevator. It is the elevator miners use to access the mine (Tr. 73-74). The state permit limits the elevator's capacity to 28 persons (Resp. Exh. R-5). Miners travel up and down the Blakes Ridge elevator shaft in the elevator's cage. The cage, which is 8-foot high and approximately 11 ½-foot wide by six-foot deep, is suspended from wire

ropes in the shaft (see Tr. 38.76-77, 123-124, Resp. Exh. R5).

Taylor and the men waited for the elevator cage at the top landing of the shaft. The elevator ascended from the bottom. When it reached the top and the doors opened Taylor saw two miners on the elevator. Taylor also saw a supply cart (Tr. 17).<sup>3</sup> Upon seeing the cart, Taylor explained to those with him that an earlier issued safeguard prohibited "transporting the cart or supplies with persons on the elevator" and therefore the presence of the two miners and the cart on the elevator violated the safeguard (Tr. 17). Taylor then issued Citation No. 7130337. It states:

Two miners, including one foreman, were observed exiting the Blakes Ridge elevator at the top landing. The men had traveled up the elevator shaft with a four-wheeled supply cart (Exh. P-1).

Taylor believed it was reasonably likely a miner would be injured by the cart if the elevator cage stopped abruptly. He envisioned several situations that would cause the elevator to stop: the elevator would descend past the bottom landing and hit the bottom of the shaft; the elevator would ascend past the top landing and crash into the headhouse [<sup>4</sup>]; or the elevator would go into overspeed and the brakes would set suddenly (Tr. 19). The abrupt halt of the elevator would propel the miners, the cart, and any supplies carried on the cart into one another (Tr. 19-20).

### **THE SAFEGUARD**

Safeguard No. 7128775, the safeguard that McElroy allegedly violated, also was issued by Taylor. On May 5, 1999, while conducting an inspection at the mine, Taylor saw approximately 10 miners leave the Blakes Ridge elevator at the bottom landing. Also on the elevator was "a cart loaded with different items" (Tr. 20-21). Upon seeing the miners and the loaded cart together on the elevator, Taylor issued the safeguard. William Blackwell, the mine's safety supervisor, was present. Blackwell emphasized that Taylor did not inspect the elevator before he acted (Tr. 148). Blackwell also emphasized that prior to May 5, 1999, the company had never been cited for any

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<sup>3</sup> The cart was 4- to 5-feet long and 3-feet wide. The bed of the cart was approximately one and one half-feet off of the ground. The cart rested on four wheels (Tr. 37). According to Taylor, the cart was metal with "a sharp metal edge all the way around it" (Tr. 38). Bob Barsch, the master mechanic at the McElroy Mine, stated that the cart was typical of those at the mine. The cart was used frequently to haul supplies such as mine curtains, small equipment parts, and pumps. It was equipped with a hand brake that was set whenever it was brought on the elevator. The hand brake kept the cart from rolling back and forth (Tr. 136).

<sup>4</sup> A "headhouse" is a building or structure enclosing the frame holding the pulleys raising and lowering the elevator cage (see American Geological Institute Dictionary of Mining, Mineral, and Related Terms (2<sup>nd</sup> ed. 1996) 256).

safety violations relating to the elevator (Tr. 147).

The safeguard states:

Ten miners including two [foremen] were observed on the Blakes Ridge elevator at the bottom landing, also on the elevator was a . . . cart loaded with 6 boxes of water, a belt conveyor scraper, and a pipe connector. If the elevator would stop abruptly, the cart and/or supplies could expose these men to injury from being struck. To eliminate this hazard, the following safeguard notice is hereby issued[:]

This is a notice to provide safeguards prohibiting supplies, parts or tools except small hand tools or instruments, to be transported with persons on the elevator at this mine (Gov. Exh. 2; see also Tr. 21).

By issuing the safeguard Taylor believed he had created at the mine a mandatory safety standard that did not otherwise exist. Its purpose was to protect persons on the elevator from the hazard of being hit by moving equipment, parts, or tools (Tr. 22-24). As Taylor stated, he wanted to prevent the miners from “being struck by the materials on the cart or even by the cart itself . . . [i]f that elevator . . . stops hard” (Tr. 23).

In Taylor’s opinion the elevator was “always subject to breakdown or malfunction . . . regardless of how well it [was] . . . maintained” (Tr. 23). But he added that even if the elevator did not come to a sudden, unexpected halt, miners could be injured if they tripped over the supply cart. This was especially true “at the end of the shift [when] people run and jump on the elevator” (Tr. 35). If a miner tripped he or she easily could break a leg, twist an ankle, or suffer a bad bruise (Tr. 35, 39).

### **EVENTS LEADING TO THE SAFEGUARD**

Taylor’s decision to issue the safeguard was not solely the result of what he saw on May 5. Several years before there had been an elevator accident at the Megs No. 31 Mine (Megs or Megs Mine), a mine owned and operated by Southern Ohio Coal Co.. The accident occurred when an elevator cage traveled past the top landing and crashed into the headhouse. Four persons were on the elevator. They were seriously injured when they hit the ceiling of the elevator cage (Tr. 45-46). Taylor saw the cage after the accident. He saw the footprints of the miners on the ceiling of the cage (Tr. 46, 160-161). He was deeply impressed and concerned. The accident graphically portrayed to him what could happen when an elevator came to a sudden stop and things within it were set in motion (Tr. 160). (“I will never forget. It is something I will never forget” (Tr. 161)). Taylor believed if supplies or a cart had been on the elevator, the miners

could have been caught between the top of the cage and the equipment and their injuries could have been even more severe (Tr. 23, 44-46).

In addition, early in 1999 while inspecting Consol's Shoemaker Mine, Taylor saw two miners, a cart, and supplies on an elevator (Gov. Exh. 3). Based on the Megs accident and on "[j]ust common sense" about elevators, Taylor concluded that action to protect such miners was warranted. Therefore, he wrote a memorandum to his MSHA district manager requesting permission to issue safeguards to prohibit the transportation of supplies or tools with miners on elevators (Gov. Exh. 3; Tr. 25, 42-43, 46-49). Taylor was given permission to issue a safeguard not only at the Shoemaker Mine but at any mine where he encountered miners and equipment on an elevator (Tr. 27-28).

### **THE BLAKES RIDGE ELEVATOR AND ITS SAFETY FEATURES**

Taylor testified that when he issued the safeguard and the subsequent citation at the McElroy Mine he was not familiar with all of the safety features on the Blakes Ridge elevator (Tr. 59). Although he was sure that the Blakes Ridge elevator had been installed more recently than the Megs elevator and although he believed it "more than likely" that the Blakes Ridge elevator had safety features that were not installed on the Megs elevator, he could not say what those features might be (Tr. 58-59). He maintained, however, that he had spoken with an MSHA electrical inspector who was trained in elevator safety and who was familiar with the accident at Megs. Taylor could not recall whether he spoke with the inspector before he issued the safeguard or after he issued the safeguard, but he believed the inspector felt that the Blakes Ridge elevator could experience an accident similar to that at Megs (Tr. 54-55). The inspector's opinion did not surprise Taylor who noted that although virtually all elevators were required to have safety features such as safety catches and buffers to prevent common accidents and operational faults, these features did not ensure smooth stops (Tr. 59-60). Thus, any elevator could stop abruptly.

Taylor's opinion that any and all elevators were subject to abrupt and sudden stops was strongly disputed by the company's witnesses. They maintained that because of its numerous safety features it was nearly impossible for the Blakes Ridge elevator to experience such halts. According to mine superintendent Thomas Coram, the elevator had safety devices which operated separately or together to control at all times the rate of the elevator's ascent and descent, to keep its cage level, to prevent its overspeed, and to ensure that it stopped smoothly and safely (Resp. Exh R-6; see Tr. 84-86). While some of these safety features were common to all elevators, several were not common (Tr. 95). To emphasize this point the company offered a list of eleven of the elevator's specific safety features. These features related to speed control, level detection, overspeed protection, brakes, and buffers. Five of the eleven features were noted to be in addition to the protections required by MSHA and the state (see Exh. R-6; Tr. 87). Further, they were features the Megs elevator lacked (Tr. 88).

Christopher O'Neil, the longwall maintenance coordinator, who previously had worked at the mine as an electrical and a maintenance foreman and who trained miners on the function and

operation of the Blakes Ridge elevator (Tr. 104), explained that the elevator was not subject to lateral motion. It “sets in a housing and . . . [it is] held by rails and it runs up [and down] . . . with rollers on the rails” (Id.). According to O’Neil, the elevator travels at a computer-programed rate of 650-feet per minute. The elevator could not be involved in a high speed, uncontrolled, rapid ascent nor rapid descent because if it exceeded its programmed rate of speed, power would be lost. When power was lost the brakes set automatically. Moreover, when the brakes set and the elevator came to a stop, a person would feel “nothing dramatic, nothing drastic” (Tr. 105). If the elevator came to an emergency stop, O’Neil calculated that everything in the cage would continue to rise for .3 seconds but “nothing would come off any cart that was on the elevator” (Tr. 115-116), nor would any person rise off the floor (Tr. 116). This kind of safe stop also would happen if a broken rail in the shaft caused the elevator to cease running (Tr. 122, 126). O’Neil therefore maintained that at a speed of 650-feet per minute, materials transported on the elevator never would be a hazard to miners (Tr. 126). Finally, if for some unforeseen reason the computer did not shut off the power, and the brakes did not set automatically, the resistors would limit the speed of the elevator to 180-feet per minute, one fourth of the elevator’s normal speed (Tr. 106-109), a speed at which a safe stop would be ensured.

### **THE LAW**

The law regarding safeguards and their interpretation is well settled. The Commission has stated that section 314(b) of the Act, “manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining” (Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985)). Because section 314(b) gives the Secretary “an unusually broad grant of regulatory power” without regard to statutory rule making procedures, the Commission has observed that the exercise of the power “must be bounded by a rule of interpretation more restrained than that accorded promulgated standards” (Southern Ohio Coal Co., 7 FMSHRC 509, 512 (April 1985)). In addition, the safeguard must identify with specificity the nature of the hazard involving the transportation of miners or materials at which it is directed (Id.). It must also address a hazard that is not covered by an existing mandatory safety standard and that actually is present in the mine (Southern Ohio Coal Co., 14 FMSHRC 1, 8 (January 1992)).

The Secretary bears the burden of establishing the validity of the safeguard by showing that the inspector evaluated the specific conditions at the mine and determined that the safeguard was warranted in order to address the actual transportation hazard (Southern Ohio Coal Co., 14 FMSHRC at 14). The operator may rebut the Secretary’s proof by showing, for example, that the safeguard was not based on an actual hazard at the mine or that the safeguard was issued routinely without consideration of the specific conditions at the mine (Id.).

If the validity of the underlying safeguard is proven then the burden of proof with regard to the citation that cites the safeguard also is on the Secretary. She must establish that the conditions for which the citation was issued came within the safeguard (see e.g., Cyprus

Cumberland Resources Corp., 19 FMSHRC 1781, 1785-86 (November 1997)).

### **THE VALIDITY OF THE SAFEGUARD AND THE CITATION** **THE HAZARD ALLEGED**

Taylor specified in the safeguard the following hazard against which the safeguard was directed: "If the elevator would stop abruptly . . . [miners] could be exposed to injury from being struck by the cart and/or supplies" (Gov. Exh. P-2).<sup>5</sup> That the hazard Taylor perceived involved the sudden and abrupt halt of a moving elevator and the resulting movement of the things it carried was reiterated when Taylor testified about the reason he issued Citation No. 7130337. It was, he stated, to protect miners from "being struck hard by the material on the [supply] cart or even by the cart itself . . . [i]f [the] elevator . . . stops hard" (Tr. 23). The Commission mandated in Southern Ohio that the Secretary must establish the alleged hazard actually existed at the mine (14 FMSHRC at 14). Here, that mandate means the Secretary must prove that the cited elevator was subject to stops that would set miners, carts, or equipment in motion so as to create a danger to miners. Such sudden or abrupt stops are the sine qua non of the hazard.

### **THE McELROY MINE ELEVATORS AND THE SAFEGUARD**

Prior to determining whether the Secretary proved the cited elevator was subject to such stops, it is necessary to clarify the scope of the safeguard at the mine. Taylor testified the safeguard applied to both the Fish Creek elevator and the Blakes Ridge elevator (Tr. 48). However, the safeguard named only the Blakes Ridge elevator and stated that it prohibited the transportation of supplies, etc., "on the elevator at this mine" (Gov. Exh. P-2 (emphasis added)). The Secretary, the company, and I are bound by the safeguard (Southern Ohio Coal Co., 7 FMSHRC at 512), and I conclude that as written, the safeguard applied only to the Blakes Ridge elevator.<sup>6</sup>

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<sup>5</sup> As previously noted, in addition to protecting miners from the danger caused by the elevator stopping abruptly, Taylor testified the safeguard protected miners from broken bones, sprained ankles, or bruises that could result from tripping over a supply cart (Tr. 35, 39). The danger of tripping differs fundamentally from the hazard underlying the safeguard — the hazard posed by the abrupt or sudden stopping of an elevator when it carried miners, carts and supplies. Clearly, a tripping hazard was not specified in the safeguard as written. Therefore, in evaluating the safeguard's application to the conditions alleged in the citation, it cannot be considered (Southern Ohio Coal Co., 7 FMSHRC at 512 (interpretation of safeguard must be "more restrained than that accorded promulgated standards").

<sup>6</sup> Restricting application of the safeguard to the Blakes Ridge elevator is a limitation without a practical effect. Counsel for McElroy stated the company was concerned only with the



## THE ACTUAL HAZARD

Clearly, Taylor's belief that the safeguard applied to the Blakes Ridge elevator was based on his view the elevator was subject to sudden and abrupt stops and in this way was no different from other elevators. As he put it when discussing the reason for such stops, "an elevator is a mechanical devise that is always subject to breakdown or malfunction . . . regardless of how it is . . . maintained, there is always the possibility of failure" (Tr. 23). Taylor's belief in the universal nature of the hazard was reflected further by the permission he was given by his district manager, permission that he understood authorized him to issue a safeguard on "[a]ny elevator that was used in an underground coal mine" to transport both supplies, equipment, tools and miners (Tr. 28).

Despite Taylor's belief in the universal nature of the hazard, the Secretary's burden of proof was more particular. It required that she prove the Blakes Ridge elevator was subject to the abrupt and sudden stops Taylor feared. She did not do so. The testimonial evidence she offered was far too general and was refuted by the documents and more specific testimony offered by the company's witnesses.

Although the Secretary rested her case solely upon Taylor's testimony, it was apparent from the outset that Taylor had almost no knowledge of the devices controlling the operation of the Blakes Ridge elevator. Taylor was not an elevator expert. He never investigated an elevator accident and he never inspected the Blakes Ridge elevator (Tr. 43, 48). While he was strongly influenced by the Megs accident, it occurred several years before he issued the safeguard. As a result, and as noted previously, Taylor agreed it was "more than likely" the Blakes Ridge elevator exhibited safety features that were not present on the Megs elevator (Tr. 58- 59). Indeed, aside from a general belief that safety catches, buffers, and brakes were required to stop the cage of an elevator and that such features would not ensure the cage halted smoothly, Taylor did not indicate any awareness of other safety devices nor of how such devices might function (Tr. 62). Rather, Taylor relied upon his belief that, "all elevators . . . malfunction and . . . stop abruptly" (Tr. 49). McElroy was able to show that when it came to the Blakes Ridge elevator Taylor's belief was not true (Tr. 49).

McElroy refuted the Secretary's case by presenting credible documentary evidence and testimony about safety devices on the Blakes Ridge elevator that controlled the rate of its ascent, its descent, and the manner of its stops. McElroy's witnesses emphasized that several of the devices were over and above those required by state and federal regulations as well as over and above those MSHA required added to the Megs elevator after the accident. Further, McElroy

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application of the safeguard to the Blakes Ridge elevator (Tr. 66-67). Aside from the fact that this narrow focus was dictated by the safeguard itself, there was a very pragmatic reason for the company's limited concern. The sole elevator used to transport miners into and out of the mine was the Blakes Ridge elevator (Tr. 73-74), which was no doubt why neither party offered evidence regarding the Fish Creek elevator.

indicated with specificity what the “extra” devices were and how they functioned (Tr. 84-88, 95; see Resp. Exh. 6). Indeed, mine manager Coram testified that he was aware of no extant safety devices that the Blakes Ridge elevator did not have (Tr. 87), and his testimony was echoed by O’Neil (Tr. 110).

Of particular note was testimony regarding the elevator’s breaking system and its overspeed governor. O’Neil explained why there could not be an uncontrolled descent or ascent that exceeded 650-feet per minute, the normal speed of the elevator and how, when either the drum or disk brakes were applied, the elevator would not come to the sudden and abrupt halt feared by Taylor (Tr. 105-106). O’Neil’s testimony also established that even if the power failed, the drum and disk brakes normally still would be applied and the elevator would come to a controlled stop (Tr. 106). Further, if for some reason the drum and disc brakes malfunctioned, the dynamic brake resistors would control fully the descent of the elevator (Tr. 107). O’Neil’s testimony was compelling, and for me it was conclusive:

[It] takes power to run that [elevator] cage up and down. If for some reason during travel . . . you were to lose power, there are two brakes . . . a drum brake that is physically attached to the motor . . . and a disk brake that is attached to the shaft of the pulley. The disk brake was an add on, that was not required . . . [it] is a backup redundant safety [feature].<sup>7]</sup>

Most of these brakes are fail safe, which means that it takes power to release the brakes. You have to have . . . voltage to . . . release these brakes. So if you lose voltage . . . the brakes set . . . .<sup>8]</sup>

So if you were in travel . . . and you lost power, both brakes would set. The drum brake would set and the disk brake would set. In addition suppose for some unforeseen reason, the disk brake would fail and the drum brake would fail, there is [a] mechanical overs[p]ee[d] device that is attached to a governor rope that is

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<sup>7</sup> According to O’Neil, the company, “decided to put an additional brake on and they added a disk brake as a back up to . . . [the drum brake] . . . . It’s just opposite the drum brake . . . So if you were to sever the shaft between the pulley and drum brake, the disk brake would stop the pulley. On the same token, if you would sever the shaft between the pulley and the disk brake, the drum brake would take over” (Tr. 127).

<sup>8</sup> O’Neil also stated: “ If for any unforeseen reason you would lose power, the drum brake sets on the motor which is directly attached to the pulley that the ropes are on. . . . The drum brake sits on the pulley and the ropes are not going anywhere and the ropes are attached to the [cage]” (Tr. 125-126).

attached to the side of the car. [The device] . . . works on centrifugal force. It has nothing to do with electrical power . . .

If that cage were to overs[p]ee[d], the centrifugal force on . . . [the] governor pulley would trip a safety mechanism on the side of the car . . . and . . . that would stop the cage . . . .

[T]here is also what they call a dynamic brake . . . . If [the] cage loses power, the brakes fail . . . the elevator descends . . . .the [dynamic brake] resistors . . . are designed to limit current to control the speed on that cage to 180-feet per minute based on the current that was is allowed to flow through the resistors.

Worse case scenario, the elevator would descent into the mine at 180-feet per minute, which is a third or a quarter of . . . [the] normal full speed of the elevator (Tr. 106-109).

O'Neil also offered uncontradicted testimony that even if the elevator came to a sudden halt at its normal rate of 650-feet per minute, a rate dictated by its computers, persons or equipment in the cage only would continue moving for .3 second and "nothing would come off any supply cart" nor would any person rise off of the floor (Tr. 115-116, ). Further, O'Neil testified the same was true if the elevator cage, traveling at 650-feet per minute, came to a halt after hitting a broken rail (Tr. 126). If persons and equipment on the elevator were not propelled into hazardous movement when the elevator was stopped while traveling at 650-feet per minute, it is logical they likewise would not be propelled into hazardous movement if the elevator stopped while traveling at 180-feet per minute.

Given the testimony regarding the safety features on the Blakes Ridge elevator and the effect of the features on the operation of the elevator, I conclude the company has established that there was no reasonable possibility that the elevator would come to the abrupt and sudden halt envisioned in the safeguard. The Secretary did not otherwise prove that such a hazard actually existed at the mine, and therefore accordingly, I conclude the Secretary established neither the validity of the safeguard nor that McElroy violated section 75.1403, as alleged.<sup>9</sup> In reaching this conclusion, I recognize that when asked whether the elevator cage could ascend through the penthouse and come to a sudden and hazardous stop, O'Neil stated that "anything was possible" (Tr. 116), but based on the record made by the parties I must conclude that such a possibility lies

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<sup>9</sup> This is not to say that transportation on the Blakes Ridge elevator of miners and loaded carts, is without hazard. Both the Secretary and the company recognized a danger to miners when the elevator was crowded and miners were in a hurry (Tr. 35, 39, 75-76). However, that is not the hazard at which the safeguard was directed. Whether reliance on the company's policy to restrict the number of miners who can travel under such circumstances is adequate to guard against the broken bones, cuts, and bruises that could result, or whether another and different safeguard is warranted, is a matter for the Secretary to determine.

entirely beyond the bounds of reason.

**ORDER**

It is **ORDERED** that safeguard No. 7128775 is **INVALID**. It is further **ORDERED** that Citation No. 7130337 is **VACATED** and that this proceeding is **DISMISSED**.

David F. Barbour  
Chief Administrative Law Judge

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