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SOL (MSHA) V. PENNSYLVANIA GLASS
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. BARB 79-108-PM A.O. No. 38-00138-05001
v.	
PENNSYLVANIA GLASS SAND CORP., RESPONDENT	Columbia Mine

DECISION

Appearances: Leo McGinn, Trial Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner;
Jeffrey J. Yost, Esq., Berkeley Springs, West Virginia, 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 November 16, 1978, through the filing of a petition for assessment of civil penalty, seeking a civil penalty assessment for nine alleged violations of the provisions of certain mandatory safety standards. Respondent filed an answer and notice of contest denying the allegations and requesting a hearing. A hearing was held in Columbia, South Carolina, on April 17, 1979, and the parties were afforded an opportunity to file posthearing proposed findings, conclusions, and briefs. Respondent filed a brief and proposed findings and conclusions and the arguments set forth therein have been considered by me in the course of this decision. Petitioner submitted no posthearing arguments.

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.

DISCUSSION

The section 104(a) citations at issue in this proceeding were issued on March 13 and 14, 1978, during an inspection of the mine, and they allege violations of the following safety standards:

Citation No. 103201, 30 CFR 56.12-34:

An unshielded light bulb was being used in the trailer at the bag house. Three men were loading bagged flour in the trailer for shipment. The bulb was 5 feet from the floor at the trailer hanging from a nail. This was a 110-volt circuit.

30 CFR 56.12-34 states: "Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded."

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Merle Slaton, testified that in March of 1978, he made frequent inspections at respondent's Columbia Mine and that on approximately 15 other occasions he visited the mine. The mining operation consists of sand, which is mined in open-pit fashion with a front-end loader, and approximately 43 to 45 men are employed at the mine which operates three shifts 7 days a week. On March 14, 1978, he wrote and served upon plant manager John Michner, Citation No. 103201 (Exh. G-1), for a violation of 30 CFR 56.12-34, for using

an unshielded light bulb. Material was being bagged, put on a belt conveyor from the bagger, and the bags were then carried into a tractor trailer that had been backed into the loading dock, and employees were stacking the bags on pallets. The light bulb in question was hanging on nails and strung along the wall inside the closed trailer approximately 5 feet from the floor and 8 to 10 feet back from where the employees were working and was being used for illumination. Normally, a grounded wire cage enclosing the light bulb is provided. However, in this case he saw no evidence of any guard or shield in the area. This was primarily a nonserious type of violation, although it could possibly result in a fatality. If someone were to contact a lighted bulb, a burn could result. If the bulb were broken by someone bumping into it or hitting it with an object, he could be cut. The 110 watts could emit enough of a shock to kill someone. The light bulb had been unshielded for approximately an hour and a half to 2 hours, and the foreman would normally be responsible for seeing that the bulb is shielded (Tr. 14-23).

On cross-examination, Inspector Slaton testified that the foreman was not present at the time the violation occurred, but that he was present at the bagging area, and for part of the time while he was there. It is not necessary for an employee to come into contact with both sides of the bulb filament simultaneously in order to become shocked, and he believed it is possible for someone to grab the energized side of the bulb that was exposed plus a ground wire.

Three men were loading the truck using a retractable conveyor which extended itself up to where they were loading and retracted as they loaded the truck and moved back in the truck. During the time he was observing the men, the light was always 8 to 10 feet behind them. After he observed the violation, he asked the men to correct it and 30 minutes later after he came back to check on it, they had already taken the light out and replaced it with a grounded circuit, and it would not have been possible for them to correct it any sooner (Tr. 23-32). The trailer was an "18-wheeler," approximately 40 feet long and 8 feet wide (Tr. 32-36).

Respondent's Testimony

John Michner, plant manager, testified that guarded extension lights are available at the plant and are normally obtained by employees by asking a foreman or supervisor for a storage requisition slip for the trouble light and then taking the slip to the storage room and exchanging it for such a light. Trouble lights are used throughout the plant as required on maintenance jobs, and each maintenance man has one in his locker, or will obtain one if he feels it is required on the job. From July 24, 1978, to April 2, 1979, 14 trouble lights were used at the plant, and some were damaged and had to be replaced, but the majority disappear on the job, i.e., they are probably stolen (Tr. 36-38).

On cross-examination, Mr. Michner stated that the light in question was stored in a locker in the bagger building along with other valuable equipment, and the leadman and bagging crew normally install the trouble lights. With regard to checking the installation of the light for safety, the shift foreman will normally go underground when a bagging crew is starting, but he is usually there a few minutes to make sure that the right material is being bagged in the proper blocks and on the proper pallets. Although the shift foreman's duties include checking for safety violations, he will normally attend to other duties and will not return unless there is a problem.

Mr. Michner stated that the plant did not specifically have a safety director nor a safety manager at the time of the alleged violation, nor was there a formal safety training program. Safety meetings, however, are held four times a year for all employees (Tr. 39-41).

Citation No. 103202, 30 CFR 56.12-8:

The electrical wiring for the start-stop switches and the wind-up reel were not bushed with insulated bushings. These were all on the power curve conveyor. No energized circuits were exposed. This was a 480-volt circuit.

30 CFR 56.12-8 states:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Petitioner's Testimony

Inspector Slaton confirmed that he issued Citation No. 103202 because the wiring for the start-stop switch and the wind-up reel on the power curve conveyor were not bushed with insulated bushings. The power curve conveyor is the conveyor that is used to load trucks and rail cars with bagged sand, and it is the same conveyor that was being used in the previous citation concerning the unshielded light bulb. The wire from the wind-up reel leading into the receptacle holding the start-stop switches had possibly been spliced and the outside insulation had been cut away leaving the circuits going into the receptacle without a bushing. These circuits were not energized. The purpose of the bushing is to keep the wires going into the receptacle hole from vibrating and moving, and it serves as insulation. Mr. Slaton was concerned that the 6 inches of wire going into the receptacle box had not being bushed.

Inspector Slaton indicated that since the conveyor belt was running at the time and was on a 480-volt circuit with the wires laying loose in the hole, there was a possibility that they would vibrate through the smaller amount of insulation, which would cause them to short out into the metal conveyor, thereby causing the conveyor to become energized with the voltage. There was the possibility of electrical shock and fatality resulting from men coming in contact with the conveyor and being grounded at the same time, and in his opinion, the voltage was sufficient to produce a lethal affect. Men would normally be in contact with the conveyor while loading and unloading and he had no idea how long the condition existed. He assumed that maintenance personnel would be responsible for inspecting the wiring and bushings (Tr. 41-47).

On cross-examination, Mr. Slaton identified a picture of the receptacle box in question. The individual wires coming out of the cable entering the box were individually insulated and he assumed that the part of the cable which had been stripped back resulted from some repairs made inside the box. The individual "nut-type" bolts which hold the cables entering and exiting the junction box were intact and in place, but three of the wires inside one of the cables entering the box were stripped back approximately 6 inches. He did not know what was inside the box behind and at the ends of the "nut-type" bolts. From his experience, however, they are the devices which contain the insulated bushings. The individual wires appeared to be well-insulated and no energized circuits were exposed (Tr. 47-51).

On redirect examination, Mr. Slaton stated that the three wires which had been stripped back were not fitted inside and down through the bushing into the junction box. However, the wires did go through the bushing into the box, but the outside insulation was taken away although they were individually insulated (Tr. 51-58).

When asked whether the circuits inside the junction boxes are required to be approved by MSHA, Inspector Slaton responded that they are supposed to be; however, the only way that inspectors would have any way of knowing whether it was properly wired or installed, is to shut down the equipment, energize the circuit and open the boxes, which inspectors do not do except on electrical inspections. To his knowledge, at the time of the inspection, there was nothing wrong with the particular junction box at issue (Tr. 59-62).

Respondent's Testimony

Mr. Michner stated that the piece of equipment involved in the citation is a telescoping conveyor, and since the start-stop buttons are on the end of the conveyor, the buttons move as the conveyor moves. The wire or cable running to the button is stored on a wind-up reel on the stationary part of the conveyor, and as the conveyor is extended the wire is pulled from the reel. The conveyor

was supplied with an inadequate or marginally adequate storage capability on the reel, and it causes problems. If the conveyor is extended beyond its design length, it pulls the cable from the buttons since the cable is not as long as the length to which the conveyor could be extended. Although the cable itself was properly installed, since the cable itself went through the bushing on the box, when the conveyor was overextended, it would pull the cable out of the bushing and the slack that was used in the box to make up the start-stop button was then pulled out through the bushing. Mine management did not initially know how to correct this situation since more cable could not be added due to the lack of room on the storage reel. However, the conveyor buttons have since been moved farther down the conveyor to correct the situation permanently. On the day the citation issued, the same procedures were followed, that is, the buttons were moved and the cable was pulled back through the bushing. The bushings around the hole in the switch box were still intact. Although there is no regular electrician on the payroll at the plant, a contract electrician has been working at the plant for the most part on a fulltime basis for a number of years (Tr. 64-66).

On redirect examination, Mr. Michner stated that the mine has an ungrounded delta system, and if one of the three phases touches the ground anywhere in the plant for one reason or another, it will energize the ground and it will register on one of the ground detection meters in the control room. By turning off the equipment around the plant, an electrician can isolate the grounded equipment and locate it. Normally, the equipment will continue to function and there is no shock hazard because in order for there to be a shock hazard, a person has to get his body or some part of his body between areas of two different voltages.

On recross-examination, Mr. Michner stated that if the insulation on two of the individual conductors had broken during the telescoping and the two wires touched each other, there would be a short circuit, which would trip the circuit breaker and deenergize the equipment. If one conductor broke down, the equipment would continue to run, but one phase would be touching the ground and the conveyor and ground would be energized to 480 volts. In such a circumstance, he did not believe there would be any potential for anyone to get hurt, but he would not go as far as to say that the system is entirely fail safe (Tr. 70-72).

Inspector Slaton was recalled as the court's witness and drew a sketch of the condition which be cited (Exh. ALJ-1). He stated that the individual wires remained intact and the outer insulation of the main cable came loose. The bushing was inadequate because it allowed the main cable cover to slip back, thereby exposing the individually insulated wires (Tr. 72-76).

Citation No. 103204, 30 CFR 56.16-9:

A track and rolling dolly was needed for changing the No. 2 scrubber liners. There was no way for men to stay clear of suspended loads. One man would need to work under the load. This is a periodic job done by maintenance.

30 CFR 56.16-9 states: "Men shall stay clear of suspended loads."

Petitioner's Testimony

Inspector Slaton described the scrubber operation and identified a picture of the unit in question after the condition was abated (Exh. R-2). The scrubber liners are cleaned periodically and in order to facilitate the cleaning process, the scrubber motors and other scrubber parts, such as guards, are lifted out by means of a chain attached to an overhead steel beam. Once lifted out, the parts would remain suspended above the scrubbers with no means of pushing them out of the way, and men would have to work under the suspended loads while working on the scrubbers. A track-and-roll dolly was installed to abate the citation and this allowed the machinery to be hoisted up and moved out of the way of the men working under the suspended loads. The equipment lifted out might weigh 1,500 pounds, and if it fell on someone it would be fatal (Tr. 79-88).

On cross-examination, Inspector Slaton testified that he did not personally see any men working under any suspended load while changing out the liner. The condition which he believed constituted a health and safety violation was pointed out to him by the miners' representative who accompanied him during his inspection, and his testimony has been a reiteration of what the miners' representative told him (Tr. 88-89).

On redirect examination, Inspector Slaton testified that he was accompanied on his inspection by Robert Bowles, the miners' representative and MSHA inspector Earl Diggs. Upon arriving at the scene of the alleged violation, Mr. Bowles remarked that a way was needed to keep men out from underneath the scrubbers. Although there was a rolling dolly installed at another plant location which provided a means for moving a suspended load away from the area where the men were working, no such equipment had been provided at the area where the alleged violation occurred. Mr. Bowles pointed out to him the need for providing a way for moving a load away so that the men would not be working directly under it. Plant Manager Michner agreed that men had to stay under the load while they were changing the liners, and according to Inspector Slaton, Mr. Bowles contended that men were forced to remain under the suspended load while they were changing the liners. Mr. Slaton questioned him about this in the presence of Mr. Michner, and he discussed with Mr. Michner the procedures that

were involved in changing the liners. During the conversation, there was no denial of the fact that the liners had to be changed in the scrubber nor the fact that the men were working under suspended loads while this was being done (Tr. 100-104).

On recross-examination, Inspector Slaton stated that the guards are located over the top of the four scrubber motors and that when the scrubber lining is changed, the miners manually lift out the scrubber screen or guard and set it aside since there is no hoist for the guard. The motors are lifted out individually one at a time rather than lifting all four motors out at any one time. A hoist was fastened to an overhead beam and a chain was lowered down and hooked to the motor so that it could be lifted up with the hoist. According to Inspector Slaton, Mr. Bowles stated that the motor was left suspended while the men worked on replacing the liner, but that it was tied off with a safety chain while suspended. Under the "Gravity" section on his inspector's statement, Inspector Slaton testified that he had indicated "improbable" with respect to "the occurrence of the event against which the cited standard was directed" since the safety chain was always used to support the load in case the suspension failed (Tr. 104-107). Mine management has always been cooperative in making any changes he has recommended, including the installation of the track and dolly installed to abate the citation (Tr. 109). The installation of the dolly at the first location was done voluntarily by the operator rather than as the result of a citation or a notice, but Mr. Slaton had no idea as to why a similar apparatus was not installed at the location in question at the same time. The operator freely acknowledged that the men worked under the load when they changed the liners (Tr. 113-114).

Citation No. 103205, 30 CFR 56.11-1:

A working platform was not provided for maintenance on the flour-loading dust collector air slide. Two men would be involved in this work. This work is only done periodically.

30 CFR 56.11-1 states: "Safe means of access shall be provided and maintained to all working places."

Petitioner's Testimony

Inspector Slaton confirmed that he issued Citation No. 103205 because there was no work platform installed adjacent to the air slides which are approximately 12 to 18 feet above the ground and under the flour-loading dust collector. Periodic maintenance is performed on the air slides and a platform is required due to the fact that the air slides are suspended above ground. Work was performed by means of safety belts and lines used by workmen who would climb out on a beam to work on the slides. He has never seen any employees performing maintenance on the particular air slides which

he cited, although he has observed such work performed on other air slides which had been provided with working platforms. He does not consider the use of safety belts and lines to be safe since safety belts may not always be used by the men. Although safety belts were generally available at the operation, they were not readily available to the men at the particular location cited at that particular time (Tr. 125-128). With respect to the risk of injury, Inspector Slaton stated that he is of the opinion that serious injury could result if men did not wear their safety belts, but that if a man was wearing his safety belt, and everything was held intact, any injuries incurred would be bruises or possibly broken ribs. He made no attempt to ascertain why a walkway was not provided, although they were provided on other air chutes (Tr. 129-130).

On cross-examination, Inspector Slaton testified that he did not see anyone working on the air slides, and he acknowledged that his testimony is based on what the miners' representative told him during his inspection when he pointed out the area to him and described the condition. He does not know how often the air slides need to be replaced, but believed it was "periodic," but he did not know how often. In order to get into the area to repair the slides, the men used steps and walkways, which were safe at the time. They would then have to line themselves off to reach the slide (Tr. 130-131).

Citation No. 105601, 30 CFR 56.14-1:

The flat belt drive on the sand floatation tanks was not guarded. The pinch point was approximately 4 feet from the floor.

30 CFR 56.14-1 states: "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, shall be guarded."

Petitioner's Testimony

MSHA inspector Earl W. Diggs testified that he issued Citation No. 105601 (Exh. G-6), for a violation of 30 CFR 56.14-1, because upon observing the skimmer paddle wheels turning on the flotation tanks inside the mill building, he noticed that the flat drive at one end of the skimmer was not guarded. The flat belt drive is an electric motor driven paddle wheel that skims floating waste materials off the sand-cleaning tanks. The paddles are driven by a flat belt which has a pinch point at the motor drive pulley and at the paddle wheel pulley. He required a guard to be put over the drive pulley, at the electric motor, and it covered the complete belt. The danger of someone getting caught in the upper pinch point was not serious, but the motor end pinch point was serious because that is a drive. After the situation was corrected, the guard served to protect persons from the

pinch point at the drive. The danger of a guard not being in place is that a man, when performing adjustments such as opening valves to let the water in, could possibly slip and fall, or he could reach to grab something to keep him from falling and get caught in the pinch point. However, it is customary not to change the paddles without first locking out the circuit. Inspector Diggs indicated he would consider the violation to be nonserious because if a man's clothing got caught in the pinch point, his arm could possibly become twisted. He did not know why the drive was not guarded, and did not know how long it had been unguarded since this is the first time he had noticed it. He did not know whether a maintenance man was regularly assigned to perform maintenance on the belt (Tr. 148-154).

On cross-examination, Inspector Diggs stated that after he issued the citation, it took a few hours to install the cover, and that it was done promptly. The drive belt was a flat belt and not a V-shaped pulley so there was not a groove that somebody could get caught in. The paddles turn fairly slow and it was possible for someone to grab one of the paddles, as well as the belt itself, and stop it from turning. The pinch point was located at the end of the tank itself, within approximately 3 feet of a couple of water valves that appeared to be well-used. He recalls filling out an inspector's statement after the inspection and he remembers checking the box under "Gravity" and stating that "[t]he pinch point was in an out of the way position." He also indicated on the statement that it was "improbable" that someone could be severely injured on it (Tr. 154-156).

Inspector Diggs acknowledged that he had inspected the plant before and he had never previously noticed a guard. The belt was fairly loose on the drive and there was no heavy tension. A person could reach up and hold the paddles and this would stop the belt from turning, but it would not stop the drive pulley from turning and grinding away in one's hand. The pulley sheave is located approximately 4 feet from the floor, while the drive pulley is higher up in the air, approximately 5 or 6 feet. Once the paddle is stopped by hand, the pulley is also stopped from turning.

Since the tension was not enough to turn the paddle wheel, there is a possibility that if someone got his sleeve caught, he could pick it out by slowly turning the belt. However, there is also the possibility of someone getting caught in the keyways, locks, or fastening nuts of the flat belt, that is, inside the pulley. The keyways are located in retainers and hold or lock the pulley onto the shaft, but he does not recall whether or not the keyways were exposed (Tr. 156-161).

In response to questioning by the bench, Inspector Diggs stated that the area involved was a passable, but remote area where someone would seldom pass through. The pinch point was located away from travelways. Any maintenance needed to be performed on the pulley

device would likely consist of regular belt maintenance or the repair of a broken belt. Removal of the guard could be accomplished by removing two bolts on each side of the guard. The condition was abated on the same date as the citation issued--at 10:10 p.m. that night (Tr. 162-163).

Respondent's Testimony

Mr. Michner testified that the guard that was obtained to abate the condition came from a local fabrication shop, since there are no facilities at the mine to do the type of fabrication required. He acknowledged that the belt could be stopped from turning by grabbing it in one's hand. Although he has never measured it, he estimated that the upper drive pulley is 7 to 8 feet from the floor and that the lower pulley is approximately chest-high. There had never previously been a guard on this particular pulley before, and no inspector previously suggested that the pulley or belt be guarded. If such a suggestion had been made, then it would have been done. No one had ever been injured while the belt was unguarded, and the reason that the belt had not been guarded is that it never occurred to anyone that there was a hazard there. The machine was manufactured by Denver Equipment Company, which has made a million such machines, and over the years, he has never seen one of these machines guarded. The machine in question has been running unguarded at the plant since 1961. Before he came to work at the Columbia Mine, Mr. Michner worked at respondent's plant in New Jersey, where there are six identical machines that have been running since 1962 without guards; however, such machines are probably now guarded. He is certain that inspectors who visited the mine had previously observed the condition since the machine was located outside his office window and anyone who walks on the main walkway through the wet process, walks past the machine (Tr. 165-169).

Citation No. 105603, 30 CFR 56.12-8:

The electric wiring entering the acid pump drive motor did not enter through proper fittings. The wet process building. The meter is fed by a 110-volt system.

Petitioner's Testimony

MSHA Inspector Diggs testified that he issued Citation No. 105603 after he observed insulated wires going into the junction box on the acid pump motor through a hole in the junction box. He identified Exhibit R-4 as a photograph of the equipment which was cited. The conduit leading into the junction box at the bottom of the photograph was broken loose and the wires were sticking out. The wires came out of the conduit and went into the motor and he could not recall whether the box shown in the photograph was there at the time of the citation. The wires were insulated and taped. However, someone could have

stepped in or tripped on the wires, thereby pulling them out and shorting the motor. The citation does not involve improper fittings, but rather, unprotected insulated wiring. The wires were hooked to the motor, and while they were taped, they were still left exposed and inadequately protected from someone walking on them or tripping over them (Tr. 170-176).

Inspector Diggs stated that the condition he observed could possibly affect the men operating in the plant area, i.e., the maintenance personnel who go in to check the acid pump for the acid flow into the system. Since the area involved is a wet process area, it is possible that a person performing maintenance duties there could step on the wires often enough so as to wear the insulation down, thereby possibly being fatally electrocuted. The likely result of the condition which he observed is possible shock, burns, or acid inhalation from a fire that could result from shorting out the 110-volt motor (Tr. 176-177). He believed that the operator was not aware of the condition until it was pointed out to him, and there was no required electrical inspection to be performed that would make the operator aware of the condition (Tr. 177-178).

On cross-examination, Inspector Diggs testified that the motor was small, approximately between three-quarters to one horsepower. His purpose in issuing the citation was to insure that a proper junction box was installed on the electrical motor. He confirmed his previous testimony that wires were coming out of a conduit rather than out of a cable, and indicated that the distinction between cable and wires is that insulated wiring has less protective insulation around it than insulated cable since insulated cable has two types of insulation--one type of insulation around the wire and then another type completely around the cable. Mr. Diggs conceded that on the citation he stated that the wires did not enter through proper fittings, and then acknowledged admitting that what is involved is not a cable, but rather a wire. Section 56.12-8 does not require wires to have proper fittings and it only applies to cables.

On redirect examination, Inspector Diggs verified his previous statement concerning the conduit, but indicated it was not connected to the motor at the junction box. The conduit, according to the inspector, is similar to wires and the cable because there is a double protection, i.e., the conduit protects the wiring and the outer insulation protects the cable (Tr. 181-182).

On recross-examination, Inspector Diggs testified that if a cable were involved, it would be connected to the motor and that either the cable or the conduit would terminate in or at the junction box at the connection to the motor. He was not aware of any standard that requires power wires to be inside a conduit or in a cable. Thus, the operator has a choice whether to use wires or cables (Tr. 182-183).

Respondent's Testimony

Mr. Michner testified that the power wiring to the acid pump drive motor came through a rigid conduit fastened on a column and the last 12 to 18 inches between the rigid conduit and the motor had no protection for the wires. The wires came out of the conduit, were fastened to the wires pigtailed out of the motor with wire nuts and tape, and were all exposed without a flexible conduit or junction box. The inspector wanted the wires to be guarded, that is, he wanted them protected in some fashion. However, he could not recall whether the inspector specified the manner in which he wanted such to be accomplished, but the installation of a junction box would be the logical approach for protecting the wires. The pump in question was located on a small steel platform, approximately 12 inches off the floor. Although it was near a normal work area, there was no traffic through the area, and it was very unlikely that someone would step on it. The only person who would probably be in the vicinity adjacent to the motor would be an electrician, and the size of the electric motor is one-twentieth horsepower (Tr. 184-186).

In response to a question from the bench, Mr. Michner stated that the wires were insulated and that there was a bushing on the motor itself. In abating the condition, a cover was put over everything in order to protect the wires, and the existing wire nuts and bushing are still in the box. In his opinion, the use of a box is the more professional way of protecting the wires, etc. Assuming the citation was to be vacated, Mr. Michner stated that he would not undo what was done and put things back in their original condition (Tr. 186-188).

Citation No. 105604, 30 CFR 56.12-30:

The electrical junction box on the drive motor for the power tank dust collector at the top of the flour tanks was torn loose. The motor is fed by a 480-volt three-phase system.

30 CFR 56.12-30 states: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

Inspector Diggs testified he issued the citation in question after climbing to the top of the dust collector drive motor and observing that the junction box had vibrated loose and was hanging down. It was physically separated from the motor, but it had not been torn loose. The wires were still leading from the motor to the junction box, the motor was located approximately 3 to 6 inches from the junction box, and the equipment was energized. He considered this to be a potentially dangerous condition because with continued vibration, it is possible that the insulation could have worn off the wires, and if there was a breakdown in the grounding system, the mill building

could have been energized. Anyone walking from the ground to a ladderway and then reaching up to grab the handrails to climb up could have been injured by electrical shock. The amount of voltage being carried though the wires depended upon how many phases could break through the insulation, and one phase is approximately 177 volts. Since the conditions outside at that time were dry, any shock would be nonserious. The condition was corrected immediately by reattaching the junction box to the motor (Tr. 190-195).

On cross-examination, Mr. Diggs testified that the electric motor was located at the top of the flour tanks at a height of approximately 50 to 60 feet. Since there was nothing located above this area, it was probably one of the most remote areas in the plant. He recalls indicating on his inspector's statement that "it is improbable that someone would get hurt because the circuits were locked out when someone was up in that area working on the equipment." In his estimation, the possibility of someone being injured by the condition would be improbable but not impossible. There was no indication that the operator had prior knowledge that the junction box had become dislodged. With respect to the requirements of the safety standard regarding the finding of a potentially dangerous condition, the inspector believed that the standard means that when such a condition is found, it should be deenergized and corrected before it is reenergized (Tr. 195-198).

Apart from the fact that the junction box was dislodged from its normal place, the only other defect that Mr. Diggs could detect was a screw missing from the cover, but the cover itself was still in place. His concern was that if the dislodged junction box was allowed to remain, it could possibly get worse. The first citation covered the situation which he found, and although he wrote "junction box cover" on the first citation out of haste, what he actually meant was "junction box." He did not personally amend the citation because he was out of the area (Tr. 199-201).

Citation No. 103206, 30 CFR 56.12-32:

A junction box cover for the sending generator on the No. 1 separator in the mill was not kept in place. This was about 4-1/2 feet from the walkway with no energized circuits exposed. About four men would pass within 5 feet of the violation per shift. This was a 110-volt circuit.

30 CFR 56.12-32 states: "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

Inspector Slaton testified he issued the citation after finding that the junction box cover was not in place on the box located on the sending generator in the upper floors of the mill building. The circuits passing through the junction box were exposed, but were well-insulated. Although the cover is normally kept in place with screws,

there was no cover on the junction box, and it was not under testing or in maintenance. The violation occurred on the production shift when the equipment was running, and in the inspector's opinion, the violation was nonserious since the exposed circuits were well-insulated. In his opinion, any hazard would result from continued vibration wearing on the insulation, and someone possibly getting into it from the cover not being in place. The condition occurred in an area where mill and maintenance people passed by, and approximately four men per shift would pass within approximately 5 feet of the location in question. If the insulation were to become frayed to the extent it would expose the electrical circuits and people come close enough to it, they could be fatally shocked by the 110-volt circuit. In his opinion, if a person touching the circuit were standing on a metal floor, the circuit would pass through him. He was unable to determine how long the cover had been missing, and he did not see a cover anywhere in the area (Tr. 202-207).

On cross-examination, Mr. Slaton stated that the junction box cover would be facing down toward the floor when in place, and he identified a photograph of the box in question (Exh. R-5, Tr. 207-209).

Respondent's Testimony

Mr. Michner confirmed that the junction box faced toward the floor. He also stated that the wires were properly insulated, and because they were hanging out of the junction box with wire nuts on them (as in the citation including the acid pump), they were highly visible. In his opinion, there was no justification for the missing cover, and an electrician had obviously made some connection or reconnection and had not replaced it. Although he admitted to having experienced problems with respect to employees removing junction box covers and forgetting to put them back on, he had no reason to believe they were stolen, and he was not present when the citation was issued or abated (Tr. 211-214).

Citation No. 103207, 30 CFR 56.12-32:

The junction box on the pump house sump pump was not kept in place. This motor was in a remote area in the corner of the pump house. It was 8 inches from the floor. The only time anyone was exposed to this violation was during maintenance on the sump pump. No energized circuits were exposed. This was a 110-volt circuit.

Inspector Slaton testified that he issued the citation in question after observing a pump in the sump pump room with the junction box cover missing and a wire exposed. He observed no cover in the area and the exposed wire was well-insulated. The violation was not serious since there was adequate insulation on the wires. However, if the circuits become exposed where the energized wiring is exposed

and someone comes in contact with it, the situation becomes more serious because the location involved was a wet area. The pump was portable, and when in use, it rested approximately 8 inches from the floor. In order for someone to be injured if the wires were exposed, all that would be necessary would be for someone to come into contact with it while walking past it. The frequency of movement of the pump would vary depending upon how often it was needed, and he was not able to determine how long the cover plate had been missing (Tr. 214-218).

On cross-examination, Inspector Slaton indicated that the pump in question was located in the back corner of the sump room in an out-of-the-way and remote location and was not operating when he observed it (Tr. 218-219).

In response to bench questions, Mr. Slaton stated that the only time anyone would be exposed to the condition cited would be during maintenance or adjustments to the pump. The pump motor was a small 110-volt motor and the junction box was missing from the motor pump. The pump was a portable type which he believed was being stored in the area and he assumed that it was used in the sump area when needed. In order to ascertain whether the pump was down for maintenance, he asked the person who accompanied him, and since no one said anything about the pump being down for testing or maintenance, he assumed that it was not (Tr. 219-222).

Findings and Conclusions

Citation No. 103201, 30 CFR 56.12-34

Fact of Violation

This citation was issued because the inspector found an unshielded portable "trouble-light" bulb being used as lighting in a tractor trailer which was being loaded with bags of sand. The citation states that the light bulb was hanging 5 feet from the floor of the trailer. The inspector testified that the light bulb was out of the reach of three workers who were stocking sand bags on pallets in the truck, and that the exposed bulb was hanging from a nail on the side of the truck some 8 to 10 feet back from where the men were loading. During the time the inspector was observing the loading operation, the light bulb was always 8 to 10 feet behind the men and he could recall no one passing close by the bulb while he was there. Even upon his return a half hour after issuing the citation when the condition had been abated, the men were still located some 4 to 6 feet from the bulb.

Section 56.12-34 requires that portable extension lights be guarded only if the location of the light is such that a shock or burn hazard is present. In this case, it seems clear to me that the petitioner has not established that the location of the light bulb was

such as to present a shock or burn hazard. The light was being used for illumination and the testimony of the inspector establishes that it was always located some 8 to 10 feet behind the men working in the trailer and that it was out of their reach. Even after abatement, the light bulb was still 4 to 6 feet behind the men, and the inspector conceded that the usual procedure was to move the location of the light bulb back away from the men as the loading process advanced from the front to the rear of the truck and as the conveyor was retracted. Further, the inspector also indicated that during the loading process the men would usually stay in one stationary location at the end of the conveyor while off loading and stocking the material on the pallets (Tr. 34).

I find that the petitioner has failed to establish that the location of the light bulb in question was such as to constitute a shock or burn hazard and that a violation of section 56.12-34 has not been established by a preponderance of the evidence. The citation is vacated.

Citation No. 103202, 30 CFR 56.12-8

Fact of Violation

I find that the petitioner has established a violation as charged in this citation. Although the start-stop switch wiring passed through bushings, it is obvious that the bushings were inadequate since they permitted the wires to be stripped back approximately 6 inches. This condition was apparently caused by the telescoping conveyor windup reel which had an inadequate takeup capacity which in turn caused the cables to be pulled away from the stop-start switch. Although the inspector's testimony is somewhat confusing as to the conditions which he observed, I conclude and find that it does establish a violation of section 56.12-8, which requires insulated wiring passing through metal frames to be substantially bushed with insulated bushings. Since the wires in question were pulled or stripped back when the takeup reel was activated, it seems obvious that the bushings were inadequate since they did not prevent this from occurring. Plant Manager Michner's testimony confirmed the condition found by the inspector and it also confirmed the cause of the cited condition.

Negligence

Respondent's testimony confirms that it was aware of the fact that the design capability of the conveyor was such as to permit the cable to be pulled out of the start-stop switch when the conveyor was extended. This being the case, respondent should have known that the wiring in question would likely be stripped back and not held in place by the bushings. In the circumstances, I find that the respondent failed to exercise reasonable care to prevent the condition cited and that this constitutes ordinary negligence.

Gravity

Although the wires in question appeared to the inspector to be well-insulated and no energized circuits were exposed, the conveyor belt was in operation when the inspector observed the condition and he believed that a potential electrical shock hazard was present since men would come in contact with the conveyor while loading and unloading material. Although respondent's testimony indicated that the equipment would deenergize in the event a short circuit occurred because of the wiring becoming separated, the fact is that there was a potential for the conveyor to become energized and the grounding system was not entirely a failsafe system. Under the circumstances presented, I find that this violation presented a shock hazard and was serious.

Good Faith Compliance

The respondent demonstrated good faith in achieving rapid compliance. When the citation was issued at 9:45 a.m., the respondent was given until 9 a.m. the following day to correct the condition. However, compliance was achieved and the citation was terminated at 4 p.m. on the same day of its issuance (Exh. G-2).

Citation No. 103204, 30 CFR 56.16-9

Fact of Violation

The safety standard cited requires that men stay clear of suspended loads. The standard in question is one of several standards listed under a general section 56.16, which is headed by the terms "materials storage and handling." Thus, the initial question presented is whether this standard has any application to a suspended heavy load such as a scrubber motor, guard, and other such scrubber parts which must be lifted out and suspended in order to facilitate the changing of the scrubber liners or to perform other maintenance on the scrubbers.

Although I fail to see the logic in including the cited standard under a "materials storage and handling" general regulatory section, I conclude that it may be applied to a situation where it is established that men are working under any suspended loads, whether it be "materials," as that term is commonly understood, or motors or other equipment.

A second question presented is whether the condition or practice described by the inspector on the face of the citation sufficiently described a condition or practice which is in violation of the cited mandatory safety standard as required by section 104(a) of the Act, which states in pertinent part as follows: "Each citation shall be

in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."

In this case, although the citation was dated and issued on March 14, 1978, some 5 days after the effective date of the 1977 Act, it is obvious that the alleged condition or practice occurred prior to March 14th. However, since the inspector failed to indicate on the face of the citation when the alleged condition occurred, and failed to furnish any details as to the alleged condition or practice, I conclude that he failed to describe the alleged violation with any particularity. For all I know, the alleged condition may have occurred prior to the effective date of the Act.

Aside from the anemic evidentiary presentation by the petitioner in support of the alleged violation, I find that the "condition or practice" on the face of the citation fails to describe any condition or practice which amounts to a violation. The "condition" cited simply recites that there was a need for a track and rolling dolly to change scrubber liners, that there was no way for men to stay clear of suspended loads, that one man would need to work under the load, and that the job was periodically performed by maintenance. As pointed out by the respondent in its brief, section 56.16-9 does not mention tracks and rolling dollies, and the condition described does not state that miners had in fact ever worked under a suspended load. And, as testified to by the inspector, the scrubber motor was supported by a safety chain and could be tied off and swung to the side or possibly set down on the floor so that men would not have to work under it (Tr. 107).

Finally, I come to what I believe to be the most crucial issue presented with respect to the citation, namely, whether the fact that the inspector did not personally observe anyone working under a suspended load is sufficient to support a violation. In this case, it is clear that the inspector did not observe anyone working under a suspended load during his inspection. In issuing the citation, he relied on the information furnished to him by the employees' representative who accompanied him during the inspection.

Although MSHA did not file any posthearing brief or proposed findings and conclusions, counsel at the hearing took the position that it was not necessary for an inspector to personally observe a condition in order to support a violation. Citing the language of section 104(a) of the Act, which states in pertinent part "if, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, * * * he shall, * * * issue a citation to the operator," MSHA apparently takes the position that any belief by an inspector that a violation has occurred, authorizes the inspector to issue a

citation, notwithstanding the fact that such a belief is based, not on the inspector's personal observations, but on the observations or statements of a third party who may or may not have personally observed a condition or practice constituting a violation.

The testimony of the inspector reflects that during the course of his inspection, and while accompanied by the employee representative and the plant manager, the employee representative remarked that during the course of replacing the scrubber liners, the scrubber motors were lifted up by a chain hoist, tied off with a safety chain, and while suspended in such a position, the persons performing the work were required to work under the suspended motors. According to the inspector, Plant Manager Michner confirmed that this was the case and did not deny it. The employee representative did not testify, and Mr. Michner was not called to testify, although he was present in the courtroom.

Since MSHA did not file any posthearing briefs or arguments in support of any of the citations in these proceedings, its position and theory on which it believes a citation may be supported on facts outside the inspector's own personal knowledge or observations remains a mystery. Apparently, MSHA is of the view that the statutory language of section 104(a) authorizing an inspector to issue a citation if he believes that a mandatory safety standard has been violated is sufficient on its face to support a citation, irrespective of how the inspector arrives at that belief, or irrespective of the evidence produced by the petitioner in support of the alleged violation. Thus, MSHA's position appears to be that any time anyone advises an inspector of some past condition or practice outside the inspector's own personal knowledge or observations, the inspector must issue a citation. In my view, such a broad interpretion of section 104(a) raises serious due process questions, and on the facts and circumstances presented here, is rejected.

Section 103(a) authorizes frequent mine inspections and investigations, and one of the purposes of such inspections and investigations is to determine whether there is compliance with the mandatory health or safety standards. Subsection (f) authorizes a representative of the mine operator and the miner's representative to accompany an inspector during the physical inspection of the mine made pursuant to subsection (a), for the purpose of aiding such inspection. Subsection (g)(1) provides in pertinent part that:

> Whenever a representative of the miners or a miner in the case of a coal or other mine where there is no such representative has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner or representative shall have a right to obtain an immediate inspection by giving notice to the

> Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners or by the miner, and a copy shall be provided the operator or his agent no later than at the time of inspection, * * * . Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists * * * . If the Secretary determines that a violation or danger does not exist, he shall notify the miner or representative of the miners in writing of such determination. [Emphasis added.]

Subsection (g)(2) of section 103 provides in pertinent part that:

> Prior to or during any inspection of a coal or other mine, any representative of miners or a miner in the case of a coal or other mine where there is no such representative, may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing, of any violation of this Act or of any imminent danger which he has reason to believe exists in such mine. [Emphasis added.]

It seems clear that sections 103(g)(1) and (2) authorizes a representative of miners to obtain an inspection when he believes there is an existing condition which may be a violation, and to bring to the attention of the inspector an existing condition which he believes constitutes a violation. However, I find nothing in section 103 which authorizes an inspector to base a citation on some past condition or practice brought to his attention orally by a representative of miners during the course of an inspection.

Section 104(b) of the 1969 Coal Act, provided in pertinent part that: "[I]f, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard * * * , he shall issue a notice to the operator or his agent * * * .

The January 1975 edition of the Inspector's Manual dealing with the issuance of notices under section 104(b) of the 1969 Act, states that apart from imminent danger situations, the issuance of notices pursuant to section 104(b) is "the primary tool for obtaining compliance with the mandatory health and safety standards" (section 1.0). The manual guidelines and instructions for an inspector to follow in issuing section 104(b) notices state in pertinent part as follows as sections 1.0 and 1.4:

> When the inspector is satisfied upon inspection that a condition or practice exists which violates a

> mandatory standard his responsibility is to issue a 104(b) Notice and fix a reasonable time for the operator to abate the condition or practice. Notices of Violation shall be written promptly after a violation of the Act is observed, * * * . [Emphasis added.]

It seems clear that under the 1969 Act, an inspector was required to personally observe an existing condition in a mine which he believed constituted a violation before issuing a notice of violation pursuant to section 104(b). The "finding" that he was required to make concerning such a condition was obviously intended to be based on his personal observations of an existing condition. However, under the 1977 Amendments to the Act, the language presently used in section 104(a) with respect to the issuance of citations is "believes." Thus, the question presented is whether the term "believes" means the same as, or something different from, the term "finds" as previously used in the comparable section of the statute authorizing inspectors to issue citations.

Section 104(a) of the 1977 Act provides in pertinent part that:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this Act has violated this Act, or any mandatory health or safety standard, * * * he shall, * * * issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, * * * .

The connotation of the word "believe" is entirely subjective, 10 C.J.S. 238. In the common and ordinary use of the English language, and in all the general acception of the term, the word refers primarily and explicitly to the mental state of the believer without any necessary regard to the reasons, conditions, and circumstances which may have caused or influenced the existence of such mental state; and hence it does not imply, require or mean a reasonable belief. As pointed out in the cases cited in 10 C.J.S. 238, 239, the verb "believe" is susceptible of interpretation in varying degrees. In its most definite and strongest sense, it has been defined as meaning to accept as true on the testimony or authority of others; to be persuaded of the truth of anything; to be persuaded upon evidence, arguments, and deductions, or by circumstances other than personal knowledge, and the term has been held equivalent to, and interchangeable or synonymous with "find."

Words and Phrases, Volume 5, Permanent Edition, pp. 409-412, indicates that the word "believe" has been construed to mean:

> --- nearly synonymous with rely and means to accept as true on the confidence of others.

--- to be convinced or to feel that something is true or at least probable.
--- in the sense of "averred" or "alleged".
--- to credit upon authority of testimony of another, to be persuaded of truth of, to regard, accept, or hold as true.

The March 9, 1978, edition of the Labor Department's Inspector's Manual for the issuance of citations and orders contains the current guidelines for an inspector to follow when he issues citations for violations of any mandatory health or safety standards, and I take official notice of such publication notwithstanding the fact that the parties did not see fit to bring it to my attention. Section 1.1 of the manual lays out guidelines for an inspector to follow when describing an alleged violation, and it states in pertinent part as follows:

> Elements of a violation description include: An adequate description of the condition(s) and/or practice(s), which must set out the fact(s) that cause and constitute the violation of the Act or a specific regulation. The description should be written to show how and why the regulation is violated. The location in the mine where the violation and/or hazard exists must be identified for several reasons: (1) to prevent problems of timely abatement and to inform the operator as to the area of the mine so affected by the citation or order; (2) to inform the miners and their representative where the violation and hazard exist; and (3) to inform other inspectors who may be required to make the follow up inspection. Any equipment involved should be properly identified as well as located and the inspector should include in his description of the violation, any facts relevant to exposure hazards to the miners and negligence on the part of the operator. In a few words it must describe with particularity the nature of each violation.

Section 2.1, which deals with MSHA policy concerning the issuance of section 104(a) citations, states in pertinent part as follows:

> When an inspector finds, or believes, upon an inspection or investigation, that a condition or practice exists which violates a mandatory standard but does not create an imminent danger he is required to issue a Section 104(a) or 104(d) Citation (except where a Section 104(d) order is issued) and fix a reasonable time for the operator to abate the condition or practice. (Emphasis added.]

Section 2.6 of the manual provides guidance for the inspector in the issuance of citations for violations of Title I of the Act, and states in pertinent part as follows:

> Where violations of any provisions of Title I of the Act are observed at a mine, or an investigation reveals that a Title I violation exists, the authorized representative shall issue the citations on Form 1. On the Form 1, check the box for citation, and enter type of action as 104(a). In citing the violation, identify the proper section of the Act.
>
> The citation should state specifically when, where, and how the violation occurred, if relevant, and a detailed description of the conditions or practices. A violation of Title I of the Act shall be processed the same as any violation of Title II and Title III of the Act (mandatory health and safety standards). The citations should be entered in the proper inspection or investigation report, if appropriate, and such citations are subject to civil penalties. [Emphasis added.]

Section 5.0 of the manual deals with the inspector's preparation of an "Inspector's Statement," which is a form filled out by the inspector at or near the time that he issues a citation, and which contains his comments and observations concerning the six statutory criteria contained in section 110(i) of the Act. The instructions and guidelines state in pertinent part as follows:

Inspector's Statement Report. See Form No. 7000-4.

> The Statement Report shall be a description of the conditions, actions of the operator, and circumstances surrounding the violation which the inspector has observed or determined by investigation, inquiry, or discussions with the operator, supervisors, mine foremen, section foremen, miners or others which lead him to make the statements contained in the report. The description should be concise and brief but at the same time convey a sufficient description upon which a determination or recommendations can be made as to the amount of penalty. The inspector should realize that his analysis and report will influence and be given weight by others. The inspector should therefore be able to substantiate the opinions stated and such statements must be in agreement with the information contained in the citation or order issued.

> The citation or order issued under the provisions of sections 104(a), 104(b), 104(d)(1) or (d)(2), 104(c)(1) or (c)(2), 104(f), 104(g)(1), and 107(a) will best describe by section number the mandatory health or safety standard which has been violated and will contain a description of the conditions or practices as observed by the inspector upon which he made his determination as to what caused and constituted the particular violation. [Emphasis added.]

A review of the legislative history of the 1977 Amendments to the 1969 Coal Act gives little guidance as to what Congress intended when it changed the statutory language from "finds" to "believes." The Senate bill permitted the issuance of a citation based upon the inspector's belief that a violation occurs. The House amendment required that a citation be based on the inspector's finding that there was a violation. The conference substitute adopted the provisions of the Senate bill. MSHA's current Inspector's Manual, which serves as the "handbook" for the guidance of inspectors in the field while conducting inspections and issuing citations, uses the terms interchangeably. Curiously, however, the terms are used in tandem with the terms "inspections" or "investigations," and in several places where it instructs the inspector to detail the circumstances surrounding the asserted violation on which the citation is based, the terms "observed" and "exists" are consistently used in relationship with the condition or practice found by the inspector. This leads me to the conclusion that when an inspector is conducting a routine inspection of the mine, any condition which he finds during that inspection which prompts him to issue a citation must be based on his personal observations during that inspection and it must relate to an existing condition or practice which is in violation of the cited mandatory standard.

As noted earlier, sections 103(g)(1) and (2) of the Act, authorize a miner or miner representative to bring to the attention of an inspector any condition or practice in a mine which the miner or representative reasonably believes constitutes a violation of a mandatory standard. As a matter of fact, Senate Committee Report No. 95-181, reflects that both of these provisions are based on the Committee's belief that mine safety and health will generally improve to the extent that miners themselves are aware of mining hazards and play an integral part in the enforcement of the mine safety and health hazards. However, in bringing these matters to the attention of the Secretary, they must be in writing, and once received by the Secretary, serve as a starting point for initiating an immediate inspection of the mine by means of a special inspection, with notice of same served on the operator no later than at the time of the inspection. If the Secretary fails to issue a citation prior to or during an inspection of a mine in the case of a condition which has been brought to his attention based on such a written "reasonable belief," he is

required by subsection (g)(2) to establish informal review procedures for the purpose of determining why a citation was not issued and to communicate the reasons for his final disposition of the matter to the miner or his representative. Thus, it seems clear to me that while the statute permits miners and their representatives to bring to the attention of an inspector conditions which they believe constitute violations of any mandatory standard, two conditions precedent must be met before an inspector may issue a citation. First, the complaint must be in writing and served on the operator. Second, MSHA must initiate an immediate special investigation to ascertain all of the facts surrounding the conditions which the complainants believe constitute a violation. In such a circumstance, any conditions or practices found during the special inspection may conceivably result in the issuance of citations based on the results of that investigation, and, the citations conceivably could be based on information developed during the course of that investigation, including statements and testimony furnished by third parties outside of the personal observations and knowledge of the inspector.

In the instant case, it is clear that the inspector was not conducting a special inspection or investigation (Tr. 91). As a matter of fact, petitioner's counsel touched on and alluded to the requirements of section 103 during the following colloquy on the record (Tr. 96-97):

> MR. McGINN: * * * I do not know what else the inspector could do, Your Honor. If he did not cite a violation here, he could be reprimanded by the Union or by the miners' representative or other people over him.
>
> ADMINISTRATIVE LAW JUDGE: I cannot conceive of any Union or any Management representative reprimanding an inspector.
>
> MR. McGINN: I mean for a Union for failure to--an inspector, by his authority, is to cite the violation where he thinks one exists.

And, at page 117:

> ADMINISTRATIVE LAW JUDGE: That is what I am trying to find out. Was it specifically brought to the attention of the inspector or MSHA before the day of the inspection, or was it brought out during the course of the inspection casually?
>
> MR. McGINN: It was not brought up prior to the time of the inspection. This was the first inspection under the new law. The inspector said that it was specifically pointed out to him during the inspection.

In view of the foregoing discussion, I conclude that the statutory and regulatory inspection scheme distinguishes between regular mine inspections where the inspection discloses conditions and practices personally observed by an inspector during the course of his inspection, and conditions or practices developed during the course of a special inspection or investigation where the conditions or practices are developed by means of observations and evidence outside of the issuing inspector's personal knowledge and observations. In these circumstances, I find that a condition or practice cited by an inspector as the basis for a citation in the course of a routine regular mine inspection must be based on his personal observations made during the course of that inspection. On the facts presented here, it is clear that the inspector did not personally observe any condition or practice which may serve as the basis for a citation. And, by failing to include in his citation any information as to when the violation purportedly occurred, it has not been established that the alleged violation occurred subsequent to the effective date of the 1977 Act. Since the standard cited is based on the now repealed Metal and Nonmetallic Mine Safety Act, the timing of the citation becomes critical since a proven violation would subject the operator to a civil penalty up to $10,000, a remedy not previously available to MSHA under the now-repealed Metal and Nonmetal Act.

In addition to my interpretation of the application of section 104(a), it should be emphasized that the burden of proof in a civil penalty proceeding lies with the petitioner, and the petitioner must establish by a preponderance of the evidence that the respondent violated the cited mandatory safety standard. Hearings pursuant to the 1977 Act are conducted pursuant to the Commission's Rules published at 29 CFR, Part 2700, and they are subject to the requirements of the Administrative Procedure Act, 5 U.S.C. 553. Section 1006(d) of that Act, 5 U.S.C. 556(d), permits the admission of hearsay evidence, provided it is not irrelevant, immaterial, or unduly repetitious, and the courts have recognized the admissibility of such evidence in administrative proceedings, Montana Power Co. v. FPC, 185 F.2d 491, 497 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951); Vitarelli v. Seaton, 359 U.S. 535, 540 (1959); Willapoint Oysters, Inc., v. Ewing, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949). However, 5 U.S.C. 556(d) also provides that: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence."

According to Black's Law Dictionary (4th ed. 1951), the following terms are defined as follows:

> Reliable: Trustworthy, worthy of confidence.
>
> Probative: In the law of evidence. Having the effect of proof; tending to prove, or actually proving.

> Testimony carrying quality of proof and having fitness to induce conviction of truth, consisting of fact and reason co-operating as co-ordinate factors.
>
> Substantial: Of real worth and importance; of considerable value; valuable. Belonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable. Something worth while as distinguished from something without value or merely nominal.

It is well settled that mere uncorroborated hearsay or rumor does not constitute substantial evidence, Camero v. United States, 345 F.2d 798, 800 (D.C. Cir. 1965); Universal Camera Corporation v. NLRB, 340 U.S. 474, 477 (1951); Consolidation Edison Co. v. NLRB, 305 U.S. 197, 230 (1938).

I have serious reservations about an enforcement policy that authorizes an inspector to issue section 104(a) citation (which could subject an operator to civil penalties up to $10,000), based solely on oral statements made to him by a third party concerning an alleged past condition or practice which purportedly occurred outside the inspector's personal observations and knowledge at some unspecified time prior to his inspection. Such uncorroborated hearsay is in the nature of rumor and I reject MSHA's attempts to use such "evidence" as proof and support for the citation and petition for assessment of civil penalty. On the facts and circumstances presented in this proceeding, I conclude and find that the evidence presented by the petitioner to support the alleged violation is of little or no probative or credible value. It is clear that the inspector saw no one working under any suspended load on the day the citation issued, and his testimony in support of the citation is based on conversations he had with the miners' representative and plant manager who accompanied him during the inspection. Further, the inspector admitted that he never observed the procedure used for changing scrubber liners anywhere in the plant (Tr. 90), he was not conducting any special inspection based on a miner complaint (Tr. 91), and the scrubber liners were not being changed on the day of his inspection (Tr. 92). As a matter of fact, there is no testimony from anyone who observed the liners being changed in the fashion described, and there is no testimony that there were in fact any suspended loads in the plant on the day the citation issued or that men were not staying clear of such loads (Tr. 93-94). The sole basis of the petitioner's case is based on the inspector's inference that, based on the scrubber liner change-out procedure, as described to him by a third party, "there had to be a violation" (Tr. 95).

Arguably, the existence of the violation may be the fact that the procedures for changing out the scrubber liners necessarily require that a miner position himself under a suspended load, thereby exposing

himself to possible danger. That seems to be the petitioner's view of the violation in this case. However, there is no credible testimony as to when the scrubbers in question were lifted out and worked on, who worked on them, or what procedures were followed in accomplishing this task. Here, the inspector conceded that when the liners are changed out, the scrubber guards are lifted out one at a time and placed down next to where the work is being performed, thereby eliminating the possibility of anyone working under a suspended guard. As for the scrubber motors, the inspector conceded that all of the motors are not lifted out all at once. Each motor is apparently lifted out individually and one at a time by a chain hoist and then secured or "tied off" to the side with a safety chain. In such circumstances, I fail to understand how it can be said that one is working under a suspended load, since the motor is tied off and secured in a manner which apparently meets MSHA's requirements. However, without the critical testimony of those individuals directly involved in this procedure, any rational and intelligent findings or conclusions are impossible.

Although the record indicates that the inspector was accompanied during his inspection by the miner representative and the plant manager, the miner representative was not produced as a witness. Further, although the plant manager was present in the courtroom, he was not called as an adverse witness. The explanation given for failing to call the employee representative is as follows, at page 119 of the transcript:

> ADMINISTRATIVE LAW JUDGE: Was there any particular reason why this employee that was walking around was not produced today for testimony?
>
> MR. McGINN: It came to my attention late yesterday afternoon, Your Honor. I did not see time to do this. If you wish, we could continue it.
>
> ADMINISTRATIVE LAW JUDGE: No, I am not going to continue it. The citation was, you know, issued March 14th of 1978. You mean, for the first time yesterday, you learned of this?
>
> MR. McGINN: Both. I knew that -- Mr. Michner, who was a witness here, also participated in the conversation.
>
> ADMINISTRATIVE LAW JUDGE: He did what?
>
> MR. McGINN: Participated in the conversation at that time.

I believe that in a civil penalty proceeding where the petitioner is seeking to impose the sanction of a fine up to $10,000 for a violation of a mandatory safety standard, the petitioner has an affirmative

responsibility to produce that kind of evidence which would be admissible and held to be substantial in a United States District Court civil proceeding, particularly in the circumstances surrounding this citation, where the evidence needed to support the petitioner's position concerning its interpretation of section 104(a) was so readily available. Here, not only did the inspector fail to include in his citation the critical elements of the conditions purporting to be in violation of the cited standard, but the petitioner at trial failed to call critical witnesses who possibly could have supplied testimony critical to its burden of proof.

On the basis of the foregoing findings and conclusions, Citation No. 103204, alleging a violation of section 30 CFR 56.16-9, is VACATED, and a summary of the basis for this action on my part is as follows:

1. Failure of the petitioner to establish a prima facie case by a preponderance of any credible or probative evidence.

2. Failure of the inspector who issued the citation to describe with any particularity, particularly with respect to the date of the alleged infraction, a condition or practice constituting a violation.

3. In a civil penalty proceeding where the petitioner is seeking a civil penalty assessment based on a citation issued by an inspector pursuant to section 104(a) of the Act during the course of a regular inspection, petitioner must establish that the inspector's action in issuing the citation was based on his personal observations or knowledge of the conditions during the inspection.

Citation No. 103205, 30 CFR 56.11-1

Fact of Violation

This citation charges that the respondent failed to provide a working platform for the dust collector air slide where two men would be involved in periodic maintenance work. The cited standard requires that "safe means of access shall be provided and maintained to all working places."

An initial question presented is whether the listing of section 56.11-1 under the general heading entitled "56.11 Travelways," renders the cited standard inapplicable to the location described in the citation.

The term "travelways" is defined in section 56.2, the definitions section of Part 56, as "a passage, walk or way regularly used and

designated for persons to go from one place to another." The evidence establishes that the air slide in question was located and suspended approximately 12 to 18 feet above ground beneath a dust collector and no walkway was provided. Under these circumstances, there is no way that the air slide can be considered to be a travelway as defined by section 56.2, and I conclude that it was not. However, while one can argue the logic of including section 56.11-1 under the general category of "travelways," the crucial question is whether the cited air slide location qualifies as a "working place."

Section 56.2 defines "working place" as "any place in or about a mine where work is being performed." Thus, assuming it is established that work is performed on the air slide, a safe means of access must be provided and maintained while that work is in progress at that location, and I conclude that the cited standard would be applicable, notwithstanding the possible ambiguity created by including it under the general regulatory category of "travelway."

The next question presented is whether the term "safe access" requires that a work platform be installed every time work is performed on the air slide. Respondent apparently did not believe so because work was allegedly performed from an adjacent beam with the use of safety belts and lines. In addition, it would appear that at other similar air slide locations, either a walkway or work platforms were provided. Thus, on the facts presented here, there were three potential ways in which "safe access" could have been provided, namely, a work platform, a walkway, or safety belts and lines. Since the standard, on its face, does not specify what would suffice as a "safe means of access," I can only conclude that this would depend on the circumstances presented on a case-by-case basis. Since the burden of proof as to the condition cited lies with the petitioner, it is incumbent on MSHA to establish that the method used to perform work on the air slide in question did not include providing and maintaining a safe means of access to the air slide. While the inspector indicated that safe steps and walkways were used to gain access to the air slide area, he obviously believed that the precise location at which the work was allegedly being performed on the air slide did not include a work platform. Thus, the crucial question presented is whether the inspector had sufficient evidence to support his citation.

This citation is similar to Citation No. 103204, dealing with the track and rolling dolly, in that the inspector did not personally observe the alleged condition or practice on March 14, 1978, the date the citation issued. He observed no work being performed on the air slide on March 14, nor did he at any time observe anyone performing any work on the air slide in question. His belief that a violation occurred was again based solely on information provided to him by the employees' representative who accompanied him during the inspection. That information consisted solely of the representative telling him that at some unspecified time in the past, periodic maintenance was

performed on the air slide by certain unidentified men without the use of a work platform. The inspector did not know how often maintenance was required or performed on the air slide, nor did he make any attempts to ascertain why a walkway was not provided at that particular location as was the case at other air slide locations. Further, there is nothing in the record to indicate any effort on his part to ascertain who performed the maintenance work or when it was performed, and surprisingly, MSHA did not see fit to call any of these men or the representative as witnesses. MSHA's sole proof in support of the citation rests on the representative pointing to the air slide location and advising the inspector that work had been performed there in the past without the use of a work platform.

In view of the facts and circumstances surrounding the issuance of Citation No. 103205, citing a violation of 30 CFR 56.11-1, I find that the citation should be VACATED, and my reasons for this are the same as those previously discussed with respect to Citation No. 103204, dealing with the track and dolly condition and my findings and conclusions as to that citation are herein incorporated by reference as the basis for my vacating this citation.

Citation No. 105601, 30 CFR 56.14-1

Fact of Violation

I find that the petitioner has established a violation of the guarding requirements of section 56.14-1, and respondent's testimony and evidence does not rebut this fact. The exposed pinch point at the drive was some 4 feet from the floor in a location where it was possible for someone to come into contact with it, and the photograph, Exhibit R-3, and the inspector's testimony confirms this fact. The citation is affirmed.

Negligence

Respondent's testimony reflects that the machine in question had been operating in an unguarded condition since 1961, it never occurred to anyone that it should be guarded, and no MSHA inspector ever suggested that it should be guarded. I conclude that the respondent could not reasonably have known that a guard was required and was not negligent in permitting the condition cited to exist.

Gravity

The inspector believed the condition cited to be nonserious and I adopted his finding of nonserious as my finding in this regard.

Good Faith Compliance

The condition was abated on the same day the citation issued, and a day before the time fixed for abatement. Thus, the respondent exercised good faith compliance by rapidly abating the condition.

Citation No. 105603, 30 CFR 56.12-8

Fact of Violation

In this case, the citation asserted that the electric wiring entering the acid pump drive motor did not enter through proper fittings. Section 56.12-8 has three requirements, and the second one relied on by the inspector requires that cables shall enter metal frames of motors, only through proper fittings. However, the inspector's testimony is that there is no cable involved in the condition cited, and insofar as the cited wires are concerned, the standard does not require that they enter motor frames through proper fittings (Tr. 180-181). Here, there is no evidence that the hole in the motor frame was not properly bushed, and the inspector confirmed that the wires were adequately insulated. Under the circumstances, I find that the petitioner has failed to establish a violation, and Citation No. 105603 is vacated.

Citation No. 105604, 30 CFR 56.12-30

Fact of Violation

The evidence adduced by the petitioner supports the fact that the junction box in question had separated from the dust collector drive motor and was hanging down from the motor. The inspector admitted that the box had not been torn loose as stated in his citation, and he indicated that the separation resulted from vibration. He considered the condition to be potentially dangerous and that is why he cited section 56.12-30.

I find that the petitioner has established a violation of the cited section. The fact that the inspector's citation states that the box had been torn loose, when in fact it had not, does not prejudice the respondent, nor does it affect the described condition. The fact is that the junction box had separated from its usual location, and in that condition could be considered as "torn loose," and respondent presented no evidence to the contrary. Further, the fact that the equipment was energized when the inspector found the condition cannot serve as a basis for vacating the citation simply because the standard requires that the condition be corrected before equipment is energized. In my view, that fact may bear on the gravity of the condition but may not serve as a defense to the citation. The citation is affirmed.

Negligence

The inspector testified that the junction box was located some 50 to 60 feet high in one of the most remote areas of the mine. He did not believe that the respondent had any prior knowledge that the junction box had become dislodged. Under the circumstances, I find that the respondent could not have reasonably known of the condition and consequently was not negligent.

Gravity

The inspector was concerned with the fact that the junction box was dislodged and that if it were allowed to remain in that condition, it could wear down the insulation. If this happened and there was a breakdown in the ground system, the storage tank area could become energized, thus exposing the men to a shock hazard. However, he indicated that the outside conditions were dry and that the threat of shock was diminished because lock-out procedures would be followed if someone were working on the equipment.

Notwithstanding the lock-out procedures and the remote location of the box, the loose junction box posed a potential shock hazard if it were to remain undetected. Continued vibration would have probably caused it to separate completely from the motor and this would have posed a possible shock hazard. In these circumstances, I find the violation was serious.

Good Faith Compliance

The condition was corrected immediately by the reattaching of the junction box to the motor. I find that the respondent abated the condition cited rapidly and in good faith.

Citation No. 103206, 30 CFR 56.12-32

Fact of Violation

I find that petitioner has established a violation concerning the missing junction box cover for the sending generator, and respondent conceded as much by Mr. Michner's testimony that there was no justification for the missing cover and that an electrician apparently neglected to replace it after performing some work on the wiring. The citation is affirmed.

Negligence

Although the junction box was facing down toward the floor and may not have been visible if the cover were kept in place, the fact is that respondent conceded the wires were hanging out and were visible. Coupled with the fact that an electrician had apparently

performed some work on the box and neglected to replace the cover plate, and the inspector's unrebutted testimony that men would readily pass by the area, I find that the respondent should have known about the condition cited and failed to exercise reasonable care to prevent the condition cited. In these circumstances, I conclude that respondent is guilty of ordinary negligence.

Good Faith Compliance

The condition was abated one-half hour before the time fixed by the inspector, and I find that respondent exercised good faith compliance in this regard (Exh. P-8).

Gravity

The evidence established that the wires located in the uncovered junction box were well-insulated and the inspector believed the condition, as he found it, and which served as the basis for his citation, was nonserious. Respondent's testimony confirmed that the wires were well-insulated and were fastened with wire nuts. Under the circumstances, I adopt the inspector's nonserious finding as my finding for this citation.

Citation No. 103207, 30 CFR 56.12-32

Fact of Violation

I find that the petitioner has established that the junction box cover for the pump house sump pump was not kept in place as charged in the citation, and respondent presented no evidence to the contrary. Failure to keep the junction box cover in place constitutes a violation of the cited standard, and respondent presented no evidence that repairs or testing was taking place. The citation is affirmed.

Negligence

The inspector testified that the sump pump in question was located in the back corner of the sump room in an out-of-the-way and remote location, was not being used, and he could not determine how long the cover plate had been missing. In addition, he did not indicate whether or not anyone passed through the area in question or whether anyone normally would be in a position to observe the condition cited. In these circumstances, I cannot conclude that respondent was negligent or that petitioner has established any negligence with respect to this citation. Accordingly, my finding is that there was no negligence with respect to the condition cited.

Gravity

The evidence establishes that the junction box wires were well-insulated, that the sump pump was located in a remote area, and that

it was not in use. The inspector believed the violation was nonserious, and I adopt this conclusion on his part as my finding in this regard.

Good Faith Compliance

The condition was abated on the same day the citation issued and prior to the time fixed by the inspector. I find that the respondent exercised good faith compliance by taking immediate corrective action (Exh. P-9).

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

The parties stipulated that the size of the respondent's mining operation is medium-to-small, but that respondent is a subsidiary of ITT (Tr. 9). Respondent presented no evidence that any civil penalties assessed by me in this proceeding will adversely affect its ability to remain in business, and I conclude that they will not.

History of Prior Violations

The inspection in question was the initial inspection under the 1977 Act, and the parties stipulated that respondent has no prior history of violations (Tr. 9).

ORDER

In view of the foregoing findings and conclusions, it is ORDERED that the following citations be vacated and the petition for assessment of civil penalties, insofar as it seeks penalty assessments for these citations, is DISMISSED:

Citation No.	Date	30 CFR Section
103201	03/14/78	56.12-34
103204	03/14/78	56.16-9
103205	03/14/78	56.11-1
105603	03/14/78	56.12-8

In view of the foregoing findings and conclusions affirming the following citations, and taking into account the six statutory criteria set for in section 110(i) of the Act, civil penalties are assessed as follows:

Citation No.	Date	30 CFR Section	Assessment
103202	03/14/78	56.12-8	$150
105601	03/14/78	56.14-1	35

105604	03/14/78	56.12-30	75
103206	03/15/78	56.12-32	25
103207	03/15/78	56.12-32	25

Respondent is ORDERED to pay civil penalties totaling $310 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge