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SOL (MSHA) V. SUNSHINE MINING CO.
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-99-PM A.O. No. 10-00089-05004
v.	
SUNSHINE MINING CO., RESPONDENT	Sunshine Mine

DECISION

Appearances: Marshall P. Salzman, Attorney, U.S. Department of Labor, San Francisco, California, for the petitioner
Daniel L. Poole, Esq, Boise, Idaho, 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 29, 1978, through the filing of proposals seeking civil penalty assessments for five alleged violations of the provisions of certain mandatory safety standards set forth in Part 57, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest, and a hearing was held in Wallace, Idaho, on July 11, 1979.

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 proposal 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 any 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, 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

Stipulations

The parties stipulated as to the Commission's jurisdiction, and respondent conceded that the citations in question were issued and served. Further, the parties agreed that respondent is a large mining company, paid 14 assessed violations prior to the date of the 1978 inspections in issue here, and that any civil penalties assessed in this matter will not impair respondent's ability to remain in business (Tr. 2-3).

Citation No. 347006, April 10, 1978, 30 CFR 57.12-30, states as follows: "The 4400 west side switch rack and sub station (electrical) had loose ground, timber, chain link fencing material along with ground water falling into onto and around the electrical components creating the hazards of shorting and fire."

Petitioner's Testimony

MSHA inspector James Arnoldi Confirmed that he inspected the mine in April 1978, and that the mine is a large multilevel silver-producing mine. The switch rack in question supplied power to the 4400 mine level. He indicated that corrogated fiberglass which had been placed over the switch rack to keep water off had fallen into the rack area, chain link fencing had fallen over and was lying against the rack, loose rock was located throughout the area and probably caused the fence to fall down, and water was dripping in the area of approximately 10 by 6. The switch rack consists of electric components used to distribute power and he "imagined" it was energized and "believed" the voltage was 2300. Dripping water and the fence against the electrical components posed the possibility of shorting out and creating a fire. People were not working in the

immediate area, but there was timber there which could cause any fire to spread. He did not know how far away people were working, but believed they would be affected by a fire because the air course would carry smoke throughout the mine. He indicated that the operator should have been aware of the condition because "they walk by it every day" and preparations were being made to move the switch rack to another raise. The condition of the area led him to to believe that it was in that condition for several weeks. Abatement was achieved by moving the switch rack (Tr. 5-9).

On cross-examination, Mr. Arnoldi indicated that he has taken some 40 to 60 hours of electrical courses at MSHA's academy in Beckley, West Virginia. The switch rack unit itself was approximately 4 feet long and some 3 feet high, and it was located within 100 feet of the 4400 station off the main line in a small deadend "cubbyhole" drift which was some 30 or 40 feet deep. He viewed the rack from a distance of 10 to 15 feet and did not walk up to it. A muck pile high enough to knock over the chain link fence was present and it was some 3 to 4 feet high. The ceiling was some 9 to 10 feet high and one would have to climb over the muck pile to reach the switch rack. No supplies were stored in the area, and miners would have no need to reach anything located around the switch rack. He saw no miners working around the area or the service raises (Tr. 10-14).

Inspector Arnoldi discussed the matter with a company safety engineer who advised him the switch rack was being moved to another raise, but he did not discuss the air ventilation patterns in the area, nor did he inquire as to the number of men working in the mine on the day in question. A short in the switch rack could cause a fire, but he made no inquiry as to any protective devices which may have been installed to protect against any shorts. He confirmed that he was faimiliar to some extent with millisecond circuit breakers, and indicated that in case of an overload or short circuit, power would be cut off instantaneously by these breakers, but he did not inquire as to whether such circuit breakers were installed on the switch rack in question because he did not think about it. The wooden timber raise he referred to was 15 to 20 feet from the switch rack area, and there was nothing combustible between the timber and switch rack, except for the corrugated fiberglass which he "assumed" was combustible. The drift in question was not a travelway, and no miners would have any reason to be there except for an electrician or repairman (Tr. 14-18).

Inspector Arnoldi indicated that the equipment was energized and that he issued no order requiring that it be deenergized. He cited section 57.12-30 because it was "the most applicable to get the situation corrected," although he agreed the standard was "poorly written." He was not familiar with the type of switches installed on

the switch rack in question, the wiring insulation, or what a person would have to do in relationship to the switch rack in order to be exposed to an electrocution hazard. The presence of water posed a potentially dangerous situation, but he did not know what could happen with dripping water. He made no inquiries concerning the switch rack wiring insulation factor, the resistance rating of the wiring or insulation, or whether the rating was a water rating for the insulation factor (Tr. 19-25).

On redirect, Inspector Arnoldi confirmed that the presence of a switch breaker would make the likelihood of a fire a remote possibility (Tr. 26). He believed a fire hazard existed because of water dripping in the area, and the fact that the chain link fence was lying on the switch rack components. Even though power was shut off by the circuit breaker, he believed people would be exposed to a fire wherever and whatever the ventilation pattern (Tr. 28).

On recross, Mr. Arnoldi distinguished between a substation and a disconnect rack, and indicated that the former involves transformers, while the latter involves switches. The citation concerns a switch rack and he conceded that he should not have characterized it in part as a substation in his citation. A switch rack has a lower fire potential, and while he discussed the length of time the condition cited had existed with the operator's representative, he could not recall the time, and his notes do not reflect any time frame. He was told the new raise would be ready in 2 or 3 weeks (Tr. 28-30).

In response to bench questions, Mr. Arnoldi indicated that the switch rack was in operation at the time of the citation. He conceded the citation was a "type of housekeeping" condition that could lead to and contribute to a dangerous condition. The relocation work connected with moving the switch rack caused the deterioration of the area, and he did not believe the area would have deteriorated were it not for the move. He had observed the condition of other similar electrical equipment in the mine and it was in good condition. He knew that the operator was preparing to move the switch back, and he could think of no other standards which could be applicable to the situation he found (Tr. 30-32).

Respondent's Testimony

Malcolm McKinnon, former mine superintendent at the Sunshine Mine, identified Exhibit R-101 as a partial level map of the west side of the 4400 level. He was familiar with the switch rack citation, the location of the cited rack, and he was the superintendent at the time the citation issued. He was in the area in question periodically, and he indicated that several days before the citation, work had been completed to enlarge some drift pipe lines, and in that process ground had to be removed and taken down with a muck pile.

The switch rack was located close to the rear wall, at a deadend, and the area was not a travelway. Pipe construction was taking place, and the ground condition between the 4400 and 4600 areas was poor. Two men were working on one shift a day working on the repairs, and a repairman and an electrician would be in the area, and the area was under repair for 1 or 2 days before the citation was issued. He examined the rack from a distance of 5 or 6 feet and observed it from the top of the muck pile. He observed no timbers, fencing, or muck falling into and onto the electrical components, nor could he recall seeing anything leaning against the switch rack. He observed no water falling into or onto the electrical components and recalled no fiberglass. The chain link fence was partially buried in the muck pile, but he did not recall that it was in contact with the with the rack (Tr. 41-48).

Mr. McKinnon described the ventilation pattern and marked it on the exhibit. He indicated that smoke from any fire would exit directly to the mine surface rather than through any work places downstream. However, if the electrician or repairmen were in the area, they would be affected. He perceived no potentially dangerous situation on the day the citation issued (Tr. 48-50).

On cross-examination, Mr. McKinnon conceded he was not present during the inspection. He indicated that ground water was present some 20 feet from the switch rack. He observed the area within a week or 10 days after the inspection, and the area had been cleaned-up, the ground flagged off, and the fencing was back up (Tr. 50-53).

George Clapp, underground electrical supervisor, stated that he was responsible for the switch rack in question, was in the area quite often, and after the fall of ground took place prior to the citation, he was there daily. He was supervising the work in the area prior to the citation and went there after the citation issued. He described the area around the switch rack after the fall of the ground, and he indicated that the switch racks are capable of handling 5,000 volts, and the wiring is rated at 5,000 volts wet. The disconnect switches are porcelain and are rated at 5,000 volts wet. There were 2,300 volts on the rack at the time of the citation. The wet ratings are UL, (Underwriters' Laboratories) ratings, and they relate to the electrical components operating under a wet condition. Water was going down the drift at a distance of some 15 or 16 feet from the switch rack, and while the area was damp and the humidity high, he saw no dripping water. The work area for the repairmen was separated from the switch rack by a pile of rocks. He cautioned his repairmen to be careful of the energized switch rack, and he believed that experienced miners could safely remove the muck pile and loose ground without deenergizing the equipment. He saw no loose ground, timber, or chain link fencing falling into or onto the switch rack or electrical components. Maintenance had not been neglected on the rack or wiring. The probability of the facility shorting would

depend on a lot of factors, and while shorting from water was not impossible, the chances were very, very slight. Westinghouse vacuum breakers had been installed some 4 months prior to the citation, and they are ultra fast. The only thing that could catch fire was the insulation of the wiring itself, but he saw nothing flammable that could contact the wiring. The area was damp and wet and he saw no danger of a fire, and did not believe the repairmen working in the area were exposed to any unreasonable danger (Tr. 54-67).

Mr. Clapp stated that the cables from the service raise to the switch rack were insulated with bore hole steel, that a person would have to reach under the switch rack and touch an exposed part of a disconnect door before being exposed to an electrocution hazard. The disconnect switches and rack are insulated and not exposed to the front (Tr. 67).

On cross-examination, Mr. Clapp confirmed that he did not believe it necessary to deenergize the switch rack wires because experienced miners were working around them. However, he conceded that carelessness could lead to a dangerous condition. Wooden lagging was in the muck pile and an old piece of water pipe was about a foot from the rack. Had Mr. Arnoldi not inspected the area, the conditions would have prevailed for 2 weeks at most while the new raise was being constructed (Tr. 70).

In response to bench questions, Mr. Clapp indicated that even if the fencing were leaning across the switch rack, there would be no hazard since the UL rating of the cable was such that it was engineered to operate under wet conditions (Tr. 72).

Sidney R. Barker, repairman, testified he had a job assignment repairing the area at the switch rack in question. He confirmed that Mr. Clapp advised him to be careful and not to take any unnecessary chances. He also worked in the area after the citation issued. When he began his repair work, he observed no timber, water, fencing material, or muck falling into or onto the switch rack. He did not believe he was exposed to any unreasonable danger while performing repairs or cleanup (Tr. 77).

Citation No. 346811, May 11, 1978, 30 CFR 57.19-100, states: "The shaft landing at the 4500 pocket was not provided with gates between the pocket and the shaft opening."

Citation No. 346812, May 11, 1978, 30 CFR 57.19-100, states: "The shaft landing at the 4800 pocket was not provided with gates between the pocket and the shaft opening."

Citation No. 349610, May 11, 1978, 30 CFR 57.19-100, states: "The shaft landing at the 5400 level pocket was not provided with safety gates between pocket and shaft opening."

Citation No. 349611, May 11, 1978, 30 CFR 57.19-100, states: "The shaft landing at the 5000 level pocket was not provided with safety gates between pocket and shaft opening".

MSHA inspector Donald L. Myers, testified that he conducted the inspection and issued the citations concerning the shaft landings, and that fellow Inspector Guttromson accompanied him during the inspection of the skip pockets at the 4500, 4800, 5000, and 5400 levels. He described a "skip pocket" as a cutout or offset off the side of the shaft that is connected to the dumping point above where the ore comes into the pocket loading chute for transportation up the shaft on the skip. People were working on the day in question loading ore onto the hoists from the pockets. A rope or chain was istalled between the skip pocket and shaft openings, but it was not being used and had not been used for some time. No gates were installed. The depth of the pockets from the rear to the front of the shaft varied from 4 to 8 feet back to where the men were working (Tr. 84-87).

Inspector Myers stated that the hazard presented by the conditions cited was the possibility of a man slipping or falling in the shaft or something coming down the shaft and hitting him. Water and wet muck sometimes come into the pocket and may cause a spill. On the day of the citations, two persons were exposed to the hazard, and they rotated their work among the four pocket-level locations which were cited. There was nothing to prevent the men from falling on the day in question, and he believed the operator should have been aware of the conditions since a chain or rope was installed but not used, and he believed there was some reason for their installation. The conditions were readily observable and he saw no safety line or lanyard and could not recall whether the employees had safety belts. After the inspection, safety lines were obtained and provided. The conditions were abated by fabricating and constructing a chain link gate on a rail or piece of metal across the upper portion of the shaft opening. The gates were mine management's idea, he agreed that they would be satisfactory, and the conditions were timely abated. He considered the skip pocket to be a shaft landing because any landing where men have to get off and on a conveyance is a landing. Machinery would be taken on and off the conveyance at a normal landing, and if repairs are made in the skip pocket, equipment could be taken there. He believed that a "skip pocket" is a point in the shaft where the cage can be lowered with men or materials (Exhs. R-2 R-2, R-3, Tr. 88-93).

On cross-examination, Inspector Myers characterized a "level" as a working area where work such as mining or timber repair takes place, as distinguished from loading muck or ore from the skip pocket. He described the areas referred to as levels, the "grizzly," and loading pockets, and marked them on Exhibit R-1 (Tr . 93-96). He also described a "shaft station" and indicated that it is not the same

as a "skip pocket." He also indicated it was customary to have gates at shaft stations and they have been used for at least 10 years (Tr. 98-99). In his view, a rope or chain does not constitute a gate, but it is a barrier of some kind (Tr. 101). He has never researched gate construction, has not issued citations at other mines for not having gates across the front of skip pockets, and he could remember seeing no other mines with such gates installed (Tr. 101). A chain or rope installed at a skip pocket would meet the requirements of the cited safety standard, but if installed at a shaft landing station, they would not. He conceded that he required the installation of gates, but that a single chain in a skip pocket is not adequate but "it beats not having anything at all" (Tr. 103-104).

Inspector Myers stated he did not discuss with the operator what was necessary to abate the citations. He confirmed that he was at the mine on a regular inspection and that someone had complained about flooding in a pocket and the lack of gates (Tr. 104, 106). He believed that any kind of a barrier would have been sufficient although he did specify a gate. Had another barrier been in place and in use he would not have cited a violation. He stated he did not talk to the operator about other options for abatement because he cannot tell an operator how to abate a citation. Since the gate was mine management's design, and he found it adequate, he simply thought it was "fine" (Tr. 118). The gates in question will not keep material from going under the gate into the skip pocket because it has no rigid bottom, but it will prevent things from coming down the shaft into the skip pocket, and it will keep men from going out through (Tr. 118).

Inspector Myers indicated that materials such as a welder and cutting torch might be unloaded at the skip pocket for repair work, but he did not know how often this would happen. Basically, the cagers are unloaded at this location. The activity taking place at a shaft station include the off-loading of materials such as timber, explosives, drill bits, and steel pipe, and a considerable number of miners would come and go from such a shaft station at any given shift. Considerably more activity takes place at a shaft station as opposed to a skip pocket, and there is a greater risk of materials falling from such a shaft station than would be the case of a skip pocket. Miners are required to wear safety belts where there is a danger of falling and that requirement is enforced at the mine. He would not have issued the citations if the miners were tied off to protect them against falling or being pushed into the shaft, and gates are not required at working deck locations. He has never heard of anyone referring to a skip pocket as a shaft landing, and he does not know whether miners consider skip pockets to be shaft landings, and he knows of no MSHA regulation that defines a "shaft landing." Standard 57.19-103 uses the term "loading pocket," and he believes it can be contrued to mean "skip pocket," and he could not explain why

section 57.10-100 speaks in terms of "shaft landings." Respondent was in the process of developing protective "curtains" to keep material from falling down the shaft, and the one installed at the 5200 level (Exh. R-3), was developed as a result of complaints. Since it was reported that the operator "were dragging their feet" in installing the rest of the curtains, it was decided that a citation should be issued. After being in the skip pocket with the loaders, he decided they needed protection from falling into the shaft and from materials falling down the shaft, and that prompted him to issue the citations (Tr. 119-130).

Inspector Myers described the position of the skip loaders and cagers while performing their work tasks in the skip pocket, and the cagers told him that they sometimes went to the edge of the shaft and stuck their heads out in the shaft and looked down, and he understands that this is part of the cager's normal job responsibility. He also described the position of the skip and the loading process which takes place. In the normal course of business, a miner would not normally approach the open shaft at any time other than when the skip is parked right at his feet (Tr. 130-134).

On redirect, Mr. Myers indicated that at the time of his inspection no employees were exposed to danger and his inspection took place during the day shift. His primary concerns were employees falling or being pushed down the shaft or materials coming down the shaft and bouncing in on them. He would consider a chain or some type of barrier that a miner could grab onto as sufficient to abate the conditions cited (Tr. 135). He defined a "shaft landing" as any point in the shaft where men have to get off and on a skip (Tr. 137).

Respondent's Testimony

MSHA inspector Maurice Guttromson was called by the respondent as an adverse witness. He stated that he was aware of no mining texts that describe gate or curtain assemblies for skip pockets, but was familiar with mining or engineering publications that described gates for station landings or levels. The inspection in this case was the first time he had ever written citations for a loading pocket not having a gate, and subsequent to this time he has not issued any others because he has "never run across any yet that needed it." At the mine where he is presently assigned, gates are not needed because the landings are "set so far back" it makes no sense to have them. They are some 15 feet from the shaft and usually one or two cagers are present there to load the skip located in the shaft. Since the cagers are so far back, there is no way anything can come down the shaft and strike them. He defined "shaft landing" as a point in the shaft where the skip stops and men and materials are loaded on and off, and he believes that the term "shaft landing" is the same as a "shaft station or landing" (Tr. 143-144).

Robert E. Launhardt, safety director, Sunshine Mine, testified he was familiar with the citations issued in this case, and it is his understanding that the skip pocket was construed to be a shaft landing and therefore the citations were issued because the gates required by section 57.19-100 were not installed. He does not believe the citations were properly issued because he has never believed that a skip or loading pocket is synonymous with a shaft landing. It is his understanding that the term "shaft landing" or "shaft station" applies to an opening to a working level from which men and materials enter and leave a mine, and that section 57.19-100 was intended to apply to the shaft station or shaft landing gates. Had the intent been to cover skip pockets, the standard would have said so. He stated that in his experience, he has never heard the terms "loading station" or "skip pockets" used synonymously with shaft station or level. He does not believe that the cited standard applies to loading pockets or skip pockets. He can think of no reason why a cager would want to lean over a shaft and look down, and his job description does not require him to do that since it is an unsafe practice. A gate or curtain would not protect a miner if he decided to lean over the shaft with his head out. Company policy and safety rules dictate that cagers and shaft repairmen who regularly work in areas where there is a danger of falling shall wear safety belts or lines, and this safety rule is enforced. However, cagers and shaft repairmen as a group are reluctant to use safety lines when there is a shaft conveyance present because they do not want to be tied to anything in the event they have to move quickly, and the application of such a safety line in a pocket is questionable (Tr. 170-179).

Mr. Launhardt stated that he was not involved with the original design of the gates or curtains that were ultimately installed at the pockets in question, although he was aware of the fact that they were being developed, and he was not present when the citations were issued, nor was he aware of the timetable for installing the gates or curtains (Tr. 180).

On cross-examination, Mr. Launhardt testified as to his interpretation of the terms "shaft stations," "landings," "pockets," etc., and as to certain other safety standards dealing with shaft protection (Tr. 180-183). In response to further questions, he also defined the terms "stage" and "level," and indicated that the location where the gate was originally installed at the 5200 level is a skip pocket, as are the other locations cited (Tr. 189).

Wayne Baxter, shaft foreman, testified he was involved in the process of developing gates or curtains or some kind of barriers for installation at the skip pockets. Attempts were made to construct gates which swing out, but that proved unworkable. The cagers brought the problem to his attention and since the 5200 pocket was the worst location for possible falling material, work to install a gate was started there. Alternative devices prior to the gate which was

ultimately installed at this location were rejected because the cagers did not like them opening in or out. After working with the cager and a shaft mechanic, he devised the gate which was installed. He intended to install similar gates at all the pockets and had fabricated frames for the 5400 and 5000 locations, but since no two pockets were alike, each had to be measured individually. Gates are now installed at all skip pockets, and when he began the project no one told him that such gates were required. As for any delays connected with the construction of the gates, he was not aware of any, and the citations were abated on the Monday after they were issued. The abatement could not have taken place that soon had he not been actively involved in constructing the gates (Tr. 194-201). He contemplated fininshing the construction of all of the gates within a week or week and a half of the inspection, and no one complained to him about any delays in this regard (Tr. 202-203).

Findings and Conclusions

Citation No. 347006, 30 CFR 57.12-30

Mandatory safety standard 30 CFR 57.12-30 states as follows: "When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized."

The parties waived the filing of any posthearing proposed findings and conclusions with regard to the citation in question. However, they were afforded an opportunity to make oral arguments with regard to their respective positions during the course of the hearings (Tr. 22-23, 26, 35-41, 77-82).

Respondent's Arguments

Respondent argues that the inspector picked the wrong standard to cite and that the record does not support a finding that the condition cited constituted a potentially dangerous condition within the meaning of section 57.12-30. Absent any detailed evaluation of all of the circumstances which prevailed at the time the citation issued, respondent takes the position that the inspector's judgment in issuing the citation simply cannot be affirmed and that petitioner failed to carry its burden of proof. While alluding to other standards which respondent believes could have been cited, counsel could not specifically state which ones he believed were more applicable except for a reference to section 57.12-23. Further, respondent argues that the inspection was superficial in that the inspector failed to completely evaluate what was required to result in a truly dangerous situation. Respondent emphasizes that while the standard requires that any potentially condition be eliminated before equipment is energized, the inspector allowed the equipment to remain energized.

Petitioner's Arguments

Petitioner argues that the dangerous condition need not predate the energizing of the equipment wires, and that the standard should be broadly construed to either require the deenergizing of the equipment or to correct the potentially dangerous conditions. Petitioner relies on the inspector's testimony that the conditions cited were potentially dangerous, and notwithstanding the fact the the inspector made only a cursory examination of the conditions, petitioner believes there was a potential for danger and asserts that that fact is controlling. The potential danger was that a fire could have occurred, and petitioner asserts that the standard cited by the inspector was in fact the applicable standard which pertained to the conditions found.

The parties are in agreement that the fact that the inspector saw fit to describe the electrical equipment in question as a switch rack and substation is not fatally defective. The parties are in agreement, and the testimony presented establishes that what is involved here is a switch rack and not an electrical substation. The question of substation is relevant only insofar as the element of gravity is concerned since the potential for fire or electrocution hazard is significantly higher at a substation, as opposed to a switch rack (Tr. 79-80, 82).

After careful review of the arguments presented by the parties, and based upon the preponderance of the evidence adduced, including close scrutiny of the testimony, I conclude and find that the petitioner has the better part of the argument and has established a violation by a preponderance of the evidence. I conclude that the cited standard is broad enough to apply to the situation presented on the day of the cited conditions. The deteriorated conditions at the area where the switch rack was located were obviously caused by respondent's decision to move the rack to a new underground location. Work was being performed to achieve this move, and in the course of that work the ground was disturbed, a chain link fence fell over, water was present, and other debris was adjacent to and resting against the switch rack. Faced with these conditions, the inspector believed that there was a potential hazard of shock and fire caused by a possible short circuit of the equipment.

Although it is clear that the inspector failed to make any detailed evaluation or examination of all of the elements which he should have looked into to determine the extent of the hazard, the fact is that the equipment was energized and at least two men were working in and around the area in question. While the mine ventilation system and circuit breaker protection on the switch rack may serve to mitigate the seriousness of the situation presented, I cannot conclude that these factors may serve as an absolute defense to the citation or serve as a basis for a finding that no potential danger was presented.

The former mine superintendent testified that the general ground conditions in the area were poor and that water was located nearby. However, he did not view the conditions cited during the inspection. Mr. Clapp, the electrical supervisor responsible for the switch rack, candidly testified that he cautioned his crew to be careful of the energized switch rack, and he was careful to point out during his testimony that experienced miners could safely remove loose rock and muck without deenergizing the equipment, although the equipment was not deenergized due to the fact that an experienced crew was working on it. Mr. Clapp conceded that carelessness could lead to danger, and it is obvious to me that he is a safety-conscious supervisor who is concerned for the safety of his men. Coupled with his warnings to his crew to be careful, I believe it is reasonable to conclude that Mr. Clapp was cognizant and aware of the fact that there was a potential danger present, notwithstanding his assertion that the men were not exposed to any "unreasonable" danger. In addition, Mr. Clapp conceded that the probability of a short circuit is dependent on many factors, and he stated that while the chances of a short occurring due to the presence of water were slight, it was not impossible and that the wiring insulation could catch fire. He also indicated that if the citation had not issued, the conditions found by the inspector would have prevailed for approximately another 2 weeks while the switch rack was being moved. In these circumstances, I conclude and find that the conditions at the switch rack area cited by the inspector constituted a potential danger within the meaning of the cited safety standard, and the citation is AFFIRMED.

Negligence

The evidence and testimony presented reflects that mine management personnel were in the area on a daily basis and I conclude that they should have been aware of the potential danger presented and taken corrective action prior to the inspection. In this regard, I find that the respondent failed to exercise reasonable care to prevent the conditions cited and that this constitutes ordinary negligence.

Gravity

Although I have concluded that the conditions cited presented a potential danger, the seriousness of the situation is mitigated somewhat by the fact that the switch rack was equipped with circuit breaker protection and was operating below its UL wet voltage rating at the time of the citation.

Good Faith Compliance

I find that the evidence adduced supports a finding that the respondent exercised good faith in ultimately abating the conditions cited.

Size of Business and Effect of Civil Penalty Assessment on Respondent's Ability to Remain in Business

The parties stipulated that respondent is a large mine operator and that a civil penalty assessment will not impair its ability to remain in business.

History of Prior Violations

Respondent's history of 14 paid prior assessed violations, does not, in my view, constitute a significant history of prior violations, and for a large operator I cannot conclude that it warrants any additional increase in the penalty assessed by me in this matter.

Citation Nos. 346811, 356812, 349610, and 349611 all concern alleged violations of the provisions of 30 CFR 57.19-100, in that respondent failed to install protective gates at four shaft landing pocket locations between the pockets in question and the shaft openings. Section 57.19-100 states as follows: "Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances."

The parties waived the filing of written proposed findings and conclusions, but were given an opportunity to present arguments on the record during the hearing in support of their respective positions (Tr. 207-211).

Petitioner's Arguments

Petitioner's counsel agreed that the language of the cited standard does not address itself to the protection of miners who may fall into the shaft. Counsel asserted that "the problem wasn't spillage into the shaft," but rather "the problem was materials coming in, not materials going out," and quite candidly, counsel asserted that petitioner is seeking to apply the cited standard broadly to the facts presented in this case (Tr. 189-191).

Petitioner asserts that the threshold question is whether the loading pockets in question are equivalent or equal to shaft landings as described in section 57.19-100. If they are not, petitioner concedes that the citations were incorrectly issued. In support of its case, petitioner relies on the testimony presented concerning the hazards of materials falling in and out of the pockets and the hazards of men falling into the shafts. Petitioner suggests that the recognition of such dangers supports a broad interpretation of the standard to include the pockets in question, particularly in light of the general introductory statement found in section 57.19 which petitioner asserts indicates that the intent of the standards is to include the protection of men who are performing work. As for the use of safety belts or lines in lieu of protective gates, petitioner points out that belts and lines were not being used, and that the

standard requiring the use of such belts and lines simply does not apply to the facts presented (Tr. 207-208).

Respondent's Arguments

Respondent interprets the intent of the standard to protect against materials coming from the shaft landing going into the shaft and that the gate was intended to protect against that event. Further, counsel asserted that there simply is no applicable standard that relates to curtains, gates, or anything else in terms of skip pockets or loading pockets, and he emphatically believed that respondent was in the process of developing and installing protective curtains at all skip pocket locations and that its motivation in doing this was in the interest of safety and not because any particular safety standard required it. Counsel does not believe that respondent should be penalized for its efforts in this regard by being subjected to civil penalty citations and assessments. Further, counsel does not believe that respondent could have been alternatively cited with section 57.19-103, because that standard deals with spillage out of the pocket and into the shaft, and the facts presented simply do not fit that situation (Tr. 192-193).

Respondent agrees that the critical question rests on whether loading pockets are properly defined as shaft landings. Respondent asserts that the testimony presented demonstrates that in terms of normal usage in the mining industry and a reasonable interpretation of the usage of the language of the standard among knowledgeable people, that when the terms "shaft" and "landing" are used, it is intended to mean shaft stations or levels and not loading stations or loading pockets. Respondent avers that the cited standard simply does not apply to the locations cited and that respondent was in the process of devising and installing a protective device that MSHA was later willing to accept as "gates," and that the abatements accepted by MSHA as "gates" are in fact not "gates" within the meaning of the standard in issue. As for the use of safety belts and lines, respondent takes the position that there is no evidence that those requirements have not been enforced by the respondent, notwithstanding the fact that miners are reluctant to use them because they believe they are hazardous when used in conjunction with a moving shaft skip. As for the application of the standard in question to men and materials, respondent asserts that while the standard speaks in terms of preventing materials from coming down the shaft, respondent recognizes that the standard is intended to protect men from being injured and that is the predominant concern of respondent as well as MSHA. Further, respondent reiterates its argument that in the interest of safety and concern for the miners, it voluntarily began to take corrective action to devise and install a protective device beyond that required by any applicable mandatory safety standard and that it should not be penalized or assessed civil penalties simply because it has demonstrated that such devices could be designed and installed but had not done it in time (Tr. 209-120).

The evidence adduced in this proceeding reflects that while ropes or chains were installed at the pocket locations in question, they were not in use, and although the inspector indicated that while he would accept the use of any such barriers at these locations in question to prevent men from falling or being pushed into the open shaft, since ropes or chains were not being used, he considered that the locations were unprotected. Further, although the inspector denied that he insisted on gates, and indicated that the gates were "volunteered" by the respondent since respondent had installed such a device at another similar pocket location and he simply accepted this device as adequate for compliance, the fact is that his citations specifically state that gates were not provided, and I am convinced and conclude that by citing section 57.19-100, which specifically requires a protective gate, he firmly believed that the standard cited required the installation of gates at the pocket locations in question. His belief in this regard was dictated by his judgment that the hazards presented by not having such gates installed involved the possibility of someone falling into the open shaft or being struck by materials which could inadvertently fall down the open shaft and striking a person who may be leaning out over the shaft or material falling down the shaft and somehow falling into the open pocket and striking someone who may be working inside the pocket. The parties stipulated that the protective gate which was installed on the 5200 level was installed at that location at least 2 days prior to the time the citations in question issued (Tr. 202), and the evidence indicates that the gates which were ultimately installed to abate the citations were modeled after the one installed at the 5200 level.

I take note of the fact that the parties, including the inspector who issued the citations, seem to be in agreement that the cited standard is not a model of clarity and that it lends itself to different interpretations. Taken at face value, the literal language of the standard requires that substantially-constructed gates be installed at shaft landings in order to prevent materials from going through or under them. It also requires that such gates be closed except when loading or unloading shaft conveyances. Quite frankly, I have no problem with the language of the standard per se. If MSHA can establish that the four locations which did not have gates installed are in fact shaft landings, then it should prevail. If they cannot, then the citations should be vacated. The problem, as I see it, is compounded by the fact that a well intentioned inspector did not cite a mandatory standard which specifically and directly fits the facts presented here; that is, there is no standard that specifically refers to skip of loading pockets, men falling into the shaft, or materials falling into a shaft. Petitioner would have me read and apply the standard as if it included skip or loading pockets, even though those terms ar not used. In support of this argument, petitioner relies on the general language of section 57.19, and the fact that men and materials are loaded on and off at loading pockets.

Section 57.19 states as follows: "The hoisting standards in this section apply to those hoists and appurtenances used for hoisting men. However, where men may be endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied."

I see nothing in the language of section 57.19 that would support the petitioner's position that a skip or loading pocket is the same as a shaft landing. That section simply states that when men are endangered by hoists and appurtenances used solely for handling ore, rock, and materials, the appropriate standards should be applied. If men are loaded on and off the skip at the shaft locations in question then it seems to me that section 57.19 would be inapplicable. In any event, I see nothing in the language of section 57.19 to support petitioner's position. Further, as for my transforming the term "shaft landings" as it appears in section 57.19-100 to read "loading pocket," I can only note that I take the standards as I find them. Interpreting a standard broadly to achieve the Congressional intent to insure safety in the mines is one thing, but rewriting safety standards is something else. Here, the terms "shaft landings" and "loading pockets" must have some distinct and separate meaning since the drafters of the standards use these and similar terms in different standards. For example, section 57.19-101 refers to "shaft collar or landing," 57.19-103 refers to "loading pockets," 57.19-105 refers to "shaft compartments," 57.19-106 makes reference to "shaft sets," and recently enacted mandatory standard 57.19-104 refers to "shaft stations." 44 Fed. Reg. 48534 (August 17, 1979). Since those terms are not further defined in Part 57, the interpretation and application of those terms in an enforcement setting are left to the imagination and ingenuity of the inspectors issuing citations, the attorneys representing the parties, and I might add, the judge who ultimately must decide the question.

The petitioner has the burden of proof. In summary, its position is that section 57.19-100 requires the installation of protective gates at shaft landings in order to preclude materials from coming into the loading pocket. Since the definition of "shaft landing" rests in part on the fact that men and materials are loaded on and off at such landings, and since men and materials are also loaded on and off at loading or skip pocket locations, petitioner reasons that the two terms are synonymous and that for purposes of the application of section 57.19-100, shaft landings and skip or loading pocket "landings" are the same. In support of its position, petitioner relies on the testimony of the inspector, dictionary definitions, and a broad reading of section 57.19-100.

With regard to the inspector's testimony, it seems clear from the record that it is somewhat contradictory and equivocal on the question of interpretation and application of section 57.19-100.

This stems from the fact that the inspector was trying to do the best he could under the circumstances by citing a standard which obviously does not specifically and directly fit the factual situation presented in this case. For example, the inspector stated that he considers a skip pocket to be a shaft landing because "I feel that any landing where men have to get off and on that conveyance is a landing." When asked whether machinery is taken on and on and off the conveyance, he answered, "on the normal landing they do." When asked about a "skip pocket", he answered, "if repair is done on the pocket or in the area of the shaft--is in the area of the pocket, I imagine equipment is." And, when asked how men would get to the pocket, he answered, "they ride the skip down." Thus, the inspector seems to distinguish between a "normal" landing and a skip pocket (Tr. 91-92).

A second example of a somewhat confused interpretation of the language of the standard lies in the fact that one of the hazards and dangers relied on by the inspector in citing section 57.19-100, was the possibility of a miner falling into or being pushed into the shaft. However, the standard does not address itself to the protection of men falling into the shaft. It requires substantially constructed gates to prevent materials from going through or under the gates. The language "through or under" generated some debate during the hearing as to whether it meant from the shaft side into the pocket or from the pocket into the shaft, and is again indicative of the somewhat loose language of the standard.

A third example of confusion lies in the fact that the term "gate" is not defined. Pictorial Exhibits R-2 and R-3 depict some chain-link fencing fixed to a pipe or bar by rings to facilitate the lateral opening and closing of the device, and I assume that the term "curtain" stems from the fact that the device is similar to an ordinary household curtain, and the device depicted in the exhibits is the one previously installed at the 5200 level and which served as the prototype for the ones installed at the cited skip pocket locations to abate the citations.

Finally, another example of the somewhat confused interpretation of section 57.19-100 lies in the fact that the inspector would not have issued the citations if barriers such as ropes or chains, or devices such as safety belts or lines would have been installed and used at the cited locations. However, if the purpose of issuing the citations was to protect against materials coming out of the skip pockets and falling into the shaft, I fail to understand how such personal protective devices would prevent this from happening. It seems to me that section 57.19-103, which states in part that "loading pockets shall be constructed so as to minimize spillage into the shaft," would be an appropriate standard to cover that situation. As for the use of life lines or safety belts, section 57.15-5, which requires the use of belts and lines where there is a danger of falling, would be an appropriate standard to prevent a man from falling into the shaft, notwithstanding the fact that the men are not

particularly enchanted with such devices.

The inspector asserted that the reference to "gates" in his citations and abatements was only intended to reflect what the respondent had already installed at the 5200 pocket location, and that since he approved of that gate, and since respondent was willing to go ahead and install similar ones at the other locations, he accepted the installation of the gates as sufficient to meet the requirements of the standard. However, I take note of the fact that the initial inspection of the skip pocket locations which did not have gates installed was prompted by complaints made to MSHA. As a result of those complaints, an MSHA official from Arlington, Virginia, by the name of Pitts made the following notation on a piece of paper and gave it to the inspector: "57.19-100 (m) Need safety gates between pockets and shaft at 4800, 4500, 5000, 5400 the same as is on 5200 pocket," (Tr. 110; Exh. ALJ-1).

Although the inspector denied he was influenced in any way by the note given him and indicated that he made an independent evaluation of the conditions at each of the locations cited, it seems clear to me that the inspection was clearly the result of the complaint and that Mr. Pitts' note did influence the inspector. The note is dated 2 days before the inspection, and I simply cannot believe that an inspector is not influenced when an MSHA official from headquarters brings something to his attention. Here, since the note makes specific reference to section 57.19-100, and cites the identical four pocket locations cited by the inspector in his citations as being in need of gates, it seems obvious that the inspector was influenced by the note and the complaint when he issued the citations.

During the hearing, respondent made much of the fact that the inspection had been prompted by a written complaint which had not been furnished to the operator. Counsel argued that the statute requires that copies of written complaints be furnished to an operator (Tr. 105-116). After considering the testimony presented, I am persuaded that a written complaint was not in fact filed with MSHA and that the operator's rights have not been violated in this regard. As for the complaint, the note, and the influence they may have had on the inspector, I cannot conclude that this renders the citations invalid. The fact of violation must be determined on the basis of the evidence adduced to support the conditions cited and not on what prompted the inspector to conduct the inspection in the first place. The inspector was simply doing his job by following up on certain allegations of a purported unsafe condition in the mine. However, the prior notation given to the inspector is relevant to the extent that it indicates to me that he at least relied on it to some extent in citing section 57.19-100.

In the final analysis, it seems clear to me that this case is a classic example of a safety standard being applied by MSHA to a factual situation which simply does not fit. Although the parties seem

to be in agreement that some protection is needed to prevent miners from being injured, they are in total disagreement as to whether the cited standard applies, and in support of their respective after-the-fact arguments, have relied primarily on arguments concerning distinctions between the meaning of the terms "shaft landing" and "loading" or "skip pockets." In this regard, I deem it appropriate at this point to include certain pertinent dictionary definitions of several terms used in this proceeding as they appear in the Dictionary of Mining, Mineral, and Related Terms, published by the U.S. Department of the Interior, 1968 Edition, and they are as follows:

> Shaft. An excavation of limited area compared with its depth, made for finding or mining ore or coal, raising water, ore, rock, or coal, hoisting and lowering men and material, or ventilating underground workings. The term is often specifically applied to approximately vertical shafts, as distinguished from an incline or inclined shaft.
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> Landing. a. Level stage in a shaft, at which cages are loaded and discharged. Pryor, 3. b. The top or bottom of a slope, shaft, or inclined plane. Fay. c. The mouth of a shaft where the cages are loaded; any point in the shaft at which the cage can be loaded with men or materials. Nelson. d. The brow or level section at the top of an inclined haulage plane where the loaded tubs are exchanged for empty tubs or vice versa. Nelson.
>
> Shaft pocket. a. Ore storage, excavated at depth, which receives trammed ore pending removal by skip. Pryor, 3. b. Loading pockets of one or more compartments for different classes of ore and for waste built at the shaft stations. They are cut into the walls on one or both sides of a vertical shaft or in the hanging wall of an inclined shaft. Lewis, p. 257. c. See measuring chute. Nelson.
>
> Shaft set. a. Supporting frame of timber, masonry, or steel which supports sides of shaft and the gear. Composed of two wallplates, two end plates, and dividers which form shaft into compartments. Pryor, 3. b. A system of mine timbering similar to square sets. The shaft sets are placed from the surface downward, each new set supported from the set above until it is blocked in place. New wallplates are suspended from those of the set above by hanging bolts. Blocking, wedging, and lagging complete the work of timbering. At stations the shaft posts are made much longer than usual to give ample head room for unloading timber and other supplies. Lewis, pp. 45-47.

> Shaft station. a. An enlargement of a level near a shaft from which ore, coal, or rock may be hoisted and supplies unloaded. Fay. b. Enlarged space made to accommodate pump crusher, ore pockets, shunting, truck tripples, etc. Pryor, 3.
>
> Skip. A guided steel hoppit usually rectangular with a capacity from 4 to 10 tons and used in vertical or inclined shafts for hoisting coal or mineral. It can also be adapted for man riding. The skip is mounted within a carrying framework, having an aperture at the upper end to permit loading and a hinged or sliding door at the lower end to permit discharge of the load. The cars at the pit bottom deliver their load either direct into two measuring chutes located at the side of the shaft or into a storage bunker from which the material is fed to the measuring chutes.
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> Skip loader I. In metal mining, one who loads ore into skip (large can-shaped container) from skip pockets (underground storage bins) at different shaft stations in mine, operating a mechanical device to open and close the gates of the loading chutes. Also called skipman; skipper. [Emphasis added.]
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> Skip loader II. In metal mining, one who dumps ore from mine cars directly into skip in mines not equipped with skip pockets.

A review of the dictionary terms set forth above reflects that the terms "skip loading station" and "shaft landings" have separate and distinct meanings. As indicated by the definition of the term "skip loader," a skip loading station or pocket is a location where minerals are stored or loaded into a skip for transportation to the surface. In addition, the different mandatory standards previously discussed where those and similar terms are used, supports a conclusion that those terms have different and distinct meanings. Logic distates that if the intent was not to give them different meanings, the standards would not have referred to them. In addition, the testimony reflecting the activities which normally take place during the mining cycle, including the loading of ore at skip stations, persuades me that the terms have different meanings in the real world of mining underground. While it may be true that materials and men may be loaded on and off a skip from time to time at a loading or skip pocket, I cannot conclude that this fact, per se, transforms a skip or loading pocket into a shaft landing for purposes of the application of section 57.19-100. I construe the standard to apply to shaft landings, and I conclude that it requires the installation of gates, without exception, so as to preclude materials from falling from the skip or loading pocket into the shaft. However, I am not persuaded by the fact that simply taking men and materials on and off any mine

shaft landing necessarily means that gates have to be installed at those locations. It seems to me that if MSHA desires to protect miners from falling into a shaft at any such mine locations, it should vigorously enforce the existing safety belt and line standard. If MSHA desires to protect men from the hazard of materials falling into a shaft from a loading or skip pocket landing location in a mine, it should vigorously enforce the standard requiring the installation of protective devices at those locations. And, if MSHA desires to prevent both men and materials at skip and loading stations or pockets from falling into mine shafts, it should promulgate a clear and concise safety standard covering precisely that situation. The practice of rewriting safety standards through the adjudicatory and hearing process in a civil penalty setting is simply not an appropriate or desirable way to promulgate such standards, particularly when both the operator and the enforcing agency seemingly are in agreement that such a standard is in order.

In addition to the aforesaid enforcement problems dealing with a standard which does not precisely fit the factual situation presented, I believe it is basically unfair to penalize a mine operator by imposing civil penalty assessments in a situation where the mine operator recognizes the safety problems presented and is making an effort at compliance. In this case, I am convinced from the evidence presented, that the respondent did not reasonably believe that any mandatory standard required the installation of protective gates at loading stations, installed a prototype of such a device at one such location, and was in the process of devising and installing similar devices at other such locations. The citations were issued because a complaint had been filed, and the inspector issued the citations because he believed the operator was "dragging his feet" and he candidly admitted this was the case. In my view, the intent of civil penalties is to deter future violations. Here the citations were used to nudge the operator into complying with a standard whose application was questionable in the first instance. It seems to me that something short of subjecting an operator to monetary civil penalties up to $10,000 and possible mine closure if he does not ultimately come into "compliance" would have achieved the intended purpose of insuring a safe working environment for the miner working at the skip loading areas cited. Further, I firmly believe that the promulgation of a precise and clear safety standard to prevent the types of hazards alluded to in this proceeding would advance the interests of safety simply because the operator would be put on notice as to what was expected of him in terms of compliance and MSHA inspectors would not be put in the tenuous position of not knowing which mandatory standard to cite in a given situation, and they would not be placed in the position of attempting to justify their judgment calls after the citations are issued through a laborious and somewhat semantical exercise and application of some other safety standard, which may, in his view, be "close" but not quite on point. In the circumstances

and facts presented here, and after careful consideration of all of the facts and circumstances surrounding the issuance of the citations in question, I conclude and find that they should be vacated and that the civil penalty proposals seeking assessments for the alleged violations should be dismissed. My findings and conclusions are based chiefly on the fact that the cited standard applies to a shaft landing and MSHA has not convinced me by any credible evidence that the skip or loading pockets in question are in fact shaft landings, or that the standard cited requires the installation of protective gates at skip or loading pockets. The citations are VACATED.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED that the following citations be vacated and the proposals for assessment of civil penalties for those citations be DISMISSED.

Citation No.	Date	30 CFR Section
346811	5/11/78	57.19-100
346812	5/11/78	57.19-100
349610	5/11/78	57.19-100
349611	5/11/78	57.19-100

In view of the foregoing findings and conclusions affirming Citation No. 347006, and taking into account the six statutory criteria in section 110(i) of the Act, a civil penalty in the amount of $350 is assessed for this citation and respondent IS ORDERED to pay that amount within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge