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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. VINC 79-21-PM A.O. No. 12-00064-05001
v.	Greencastle Quarry & Mill
LONE STAR INDUSTRIES, INC., RESPONDENT	

DECISION

Appearances: Ann Rosenthal, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner
Michael T. Heenan, Esquire, Washington, D.C., for the respondent

Before: Judge Koutras

Statement of the Proceeding

This is a civil penalty proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, initiated by the petitioner against the respondent on October 18, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for eight alleged violations of the provisions of mandatory safety standard 30 CFR 56.14-1, set forth in citations issued by Federal coal mine inspectors on March 29, 30, and April 6, 1978. Respondent filed an answer and notice of contest on November 17, 1978, denying the allegations and requesting a hearing. A hearing was held in Indianapolis, Indiana, on March 29, 1979, and the parties submitted posthearing proposed findings, conclusions, and briefs, and the arguments set forth therein have been considered by me in the course of this decision.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty

filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, effective March 9, 1978, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 4-5):

1. Respondent owns the mine in question and is subject to the jurisdiction of the Commission.

2. Respondent has no prior history of violations, and each of the violations at issue in this proceeding was abated by the respondent with a "maximum amount of good faith."

3. Respondent employs 150 individuals, working three shifts, 7 days a week. Its annual production is 1 million tons of raw material and 700,000 pounds of finished material.

Discussion

The petition for assessment of civil penalty filed in this proceeding charges the respondent with eight alleged violations of mandatory safety standard 30 CFR 56.14-1, and the violations were noted in the following citations issued by MSHA inspectors Thurman Worth and Stanford Smith during the course of inspections they conducted at the facility in question on March 29, 30, and April 6, 1978:

Citation No. 365010

The guard was not adequate on the No. 306 V belt conveyor on the top floor of the raw bin silos (Exh. G-2).

Citation No. 367201

The large return idler pulley on stacker belt conveyor No. 214 in the quarry was not provided with a guard (Exh. G-3).

Citation No. 367203

The first (from the head pulley) large return idler pulley on stacker belt conveyor No. 214 was not provided with a guard (Exh. G-4).

Citation No. 367204

The head pulley on the No. 214 stacker belt conveyor was not provided with a guard (Exh. G-5).

Citation No. 367205

The first large return idler pulley for the takeup on five crude material belt conveyor No. 21 to the screen house was not provided with a guard (Exh. G-6).

Citation No. 367206

The first large return idler pulley for the takeup on crude material belt conveyor No. 305 to the main plant was not provided with a guard (Exh. G-7).

Citation No. 367207

The first large return idler pulley for the takeup on belt conveyor No. 215 from the surge pile to the impact crusher was not provided with a guard (Exh. G-8).

Citation No. 367208

The first large idler pulley on the takeup of the belt conveyor feeding the raw mill was not provided with a guard (Exh. G-9).

Testimony and Evidence Adduced by the Petitioner

MSHA mine inspector Thurman Worth testified that the facility in question is an open pit stone quarry operation which produces cement. He confirmed that he inspected the site on March 29, 1978, and that he issued Citation No. 365010 citing a violation of section 56.14-1

on the track-mounted raw bin conveyor belt because he believed the head pulley guard was not extended far enough to protect a person from getting into the pinch point. The criteria he used to determine whether the guarding was adequate was 30 inches, or an arm's length, and "if a person could get their arm into the pinch point, the guard would not be adequate." The 30-inch criteria is MSHA policy which has been in effect since he has been an inspector and at least since July 1976 (Tr. 8-11).

Inspector Worth stated that employees would have occasion to be near the pulley in question, possibly once a day or once a shift while performing maintenance on the belt, checking the motor, or greasing the bearings, and the belt would probably be turned on. If the belt were not running, there would be no danger, and it is possible to grease and service the pulley with the belt turned off. The checking of the bearings, which requires listening, could not be done with the belt turned off, and a person would be standing near the belt when this was done. If someone were to catch his hand in the pinch point, serious injuries or a fatality could occur. Also, someone could catch his clothing or a shovel or grease gun in the pinch point (Tr. 11-14).

On cross-examination, Inspector Worth testified that he was accompanied on his inspection by Mr. Jim Bennett, respondent's maintenance coordinator, and Mrs. Viola Cox, the union safety committee-person. His inspection followed the material through the processing cycle, and he indicated that the raw material is mined at the quarry, travels through a primary crusher, then along some belts to a stockpile and a secondary crusher, and eventually ends up at the raw mill which is the building where the citation in question was issued. The inspection in question was his first enforcement inspection, but he had visited the site earlier in order to acquaint himself with the operation and that was a casual visit. However, he would have taken action at that time had he observed any safety hazards. The plant had been previously inspected by the Bureau of Mines (Tr. 15-21).

The belt conveyor in question is not stationary and is designed to be moved from place to place over a track, and to discharge the materials into various silos. A guard was installed on the conveyor belt in question at the time he observed it. Mr. Worth identified Exhibit R-1 as a photograph of the belt tail pulley, and Exhibit R-2 as the head pulley. He could not recall whether there was a guardrail at the location in question on the day of the citation shown in Exhibit R-2, and as to the half-round cover guard depicted in Exhibit R-1, he indicated that it was installed after the citation issued in order to abate the violation, and he considers it to be fully adequate. He did not believe that there was any way a person could reach in and under that guard to get to the pinch point unless he did it deliberately. He could not state with any certainty whether another inspector would at some future time again cite the

respondent for a guarding violation. However, he would not cite another violation as long as the guard is in place (Tr. 22-31).

With regard to the "30-inch" criteria, Inspector Worth stated that he followed MSHA policy which is in the form of "memos sent from Washington" which are sent to the MSHA offices, but not published in the Federal Register, and he did not have a copy with him. He cited the violation because he believed the pinch point was not adequately guarded. He believed the respondent should have been aware of the fact that the guard which was provided at the pulley location was not adequate and that a better one should have been provided. The location was partially guarded, but a person could still get into the pinch point accidentally by slipping on loose material on the floor, or while shoveling spillage onto the belt the shovel could get caught in the belt and could pull a person into the pinch point while the belt was running. The previous guard was a box-type guard which extended over the belt, but not far out along the belt so as to prevent a person from reaching back into the pulley (Tr. 31-35).

Inspector Worth identified Exhibit R-3 as copies of citations issued on January 25, 1973, citing the same belt in question for not having a guard. At the time of his inspection, he did not inquire as to the circumstances under which guards were provided for the belt in question (Tr. 41-43).

On redirect examination, Inspector Worth stated that the handrail depicted in the photograph, Exhibit R-2, does not replace the guard, and someone could accidentally slip on a rainy day and get caught in the belt pulleys, but that is less likely since the belt in question is indoors. However, persons could slip on the walkway. The inadequate belt guard should have been obvious to anyone with experience working around belts (Tr. 47-49).

On recross-examination, Inspector Worth stated that in order to perform work on the head or tail roller, the guard would have to be taken off, but when adjustments are made for proper belt tension, the belt is running. Company policy dictates that the belt be locked out or turned off when maintenance is performed, and the only time the belt would be running is when it is being adjusted. He did not observe anyone working on the moving belt, but in his experience, workers do not always follow company policy (Tr. 51-53).

In response to questions from the bench, Inspector Worth stated that the square, box-type guards shown on Exhibits R-1 and R-2 were the guards which were in place at the time of the inspection and that the "half-moon" guards were the ones installed to abate the citation. Those guards are 36 inches long and are bolted to the side of the belt. The area back under the guards seldom requires cleaning because the material on the belt dumps directly into a silo or bin, but certain types of maintenance requires that the guard be taken off.

He defined a "pinch point" as the place where the belt and either the head or tail pulley meet. The idler rollers could be considered pinch points, and the ones depicted in Exhibits R-1 and R-2 would be pinch points and accidents do occur there, but it is less likely that anyone could be mutilated or killed by those rollers because they do not have the tension that the head or tail pulleys have. He conceded that someone could slip on the walkway along an idler pulley and get hurt, but did not know why the belt at those locations is not required to be guarded (Tr. 54-57). Section 57.14-3 is an advisory standard and would have been a more appropriate standard in this case if it were mandatory (Tr. 60).

MSHA inspector Stanford Smith confirmed that he issued Citation Nos. 367201, 367203, and 367204 (Exhs. G-3, G-4, and G-5) during his inspection of the facility in question and he cited section 56.14-1 because of the lack of pulley guards on the No. 214 stacker belt conveyor belt. He described the piece of equipment in question and indicated that it had a head and tail pulley and idler pulleys where the belt angle changed. There was a walkway along the belt in question at the locations where he cited the violations and these locations were not guarded at all with physical guards. The large return idler pulley citation location had a handrail away from the head pulley, but someone could slip or reach into the pinch point. He identified Exhibit R-4 as a diagram of the belt in question and the specific location is where he issued the citations (Tr. 64-73).

With regard to the large return idler pulley citation (No. 367201), Inspector Smith indicated that someone could reach into the pinch point from the walkway in order to reach an adjustable scraper located on the bottom of the belt and that they would do so when attempting to adjust the belt. The purpose of requiring a guard is to remind people to shut the belt down before attempting any adjustments, and by having a guard there, the belt would be shut down before the guard is removed to make adjustments to the scraper. In addition, the pinch point was close enough to someone's foot or leg and could possibly injure them if they slipped. Although persons generally use walkways to travel around the plant, he observed no one using the walkways in question on the day the citation issued. The operator should have known that someone walking along the walkway could slip on grease, rock, or a wet walkway and should have known that the pulley was unguarded as it was readily apparent (Tr. 74-80).

Regarding the first large return idler pulley citation (No. 367203), Inspector Smith indicated that it has greater tension than the other idler pulleys because it is at a point where the belt changes direction. He recalled a scraper at that location and the purpose of the guard requirement would be the same as the other scraper at the second large return idler pulley. The gravity of any injury would be the same and the operator should have known of the requirements for guarding (Tr. 81).

With regard to the head pulley citation (No. 367204), Inspector Smith stated that persons would basically be performing the same type of work around that location as that described by Inspector Worth with respect to the earlier head pulley belt citation, but he could not recall whether the pulley in this case had any grease fittings. He indicated that MSHA is very strict about guarding head pulleys unless they are "guarded by position," that is, no one could contact a pinch point even by leaning over. Head pulleys involve large areas in contact with a pulley which has tension applied, and they constitute dangerous pinch points, and there are greater chances for fatalities at those locations. The operator should have been aware of the guarding requirement and the hazard involved (Tr. 81-84).

Inspector Smith testified that Citation Nos. 367205, 367206, 367207, and 367208 (Exhs. G-6 through G-9) deal with four different belts, but that the situation at each of the locations cited was essentially the same and involved the use of adjustable scrapers. The belts were of the general configuration of that which involved Citation No. 367201 (Exh. R-4), and the danger presented in not guarding those belts was the fact that someone could slip while making adjustments or attempting to knock material off the scraper on the bottom part of the belt and could get caught in the pinch point. Although in this case he observed no one attempting to make adjustments while the belt was running, in his experience, people have attempted adjustments without turning off the belt and that is why guards are required. The four citations were similar, and Citation No. 367208, being issued a week later, should have alerted the operator that a guard was required (Tr. 84-88).

On cross-examination, Inspector Smith identified Exhibit R-5 as a flow chart which reasonably represents the transportation of materials at the plant in question, and the chart depicts the location of the belts which he cited. Generally, during an inspection, an inspector begins his inspection at the quarry and follows the flow of materials along the belts as depicted in the exhibit. He also identified Exhibit G-6 as a magazine picture of the quarry and the No. 214 belt conveyor and primary crusher which appear to be similar to what he observed the day of his inspection. The No. 214 belt rises some 70 feet into the air, at a 30-degree angle, and the belt has a covered walkway alongside of it. The purpose of the walkway is to provide access to the belt, rather than a means of travel around the plant. He indicated that the crusher is a funnel-like affair, installed underground for a distance of some 60 feet, and trucks back up to discharge the material into it. There is a tail-piece at the bottom of the underground crusher, and the belt comes up an incline to the surface. He believed those belts were guarded as required (Tr. 89-102).

With regard to Citation No. 367201, Inspector Smith testified that the second large return idler pulley was located at a point where

a short stairway was installed to reach it, and it was above the walkway and one would have to climb stairs or a ladder to reach it. The primary purpose for this access stairway is to perform maintenance, and he identified a photograph of the stairway and location in question (Exhibit R-7), and the screen depicted in the photograph was installed to abate the citation. He identified the pinch point as being in the upper righthand corner of the photograph, partially behind the girder, and the angle iron shown was there before the guard was installed. He could not recall seeing anyone on the stairway, and he was aware of the fact that 90 percent of the ompanies have a policy requiring that the belts be locked out before any work is performed on them, and he recalled seeing some safety signs posted in this regard (Tr. 102-107).

Inspector Smith identified a photograph, Exhibit R-8, as the location where he cited Citation Nos. 367203 and 367204, and the screens shown were installed to abate the citations. The screen at the bottom covers the first large return idler pulley, and the one on the bottom covers the head pulley. The stop cord is shown in the picture and is used in an emergency to stop the belt. If the cord were adjusted properly, the belt would stop if someone fell on the cord. He indicated that MSHA guarding policy has been generally upgraded since 1971 in terms of acceptance of acceptable guards in an effort to cut down on injuries and fatalities (Tr. 108-112). In explaining why on previous inspections at the plant citations were not issued for the guarding situations, Inspector Smith explained that inspectors were accepting barriers around walkways that provided access strictly for the belt, but this practice stopped because the barriers would be down and people stopped using them. Although there is a standard covering belt lock-outs, there have been too many cases where they have not been utilized (Tr. 129-130). Inspector Smith identified Exhibit Nos. R-9, R-10, R-11, and R-12, as photographs of the locations where he issued Citation Nos. 367205 through 367208 (Tr. 135-139).

In response to questions from the bench, Inspector Smith testified that anyone walking along the walkway in the areas shown in Exhibit Nos. R-9 through R-12 could possibly come into contact with the pulley devices, if
he slipped, intentionally attempted to knock material off the belt bottom, or tried to perform maintenance, and in each case, the belt would have to be running before an injury would be incurred. This is true even in those instances where handrails are installed because if someone slipped, they could miss the handrail. This would be true for Citation No. 367205 (Exh. R-9), but in Citation Nos. 367203 and 367204, a person would almost have to lean in while performing maintenance before he would slip in, and his purpose in issuing these citations was to prevent these events from happening. He was not concerned with pulleys which have only a minimum contact with the belt, and for idler rollers which have only minimal belt contacts, handrails and stop cords are acceptable as fulfilling the guarding requirements (Tr. 139-144).

Testimony and Evidence Adduced by the Respondent

Charles D. Coppinger, respondent's regional operations manager, testified that he was plant manager at the Greencastle Plant at the time the inspection in question was conducted (Tr. 148). The plant was built sometime between 1966 and 1968, and operations began there in 1969 (Tr. 151). The plant is a cement operation located at the primary raw material site. Approximately 16 people work in the quarry, and this represents 10 percent of the total plant workforce (Tr. 152). He indicated that the last lost time accident at the plant was in 1975, and he identified Exhibit R-14 as the Model 22 Safe Working Practices followed by cement plants, including the Greencastle Plant, and included therein is a requirement for locking out the equipment when maintenance is performed, and these practices are posted throughout the mine. The plant is totally automated and operated by one individual in a central control room by a computer. The plant has union and nonunion safety programs, employees have safety representatives, and unsafe conditions can be brought up at any time. The United Cement, Lime and Gypsum Workers International represents the wage-roll employees and has always made it a practice to bring safety problems to management's attention, and the conditions are always corrected. OSHA also inspects the plant, and every piece of equipment where persons might contact it have been guarded, even before the present MSHA requirements. Every belt conveyor in the plant has a pull cord, and some have walkways on both sides which the company installed at great expense because the union believed the belts could be maintained better. He conceded that the plant was cited for guarding violations after 1971, and that they were installed as required by MESA, and rarely did the abatement go for more than 1 day. The guards which were installed to abate the citations at issue in this proceeding were fabricated in the plant shop (Tr. 155-165).

Mr. Coppinger stated that it has always been the intent of the respondent to comply fully with section 56.14-1, and it is company policy to install a guard anywhere that it is needed, but this would not include areas where a person could come into contact with a belt by some extraordinary or deliberate effort, but would include areas where somebody could get hurt. Prior to the inspection in question, he did not believe that anyone was in danger along the belts in question, because no one is on the walkway except for maintenance purposes. The belts are out of the way and an elevator is used to get to the top of the raw mix silos, and he believed they were in compliance, and the union never brought the matter to his attention. The belts and guards which existed on the equipment have been that way for the life of the plant, and a few additional guards were installed where it was deemed necessary by management or if equested by the union (Tr. 165-169).

On cross-examination, Mr. Coppinger testified that he was aware of the fact that the areas cited were not guarded and he still does

not believe that guards are needed. As a practical matter, the only way a person could be injured is to deliberately stick his hand into the pulleys. The only time anyone would go along the walkways would be while greasing the idler rollers and not head or tail pulleys, and the belts are greased about three times a year. Although maintenance is performed on the belts, it is always performed while the belt is shut down. Belts are changed, but . they are not running when this is done. Scrapers are adjusted with the belt off, and no areas of the belt requires grease or oil on a daily basis. Belts which are out of alignment are adjusted by tapping idler rollers with a hammer while the belt is running, but the employee stands away from the belt while doing this, but he does walk along the walkway and this chore is accomplished once in a year or two. He conceded that employees do not always follow directions (Tr. 170-178).

Don Foxx, quarry foreman, testified that he has worked for the respondent for 33 years and is familiar with the plant belt system and the guarding requirements. He accompanied the inspectors during the inspections in question, and indicated that at several locations along the inspection route, idler rollers were not guarded except for a pull cord, and the inspectors raised no questions about those locations. Regarding Citation No. 367201, he indicated that it concerned a return roller located up a stairway ome 15 feet off the ground, with handrails on it. The crusher operator would have occasion to go up that stairway to make sure the belt was running properly, and if he were to work on the belt, he would not leave the crusher operating. He identified the crusher (Exhibit R-7), and prior to the installation of the screen guard, he had no reason to know that it was required and no inspector has ever told him that it was (Tr. 188-195). Someone would have to reach up under the truss to get at the pinch point, and he did not believe that someone could slip and fall into it, but someone could intentionally stick a hand in if they were silly enough to do it. Regarding Exhibit R-8, Citation Nos. 367203 and 367204, someone would have to reach in to get at the pinch point and would almost have to stand on his toes to do it. The belt is about a foot inside of the guards which are installed at the belt frame. All of the screens were installed by the morning or evening of the day the citations were issued. (Tr. 195-200).

On cross-examination, Mr. Foxx reiterated that with respect to the No. 214 belt citations (Exhs. R-7 and R-8), a person would have to go out of his way to accidentally get caught in the rollers and that one would have to deliberately stick his hand into the roller. The belt would be down if it were being worked on. A person would be pinched more on a bend pully than on a idler pulley. He is responsible for the No. 214 belt, and he shuts it down when cleaning of the walls is required during the rainy season, and this has occurred about three times a year. Maintenance men would have no occasion to be on the walkways, and no more than one man, a greaser, would be on the walkway (Tr. 200-206).

James M. Bennett, plant maintenance coordinator, maintains the history of all maintenance work. He accompanied the inspectors during their inspections and indicated that the screens depicted in Exhibits R-9 through R-12 were added subsequent to the inspection, and he did not object to their installation. However, prior to the inspection, he did not know that guards were required at those locations. The structural steel bracing and handrailing depicted in the photographs were present prior to the citations and he believed they would protect a person from contacting the pinch points which were later guarded by screening. Regarding the idler pulleys on the Nos. 215 and 305 belts, he indicated they were located below a "knee-high" level in relation to the catwalks (Exhs. R-10 and R-11); the handrails were in place and he believed they would prevent someone from coming in contact with the pulleys and indicated that it would be almost impossible for anyone to get into the pulleys unless he did it deliberately (Tr. 208-214).

With regard to Citation No. 365010 concerning the No. 306 belt conveyor (Exhs. R-1 and R-2), Mr. Bennett indicated that the conveyor is movable and that the handrail which is depicted in photograph Exhibit R-1 is stationary. At the time of the inspection, there was an expanded metal guard which extended some 18 to 20 inches out and over the pulley from the belt housing, and that was essentially a manufacturer's guard. There was an additional guard bolted to the belt frame, but it did not cover the top of the belt. He believed these guards were adequate and did not know that the additional guarding which the inspector required to be installed was needed, and he indicated that someone could still reach around the guard that was installed if they wanted to (Tr. 217-220).

On cross-examination, Mr. Bennett stated that when the first citations were issued, it did not occur to him to check other plant areas for guarding problems, and he believed that plant employees always follow the 22 safety guidelines, and he is not aware of any MSHA publications which may be sent to the plant (Tr. 216).

Mrs. Viola Lady is presently employed at the plant as a janitor, but previously worked as a laborer and truck driver, and her duties entailed work around the quarry and belt areas. She is a member of the union and served as safety committee person during 1977 and 1978. Safety meetings are held monthly and the employees have no hesitancy in bringing safety matters to er attention or to the attention of management, and management has never been reluctant to correct any safety concerns once it is brought to its attention, and serious safety matters are taken care of immediately. She accompanied the inspectors during their inspections, viewed each of the areas depicted in the photographic exhibits, and is familiar with the MSHA safety standard in issue. Prior to the inspection, she did not feel that there were places in the plant operation that were not guarded

and she was surprised by the issuance of the citations. She believed the locations cited were adequately guarded; no union people ever suggested that they were not, and she could not readily tell the difference between the places that were required to be guarded from other places. The company has a very good safety attitude and everyone is safety conscious, and she did not believe the company failed in its responsibility to the employees or should have known about the guarding requirements in question (Tr. 225-232).

On cross-examination, Mrs. Lady stated that prior to the inspection, she had never been on the walkways. New employees are instructed in equipment lock-out procedures and there are times when employees do not follow all company rules. Information concerning accidents are posted on bulletin boards and employees are instructed on safe working practices at the monthly safety meetings (Tr. 233-235).

Inspector Worth was called in rebuttal and testified that prior to his inspection, the No. 214 belt had been newly installed and problems were encountered in keeping it in line. Two repairmen were at the belt location working on the carrier idlers while the belt was running and they were attempting to align the belt. The walkway adjacent to the No. 214 belt goes to the top of the belt and there is a stairway for a person to walk back down, and this is true of all the belts in question. In his view, although there is a structural steel framework next to all the walkways in front of most of the roller pulleys, it would not prevent someone from getting his arm or leg through the framework (Tr. 240-243).

In response to questions from the bench, Inspector Worth stated maintenance may be performed on the carrier idlers on a running belt and no guards are required. However, handrails and stop cords are required in that situation. Performing such maintenance does present a hazard, but it is less than the hazard presented at the tail pulley location because the carrier idlers have no weight on them, whereas the tail and head pulleys have tension at those points. He conceded that a loaded belt which is running presents a hazard to someone performing maintenance around it, but indicated that the handrail would afford protection and prevent a man from falling over onto the belt. In that situation, the only requirement for guarding is a handrail or stop cord (Tr. 244-246).

On cross-examination, Inspector Worth stated that the respondent has a very good attitude regarding safety and that the violations were not intentional (Tr. 247).

Inspector Smith testified that there was an MSHA policy change in 1975 concerning barriers along the entire length of a belt walkway and that the change was internal and was not disseminated or published in the Federal Register. The intent was to alert the industry

to keep their barriers up because accidents were continuing to occur. He concurred with Mr. Worth's testimony concerning the structural framework and the severity of the injuries which would occur if someone fell through the framework (Tr. 249-252).

Findings and Conclusions

Fact of Violations

Respondent is charged with eight alleged violations of the provisions of 30 CFR 56.14-1, which reads as follows: "Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, guarded."

Citation No. 365010

The inspector issued this citation because he believed the guard which had been installed did not extend far enough forward to protect a person from reaching around to the pinch point. The existing guard had previously been installed in 1973 after a citation was issued by another inspector during the course of a previous inspection under the Metal and Nonmetal Act, and that guard was installed to abate the citation (Exh. R-3). No one raised any question concerning the sufficiency of the guard until the inspection conducted by Inspector Worth on March 29, 1978. He believed the guard was inadequate and issued Citation No. 365010, and, in so doing, he relied on the "30-inch or arm's length" MSHA policy which apparently required inspectors to cite section 56.14-1 if the pinch point at a belt location was within 30 inches or an arm's length away from where a person reaching or falling on or near the belt could somehow become entangled in that pinch point. Although the existing guard which had been installed apparently satisfied the prior inspector, it obviously did not satisfy Inspector Worth since he believed it was inadequate.

Petitioner argues that the existing guards on the 360 V conveyor feeder belt were inadequate, both at the head and tail pulley locations, and that the existing guards did not extend far enough from the pinch points to keep a person from getting caught. However, the citation simply describes an inadequate guard on the belt conveyor and does not specify any tail or head pulley as such. Respondent's Exhibit Nos. R-1 and R-2 are pictures of the two pulleys, and the inspector confirmed that one is the head pulley and the other the tail pulley. However, his testimony is limited to the head pulley and while one can speculate that he intended to cite both pulleys, that fact is not clear from the record presented. In any event, I find that the petitioner is bound by the citation as issued, and while it is arguable that the citation may be subject to dismissal on the ground of lack of specificity, the parties have not raised that issue. Consequently, I will limit my findings to the head pulley.

Petitioner argues that the 30-inch "arm's length" standard applied by the inspector as the basis for the citation is an "interpretation" that has been in effect at least since 1976, although counsel has been unable to find such interpretation reduced to writing. If petitioner's counsel cannot find it, I fail to understand how respondent is expected to comply with it when the evidence establishes that such "interpretation" was never communicated to the respondent. I find that respondent cannot be held accountable for any nebulous MSHA interpretative memo which is uncommunicated, and that respondent compliance responsibility is limited to section 56.14-1. Thus, the question presented is whether petitioner has established a violation of hat standard by a preponderance of the evidence.

Respondent's defense to the citation is that the head pulley was guarded by a box-type guard installed by the manufacturer, as well as an additional guard extending 18 to 20 inches further out which had been installed to abate a previous citation issued by MESA under the Metal and Nonmetal Act for a violation of the very same standard in issue in this proceeding. In addition, respondent maintains that the pulley was further guarded by a handrail and pull cord. Petitioner's response to this defense is the assertion that the fact that a prior inspector "erroneously" determined that the prior guard was adequate does not relieve the respondent of its responsibility to comply with the standard as "properly" interpreted. Petitioner's theory in this regard is rejected. I fail to understand how one can conclude that the prior inspector's judgment as to the adequacy of the existing guard was erroneous since he abated the citation and the respondent relied on that judgment. In my view, such indiscriminate and arbitrary enforcement practices do little to enhance safety and do much to enhance and encourage endless litigation and possible harrassment of mine operators who, in good faith, are attempting to comply with the law.

After full consideration of the evidence presented, I find that the existing guard was adequate and was in full compliance with the cited standard. I find further that petitioner has failed to establish that a person working near or at the head pulley would likely come into contact with a pinch point which is protected by a guarding device of the type installed at the belt location in question. I further find that the inspector's interpretation and application of the standard in this instance was an arbitrary application and it is rejected. The citation is VACATED.

Citation Nos. 367201, 367203, 367204

These citations involve two idler pulleys and a head pulley on the No. 214 VM stacker belt conveyor which were not guarded. Exhibit R-4 is a diagram of the conveyor device in question; Exhibit R-5 is a schematic "flow chart" indicating the role played by that belt conveyor in the plant manufacturing process; and Exhibit R-6 is a

picture of a similar such conveyor belt. Exhibits R-7 and R-8 are photographs of the three locations where the violations were cited.

The conveyor belt in question rises some 70 to 100 feet into the air, at an approximate angle of 30 degrees, and it is a covered belt with an adjacent walkway. The purpose of the walkway is to provide access to the belt, rather than a means of normal and routine travel around the plant, and if one were to walk to the top of the belt, there would be no place to go but back down the walkway or down a stairway.

The unguarded second large return idler pulley at the location of Citation No. 367201 was at a point where access could only be made by means of a short stairway installed for that purpose above the walkway in order to perform maintenance as required. Inspector Smith was concerned that someone could reach into the pinch point from the walkway while attempting to adjust a scraper on the belt bottom or one could get their leg or foot caught in the pinch point if they slipped while on the walkway. He stated that the purpose of the guarding requirement at that location served as a reminder for persons to shut the belt down before attempting any belt or scraper adjustments. With a guard installed, the belt would have to be shut down before it was removed and the adjustments made.

The unguarded idler pulleys at the location of Citation Nos. 367203 and 367204 concerned Inspector Smith because he believed someone would be exposed to the pinch points while adjusting the scaper on the first large return idler pulley (No. 367203) or greasing the head pulley (No. 367204). However, he could not recall whether the head pulley had any grease fittings. He conceded that a person would have to lean into the areas while performing such chores before he could slip in, and his purpose in issuing the citations was to prevent that from happening. An emergency stop cord was installed alongside the belt at the points in question, and assuming it was properly adjusted, it would stop the belt if one fell against it.

Respondent's evidence establishes that the walkways along the belts in question are not regularly used by the workforce as a regular means of travel around the plant. The walkways are there to facilitate ready access to the conveyor belt system for maintenance purposes. Scraper adjustments and belt maintenance are always performed while the belts are shut down. The person responsible for the belt in question indicated that the crusher operator would have occasion to climb the stairway by the idler pulley (No. 367201) to check the belt operation or to perform maintenance, but before doing so would shut the crusher down. As for the idler pulleys (Nos. 367203 and 367204), he indicated that the belt is located approximately a foot inside the belt frame and that someone would have to stand on their toes and deliberately reach in to get at the pinch points.

At page 6 of its brief, petitioner asserts that all of the pinch points cited in this case were in places where they could have been contacted by workers during the ordinary course of their duties. I find that conclusion as to all of the locations cited by the inspectors in this case to be unsupported by the evidence adduced by the petitioner in support of each citation. Citing pages 78 and 241 of the transcript, petitioner, at page 3 of its brief, asserts that the inspectors saw people on the walkways during the inspection. By that statement, petitioner would have me believe that in all eight citations the inspectors observed people on all the walkways at the locations cited and they were all exposed to a hazard. A review of the transcript references relied on by the petitioner indicates to me that the inspector did not know where anyone was walking at any given point in time. For example, at pages 78-79, the inspector testified as follows:

> Q.59. Were there people generally, during your observation in this plant, walking along these walkways?
>
> A. Walkways in general. Not specific.
>
> Q.60. But from your observation, it appeared that people did use these walkways relatively frequently to get around?
>
> A. Yes. Upon it.
>
> JUDGE KOUTRAS: Wait a minute. Let's get clarification now. Generally, people use walkways to get around the plant. Her question is: At this specific location is that true? Did you observe anybody on this walkway?
>
> WITNESS: At the time that -- I can't say that I observed anyone using them. I can't recall.
>
> JUDGE KOUTRAS: Okay.
>
> Q.61. However, people would have to use this walkway just to walk up to the head pulley and the other pulleys.

At pages 241 and 242 of the transcript, the testimony of the inspector reflects the following:

> Q.4. At any point, did you see any people on any of the walkways that are in question here?
>
> A. On 214 belt it was my understanding just prior to our inspection they had installed a new belt.
>
> Q.5. Uh-huh.

A. And they were having problems keeping it in line.

Q.6. This was during your inspection that they were having these problems?

A. Right. And they had two repairmen at this location working on the carrier idlers, trying to keep the belt -- or trying to get it lined up where it would run true.

Q.7. Was the belt running --

A. Right.

Q.8. -- while they were doing this? We've heard testimony that the walkway on the 214 belt didn't go anywhere except to the top of the belt. We haven't heard any testimony on the other walkways next to the other belts. Do any of them go to any destination or do they all go just to the top of the belt also?

A. You could go to the top of the belt on the other ones in question and take stairways down, get on another belt, and keep going on until you get into the mill area.

The only conclusions that I can come to from the testimony cited are the fact that people generally walk around walkways at the plant, the inspector either did not see anyone or could not recall seeing anyone on any of the walkway locations cited on the day the citations issued, and that people have to use the walkway to get to the head pulley locations. As for the No. 214 belt, the inspector clearly stated that it was his understanding that just prior to his inspection, a new belt had been installed. He obviously did not see the installation, nor did he see people on the walkway while the belt was being installed. What he apparently saw were two men adjusting carrier idlers while walking along the belt. As for the use of the belt system walkways and stairways as a normal means of going from one plant location to another, it is clear to me that this simply is not the case. The inspector stated that one could walk up a belt walkway and then down some stairs, up another belt walkway and down more stairs, etc., etc. Petitioner would have me believe that the normal method for an employee to travel from point to point in the plant is to take a "roller coaster" route up and down belts and stairways. This may be true of a maintenance man who may go from belt to belt, but I am not convinced that it is the normal route that nonmaintenance personnel would take while traveling by foot around the plant.

With regard to the two men working on the No. 214 belt, petitioner would have me believe that they were exposed to a hazard simply because they were walking along the belt making adjustments

to the carrier idlers. There is absolutely no evidence that these men were attempting any maintenance work on the pulley or that they were required to be at that location. As a matter of fact, the inspector himself conceded that it is permissible to perform maintenance on idler pulleys while the belt is running and that no idler guards are required in such a situation, notwithstanding the fact that a loaded moving belt presents a hazard at that location.

Respondent's testimony is that the belt walkways are not normally used for travel around the plant and that the only reason anyone would use them would be to perform maintenance work. Mr. Coppinger testified that the belts are always shut down when they are changed out or when maintenance is being performed, that there is a plant requirement for locking out the equipment when maintenance is being performed, and that the plant is totally automated and operated by computer. Quarry Foreman Foxx, a man with 33 years' experience at the plant and who is familiar with the belt system, indicated that while the crusher operator would have occasion to use a stairway to check on the No. 214 belt, he would not leave the crusher operating and someone would have to deliberately reach in and ver the belt truss to reach the pinch point. As for the large return idler pulley and head pulley on the No. 214 belt, he indicated that someone would have to stand on his toes to reach one pinch point and would have to reach in about a foot from the belt frame to reach another one.

Plant Maintenance Coordinator Benett believed that plant employess always follow the safe work guidelines, and former Plant Union Safety Committee person Lady indicated that employees are instructed on lock-out procedures, and she believed the places cited were adequately guarded.

Turning to the specific citations in question, I find that the testimony adduced by the respondent concerning its lock-out procedures and model safety practices which it has adopted and instituted for its plant operation is incontraverted by the petitioner. Although these factors may not serve as an absolute defense to the citations, those procedures and practices, when coupled with the fact that the head pulleys on the No. 214 stacker belt(Citation Nos. 367203 and 367204) were located at a place where persons were not likely to come into contact with the pinch points in the normal course of their mine duties, convince me that those locations did not require guarding The first large head return idler pulley pinch point was located in an area which would literally require someone to stand on his toes or to climb up on the belt frame and deliberately reach into the pinch point. The head pulley was located at approximately waist level, some 12 inches inside and behind the belt framework. Both locations were also guarded by a pull cord which would stop the belt if someone slipped and fell against the belt frame. One would have to deliberately reach in for a distance of over 2 feet or crawl into the opening to reach the pinch point. In such a situation, I am not convinced

that the standard requires guards at those locations, nor am I convinced that petitioner has established that in those locations the pinch points were situated in places where persons may come in contact with them in the normal course of their duties. Although not clearly stated, it seems that MSHA's position is that guards are required at every location on a mine site where there is a machine pinch point which conceivably could cause injury to anyone who deliberately and consciously seeks out that pinch point and places his hand in it. If that is the interpretation of section 56.14-1, then MSHA must come forward with some evidence that in their normal course of duties, miners are required to deliberately and consciously expose themselves to danger. With regard to Citation Nos. 367203 and 367204, I find that petitioner has failed to establish by a preponderance of the evidence that the pinch point locations were at a place where miners would likely come in contact with them during the normal course of their duties. Accordingly, the citations are VACATED.

Part of the inspector's rationale for citing section 56.14-1 and requiring a guard at the No. 214 stacker belt large return idler pulley location was to "remind" one to shut the belt down before attempting any belt or scraper adjustments, the theory being that once a guard is installed, the belt would have to be shut down and the guard removed before any adjustments are made. While this seems to be a reasonable theory, the problem is that the standard cited is not intended to serve as a "reminder." Its purpose is to require guarding of specific and "similar" pieces of exposed moving machine parts. Since there are other mandatory standards which prohibit maintenance or repairs on machinery while it is moving, cleaning of conveyor pulleys while they are in motion, and a requirement that, except for testing, guards be kept in place while machinery is being operated, e.g., 56.14-6, 56.14-29, 56.14-33, I fail to comprehend why an inspector has to rely on section 56.14-1 to serve as a "reminder" when vigorous enforcement of the other standards would seemingly be appropriate. If the problem lies with the language of the standard, then I believe the Secretary should take steps to republish it with clear and understandable langauge which can stand on its own, rather than putting the inspector in the position of trying to find the next best standard to apply in a given situation.

Notwithstanding my comments concerning the inspector's interpretation of section 56.14-1 when he cited the return idler pulley which is the subject of Citation No. 367201, I find that the location of the pulley and the pulley pinch point was such that a guard was required under the cited section. Although the pulley mechanism was located under a structural steel frame, the photograph (Exhibit R-7) clearly shows that it is adjacent to a walkway and stairway, and was exposed on both sides. Absent the screen guard which is depicted in the photograph, and which was installed after the citation, I believe the pulley location is such that someone simply casually walking along the stairway or walkway could easily fall into the pulley if he were

to stumble or trip, andI do not believe that the stop cord or steel framework on the belt would prevent him from becoming entangled in the pulley. In this instance, anyone walking by that location would be exposed to a danger, and since there is a walkway and stairway there, I believe that one may assume that they are there for a purpose and that someone will be walking the area at any given time and would be exposed to a hazard. This is unlike the previous two citations where I found that someone would have to deliberately go out of his way to reach a pinch point by either climbing up and through the belt framework. In the circumstances, I find that petitioner has established a violation as cited in Citation No. 367201 and it is AFFIRMED.

Citation Nos. 367205, 367206, 367207, 367208

The inspector issued these citations because of his concern that someone could slip and fall into the pinch points while attempting to make adjustments to the belt scrapers located at the bottom parts of the belts or while attempting to clean materials off the scrapers at those locations. Although he personally observed no one performing these chores or walking the belts during his inspection, he relied on his prior experience with instances where persons attempted to make belt adjustments without shutting down a belt and this practice impressed him with the fact that section 56.14-1 required guards at the locations cited. The fact that the respondent followed specific safety rules and had a policy of shutting or locking out the belts while those maintenance functions are performed apparently did not impress him. As a matter of fact, based on the evidence and testimony presented in this proceeding, I can venture a guess that the inspector either did not know about the policy, or if he did, he probably would have cited the violations anyway, notwithstanding the fact that he conceded that no hazard existed if the belts were shut down.

Petitioner points to the fact that the four citations involve identical pinch points at four different belt locations containing adjacent walkways which led to other plant areas and which could be used for more than just maintenance work. Petitioner asserts that someone walking on the adjacent walkways or adjusting the scrapers located near each pinch point would be exposed to a hazard if he were to slip and catch his clothing or tools in the belt mechanism.

Respondent takes the position that the cited pinch point locations were protected by the structural steel belt framework, pull cords installed between the walkway and the belt, and guardrails or handrails. Respondent also maintains that the walkways are not used as normal travelways by employees, are used only for purposes of providing access to the equipment by maintenance personnel, and that when maintenance is performed the equipment is locked out.

I find that the idler pulley location cited in Citation No. 367205 was not located at a place where a person casually walking by would likely reach the pinch point if he were to trip and fall on the walkway. Since I cannot conclude that petitioner has established that this walkway was one normally used by miners to get around the plant, the likelihood of anyone being on the walkway regularly and routinely while going about his duties is somewhat remote. Assuming that someone was on the walkway and stumbled or fell, from the photograph (Exhibit R-9), it would appear that the pulley location is some distance from the walkway and one would have to climb over the handrail, step over the opening between the walkway and belt frame, and then reach into the pulley area. A maintenance man would encounter the same difficulties in reaching the equipment. In these circumstances, I find that petitioner has failed to establish a violation and the citation is VACATED.

With respect to the large idler pulley on the Nos. 305, 307, and 215 belts, Citation No. 367206, 367207, and 367208, I find that they were located in areas which were required to be guarded. The pulleys were at approximately knee-high level adjacent to a walkway, and from the photographs (Exhibits R-10, R-11, and R-12), it would appear that someone walking along the walkway could get his legs or arms caught in the pulley if he were to fall or slip. Although the belt framework does provide some protection, the openings are large enough to allow someone to become entangled in the pulleys. Although respondent has established that the walkways are not normally used as a regular means of travel about the plant, that fact weighs on the gravity of the situation presented, and I do not accept is as a defense to the citation. This also applies to the lock-out and safety procedures which respondent has established, that is, the fact that the equipment is locked out and the maintenance men follow the company safety rules, may not, in my view, serve as an absolute defense to the guarding requirements of section 56.14-1. Those facts may be considered in mitigation or in connection with the seriousness of the situation presented. The same would apply to the structural steel belt framework which respondent maintains provided sufficient guarding. In my view, the purpose of the framework is to provide structural and stress support for the belt conveyor system and I am not convinced that it was intended to serve as a primary guarding device to protect people on the walkway. The fact that it affords some protection may be considered again as part of the gravity issue, but not as an absolute defense to the citation. Under the circumstances, I find that the petitioner has established the violations as cited in Citations 367206, 367207, and 367208, and the citations are AFFIRMED.

Gravity

I believe that the question of gravity must be determined on the basis of the conditions or practices which existed at the time the citations in question issued. General or speculative conclusions

as to the hazards involved with respect to unguarded belt locations simply is not sufficient to justify a substantial civil penalty assessment, absent a showing of gross negligence or a total disregard for the safety and welfare of the workforce. Respondent asserts that petitioner has failed to establish that the machine parts in question were exposed or moving at the time of the citations and that this is an absolute defense to the alleged violations. Respondent's arguments in this regard are rejected. However, I find that petitioner has not established that men were required to work or were actually working in or near any of the unguarded moving belt locations cited in Citation Nos. 367201, 367206, 367207, 367208, and absent such a showing, I cannot conclude that the violations were serious, and that fact is reflected in the civil penalties assessed by me with regard to those four citations.

Good Faith Compliance

The parties stipulated that respondent exercised maximum good faith in achieving compliance once the conditions were cited (Tr. 238-239). In addition, the testimony adduced reflects that respondent took immediate steps to correct the conditions cited, and that in each instance where the citation has been affirmed (Nos. 367201, 367206, 367207, 367208), respondent exercised rapid compliance and that fact is reflected in the civil penalties assessed by me with regard to those citations.

History of Prior Violations

I find that respondent has no prior history of violations, and this has been considered by me in assessing the penalties which have been levied in this case.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Remain in Business

The evidence adduced with respect to the size and scope of respondent's quarry and cement operation at the Greencastle Quarry and Mill supports a finding that respondent has a medium-sized operation. Further, respondent has not advanced any argument that reasonable and appropriate civil penalties for the citations which have been affirmed will adversely affect its ability to remain in business. Accordingly, I conclude that the penalties assessed will not adversely affect the respondent in this regard.

Negligence

With regard to Citation No. 367208 issued on April 6, 1978, I find that the respondent failed to exercise reasonable care to prevent the violation since the earlier citations issued on March 30, 1978, should have alerted the respondent as to MSHA's enforcement policy concerning the application of the guarding requirements of

section 56.14-1. Accordingly, as to that citation I find that respondent's failure to comply resulted from ordinary negligence. With respect to the remaining citations which have been affirmed, I find that in view of the somewhat confusing language of the guarding standards previously discussed, including some of the internal MSHA guidelines communicated to the inspectors but not to the operator, that the respondent in this case took reasonable precautions to prevent the violations and that in the circumstances, it could not reasonably have known that physical guards were required by section 56.14-1 at the locations cited. Accordingly, I cannot conclude that the citations which have been affirmed resulted from respondent's negligence.

Additional Issues Raised by the Respondent

Estoppel

Part of the respondent's defense to the citations issued in this case is the assertion that MSHA had not previously cited any guarding violations during previous inspections. Although this may touch on the question of negligence if it established that an inspector specifically advises an operator that a guard is not required at a particular location, I do not believe that the fact that an inspector failed to cite a violation while on the mine property at any given time may serve as a defense to the citation. This defense is one that is often invoked by a mine operator as a defense to a citation and it is a defense that can be invoked for practically every citation. However, as correctly pointed out by the petitioner at page 5 of its brief, such a defense has been consistently rejected. I conclude that petitioner's position on this issue is correct and respondent's assertion to the contrary is rejected.

"Significant and Substantial" Findings

Respondent takes issue with the "significant and substantial" findings made by the inspectors on the face of the citations i ssued in this case. As far as I am concerned, the fact that an inspector chooses to mark the "significant and substantial" box on the face of a section 104(a) citation does not establish that conclusion as a matter of fact. I can find nothing in section 104(a) that requires an inspector to make such findings when he issues a section 104(a) citation. It seems to me that if an inspector believes that the conditions or practices constitute significant and substantial hazards, he should issue an unwarrantable citation under section 104(d)(1). In any event, I conclude that in the case of a section 104(a) citation, the question of an alleged "significant and substantial" hazard should be treated as part of the gravity issue and that is what I have done in this case.

Clarity of Section 56.14-1

Respondent has advanced the argument that in order to establish a violation of section 56.14-1, petitioner must establish that the unguarded belt pulley parts cited were similar to gears, sprockets, etc., that they were exposed, and that they were moving. As to the similarity of the pulleys in question to the other enumerated parts described in the standard, I find that the petitioner has established that they were similar. Although the standard is not a model of clarity, I conclude that it sufficiently escribes the types of parts intended to be covered and respondent has not established anything to the contrary. As for being exposed, I conclude that since the pulleys were not guarded, they were exposed within the meaning of the standard. With respect to the question as to whether they were moving at the time of the citations, I find that this fact need not be established to prove a violation. Since the equipment in question concerns belt lines used to move materials, logic dictates that at some point in time the belts will, in fact, be moving and I conclude that this is all that is required. Under the circumstances, respondent's arguments that these factors may serve as an absolute defense to the citations are REJECTED.

Having disposed of the individual citations which are in issue in this proceeding, I feel compelled to make some comments and observations which cut across all of the citations issued by the inspectors in this case. It has been most difficult for me to comprehend from the record adduced in this proceeding precisely what MSHA's interpretive and enforcement policies are with respect to the application of section 56.14-1. The standard seemingly provides for guards at certain belt locations where exposed machine parts may be contacted by person. A literal application of that language would require guards at all belt locations containing any of the machine parts listed in the standard or containing any pinch points or exposed parts of any kind. The problem is that other mandatory and advisory standards under the guarding and methods and procedures provisions of the safety standards set forth in Part 56 governing sand, gravel, and crushed stone operations deal with exceptions which allow for contradictory and self-defeating application by industry and Government enforcement personnel in the field. That situation is aggravated by the promulgation of uncommunicated MSHA internal memoranda and policies advising its inspector force as to interpretation, but seemingly leaving those being regulated in the dark. Examples of what I believe are some of the somewhat contradictory application of the machine guarding requirements are the following:

> In citation 365010 the inspector obviously sought to protect a person who would deliberately reach around the installed guard and stick his hand into the pinch point. The guard which had been installed on the belt in 1973 as a result of a prior MESA inspector was apparently deemed

adequate by MSHA until the March 1978 inspection which resulted in the citation. In issuing the citation, the inspector believed the guard should have extended further forward to protect one from reaching around it. In such a situation, advisory standard 56.14-3 would have been more appropriate, and the inspector so stated, but since it is advisory, he did the next best thing and cited 56.14-1, which contains the somewhat loose and ambiguous language "which may be contacted * * *." It seems to me that if the Secretary desires to protect someone who would foolishly and deliberately reach around an existing guard and stick his hand into a belt pinch point, then he should take steps to promulgate the advisory standard as a mandatory standard so that there is consistent and even-handed enforcement.

In issuing citation 365010, the inspector relied on a "30 inch, arm's length" internal MSHA policy directive which apparently had not been communicated to the operator. Further, although the existing guard was installed as a result of a prior 1973 citation under the very same section cited in 1978, the inspector could not state with any degree of certainty whether another inspector would again cite the operator if he believed the guard needed to be further extended. This leaves an operator in a somewhat precarious position of not knowing what is expected of him from inspection to inspection.

In citation 367201, the inspector believed the purpose of section 56.14-1 is to "remind" persons to shut down the equipment before attempting to make belt or scraper adjustments. Since mandatory standards 56.14-29, 56.14-33, and 56.14-35 all seem to require the shut down of equipment before lubrication, cleaning, or maintenance is performed, and 56.14-6 requires that the guards be kept securely in place while the equipment is being operated except for testing, I fail to understand why an inspector has to resort to section 56.14-1 to achieve what seems to be provided for these other mandatory standards. If the answer lies in the fact that the Secretary wishes to guard against foolish and deliberate acts of self-mutilation then he should promulgate a safety standard to cover that situation, or as a minimum insure that the interpretations and applications of pertinent standards are communicated to the industry and consistently enforced.

In citation 367204, the inspector was concerned over the possibility of someone leaning into a belt area while attempting to grease a moving belt, thereby exposing himself to the pinch point. Mandatory standard 56.14-35 prohibits the lubrication of machinery while it is in motion

unless it is equipped with extended grease fittings or cups. Here, the inspector did not know whether such grease fittings were present, but I venture a guess that if they were, he would still have cited section 56.14-1. Thus, in this situation, an operator who greases a moving belt by means of a grease fitting extending into a walkway adjacent to the moving belt, in full compliance with section 56.14-35, would still be subject to a citation under section 56.14-1 on the theory that the person performing the greasing chores might in some way stand on his toes or crawl into the pinch point area of the belt which is located a foot or so from the edge of the belt. I have some difficulty in comprehending such interpretive and enforcement theories, particularly in situations where the belt in this case was "protected" by a stop-cord which MSHA accepts as an adequate "guarding device" for moving belt lines, and which would stop the belt if someone fell against the cord.

In presenting the rebuttal testimony of the inspectors, it seems obvious that petitioner sought to stress the fact that two repairmen were exposed to the hazardous conditions cited by the inspector. The problem with this is that the repairmen were apparently performing these chores in complete compliance with other applicable standards. MSHA's theory simply begs the question and is somewhat confusing and contradictory. For example, MSHA does not require guards along the entire length of a belt line on the theory that belt rollers and idlers do not present the same type of pinch point hazard which is present at the belt or tail or head where there is greater tension on the belt. Thus, in the case of a man walking along a loaded, moving belt, tapping and adjusting roller idlers, MSHA accepts a stop-cord or hand rail as adequate devices to prevent that man from slipping on the walkway and falling through the rail opening against the loaded belt and getting caught between the idler roller and belt. In response to that precise hypothetical setting, Inspector Worth indicated that stop-cords and handrails are acceptable protective devices, notwithstanding the recognized hazard presented. Although he indicated that the handrail would prevent the man from falling against the belt in that situation, he obviously did not consider it to be adequate protection at the belt pulley location in citation 367201. It seems to me that a pinch point present at a belt tail or head where the tension is such as to prevent any belt movement is no different from a hazard point of view than a loaded belt moving at high speed where the load of the moving materials over a belt idler or roller does not allow for belt movement, thereby

creating a pinch point. Yet the two situations seem to be dealt with differently in terms of what is required under section 56.14-1.

During the course of these proceedings, the inspectors alluded to certain MSHA policies concerning applications of the guarding standards. One such policy is the "30 inch, or arm length" rule. Another is the "guarding by location" rule, and yet another is the policy concerning barriers or handrails which was alluded to by Inspector Smith. The problem with these "rules of interpretation" is that no one seems to know about them except the inspector who is issuing citations. It seems to me that there should be some better way to promulgate and enforce guarding standards which are consistent, direct, and understandable, not only to the inspector, but to industry people who are expected, and I might add on the basis of the record here, willing to comply, and who may be subjected to plant closures and civil penalties for failing to do so. During the course of these as well as other guarding violation proceedings, MSHA's inspectors seem to be relying on generalized and stereotyped conclusions that persons walking or working along a walkway parallel to a moving belt are ipso facto placed in a hazardous position since they may inadvertently slip and fall into a pinch point at the tail or head pulley, thereby incurring serious or fatal injuries. That is a real concern that I share with the inspectors, and from the testimony that I have heard in this case, it is a concern shared by industry people as well. However, problems arise when an inspector attempts to apply these generalized precepts to a specific work-environment situation at any given operation without any real evaluation of all of the prevailing facts and circumstances.

While I accept the fact that a person shoveling around an unguarded belt tail pulley may catch his shovel in the pinch point, I fail to understand how the inspector can conclude that is the case if the evidence shows that no such shoveling ever takes place at that location. While I accept the fact that a person reaching in to grease a tail pulley may become entangled in a pulley pinch point which is unguarded, I fail to understand how an inspector can reach that conclusion in a given case if he does not know whether there is a grease extension present which allows for greasing from a safe distance without the need for a guard. And, while I share an inspector's concern for the protection of a fool who would deliberately place his hand

into a pinch point, I believe that the only rational way to prevent that from happening is to promulgate a "fool safe" safety standard stating that precise proposition, rather than attempting to apply standards which are fraught with nebulous exceptions and language that no reasonable person can understand.

ORDER

On the basis of the foregoing findings and conclusions, the following citations are VACATED and the petition for assessment of civil penalties, insofar as those citations are concerned, is DISMISSED:

Citation No.	Date	30 CFR Section
365010	03/29/78	56.14-1
367203	03/30/78	56.14-1
367204	03/30/78	56.14-1
367205	03/30/78	56.14-1

On the basis of the foregoing findings and conclusions, the following citations are AFFIRMED, and civil penalties are assessed as follows:

Citation No.	Date	30 CFR Section	Assessment
367201	03/30/78	56.14-1	$75
367206	03/30/78	56.14-1	75
367207	03/30/78	56.14-1	75
367208	04/06/78	56.14-1	90

Respondent IS ORDERED to pay the civil penalties assessed in this proceeding, as indicated above, in the total amount of $315 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge