CCASE:
SOL (MSHA) V. OTTAWA SILICA
DDATE:
19791228
TTEXT:

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 Proceedings Docket No. WILK 79-69-PM A.C. No. 06-00018-05001
v.	Docket No. WILK 79-70-PM A.C. No. 06-00018-05002
OTTAWA SILICA COMPANY, RESPONDENT	Lantern Hill Mine and Mill

DECISION

Appearances: Stephen P. Kramer, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Richard E. Blodgett, Division Manager, Ottawa Silica Company, Ledyard, Connecticut, for Respondent

Before: Administrative Law Judge Michels

These proceedings were brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petitions for assessment of civil penalty were filed by MSHA in both dockets (WILK 79-69-PM; WILK 79-70-PM) on January 18, 1979, and timely answers were filed by Respondent. The cases were heard on both docket numbers in Middletown, Connecticut, on October 18, 1979, at which both parties were represented.

Docket No. WILK 79-69-PM involved 20 alleged violations. Docket No. WILK 79-70-PM involved two alleged violations. Evidence was received as to each citation and a decision was rendered from the bench. These decisions as they appear in the record, with certain necessary corrections or changes, are set forth below.

Preliminarily, the Petitioner moved to withdraw its petition with regard to Citation No. 212903 (Docket No. WILK 79-69) because the citation was vacated. The motion was granted and the petition was withdrawn. Petitioner then moved to amend Citation Nos. 212894, 212895, 212904, 212906, and 212908 to read 56.12-30 instead of 56.12-2. The Respondent moved to dismiss those citations. The Petitioner's motion was denied and it moved to withdraw its petitions with respect to those five violations. The motion to withdraw the petition was granted and as to those citations the petition was dismissed with prejudice.

Docket No. WILK 79-69-PM

Citation Nos. 212896, 212898, 212899, 212900, 212907, 212909, and 212911, issued July 11, 1978

The following is the bench decision on these citations found at pages 54-60; 79-82; 91-93; 102-104; 112-113; 123-124; and 139-142 of the transcript:

Citation No. 212896

This concerns Citation No. 212896.

The inspector charged as the condition or practice: "Mandatory standard 56.12-32 was not being complied with in that the electrical cover plates were not replaced in storage building by shop." The standard cited reads: "Inspection for cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The first question is whether or not there has been a violation. I believe that the facts in this are practically undisputed. The evidence and the testimony shows that there was a cover plate missing on a particular junction box, as charged. Accordingly, I find a violation of mandatory standard 56.12-32 * * *.

First, as to the history of violations, a document has been received, P-36, which shows that for the Lantern Hill Mine and Mill, the Ottawa Silica Company was assessed on a total of 24 citations in 1978. I will find that this is no appreciable history of past violations. I also note, in connection with this case * * * that 1978 was the first year that the law became applicable to this operation.

The next criterion is the appropriateness of the penalty to the size of the operator. The evidence shows that in this operation there were 27 people or miners engaged in the work, and 65,000 tons of material were produced annually.

Counsel for MSHA has indicated that this was a medium-sized company. He has presented no particular evidence by which I can measure the difference between companies, but in the circumstances, I will find, at least for the purpose of these violations, that this is a small-to-medium size, and may well be a medium-sized company.

No evidence was adduced that the penalties to be assessed here, or this penalty, will affect the operator's ability to continue in business.

It was further stipulated that the operator abated this, as well as all the citations which will be considered in these dockets, rapidly and in good faith, and I so find.

The fifth criterion would be with regard to gravity. Normally, the fact a cover is off from an electrical appliance or enclosure would be considered a serious violation. I will take into account the fact that the evidence shows that this receptacle or container was out of the practical reach of a miner standing on the floor. Of course, it is always possible for someone, under some circumstances, to stand on a chair or other object and to reach it. In the circumstances, however, I would find that it is slightly serious.

The final criterion is negligence. In this case the evidence shows that prior inspections under the predecessor Act did not reveal the existence of this lack of a cover. The testimony further shows that it is in an out-of-the-way spot that would be easily overlooked. Furthermore, the inspector, while he did testify that the operator should have known, is, I believe, a little unclear in this regard. And his observations, made in his report, may even show the inconsistency. Accordingly, and in these circumstances, especially since this was the first inspection made under the new Act, I would find a small degree of negligence.

The assessment is as follows: Taking into account the good faith and rapid compliance shown by the operator, the fact that this was the first inspection under the Act then recently made applicable to the operator, and the further facts that there were, as I have found, only a small degree of gravity as well as negligence, I will assess only a nominal penalty in this instance, which will be $10.

That completes my decision on this citation.
(Tr. 54-60).

Citation No. 212898

This is the decision on Citation No. 212898. And if I didn't say so in the beginning, I should state here and now that all of these citations are in WILK 79-69-PM.

The inspector charged as follows: "Mandatory standard 56.12-32 was not being complied with in that the cover plates on the electrical equipment were not replaced in electric motor storage area." This charges the violation of the same mandatory standard as the previous citation, and I will not repeat the standard.

Again, there is no dispute about the fact of the violation. The inspector has charged the lack of cover plates, and it was his testimony that there were two junction boxes involved. The evidence suggests that in the area there were three junction boxes, and there is no dispute that none of these had cover plates on them. And, moreover, there is no dispute about the testimony that there was no testing taking place at the time.

And in light of these circumstances, and without repeating my previous remarks, but which are also applicable here, I find that in this citation there is a violation, as charged, of 30 CFR 56.12-32. It is unnecessary to repeat my findings as to the criteria that are generally applicable. I need find, in addition here, only specifically as to gravity and as to negligence.

So far as the gravity is concerned, it appears to me that the seriousness is somewhat greater, in that, as pointed out by counsel, three junction boxes were involved. It is also shown that some of these junction boxes are out on the outside of the wall of the shed, and were accessible to a miner, which, in my view, would make it a more serious violation.

Furthermore, at some point consideration should be given to the fact that there were relatively large numbers of similar conditions which have been charged in this proceeding. I could not take that into account in the first citation because there was no evidence as to other violations at that point. However, at this time it is beginning to show more of a picture of a failure to replace or to install cover plates on these junction boxes. I will take that into account. I will find, as to this citation, that it was serious.

So far as negligence is concerned, my comments about the fact that the showing is now of a failure in a number of instances to have the cover plates installed, and thus I think would show somewhat more negligence that it was possible for me to find on the previous citation. Nevertheless, and in spite of all that, I will continue to take into account the fact that the operator did show rapid good faith in compliance, and furthermore, and which I think is important, that this was the first occasion in which the mine was inspected under the Act recently made applicable. I think that is important as a mitigating circumstance because, in these circumstances, the mine and the operator is being for the first time advised precisely and concretely as to what the requirements are.

Now, that's not a complete defense, because the law doesn't allow such a defense, but it is a mitigating circumstance, in my view.

Taking all those factors into account, I will assess the penalty of $25 for this violation.

That completes my decision on this citation. (Tr. 79-82).

Citation No. 212899

This is Citation No. 212899.

The inspector found as the condition or practice as follows: "Mandatory standard 56.12-32 was not being complied with in that an electrical cover plate was not replaced in upper storage shed."

The mandatory standard cited is the same as that previously quoted in the record, and I won't repeat that.

The evidence presented shows that there was a violation of this mandatory standard in that in the upper storage shed an electric cover plate was either not replaced or missing. The operator does not dispute the evidence. Accordingly, I find that on this citation there was a violation of 30 CFR 56.12-32.

I need make findings on only two of the criteria which, are gravity and negligence, since the findings on the other criteria are applicable to this citation also. Gravity. In this instance, since the testimony shows that the particular junction box was not readily accessible, in fact almost inaccessible, I find that there is a slight degree of gravity or seriousness. So far as negligence is concerned, the box was located in a relatively remote location. For that reason, ordinarily this would not be, in my view, a high degree of negligence. However, I do have to take into account that there is a pattern shown in this record of a number of such boxes. I agree with counsel that a thorough inspection should have revealed these violations or these conditions.

Nevertheless, I still continue to take into account the fact that the operator did comply in good faith rapidly, and also the fact that this was an initial inspection under a newly applicable Act. It is true, of course, that the law was previously applicable under the old "Metal/Nonmetal" Act,

but it did not carry the penalty. For such reason, I believe that the enforcement procedures may have been somewhat different, and that is the reason for my view that, in a sense, the operator was newly brought under an Act for which MSHA had adopted new procedures for enforcement.

Under all these circumstances, I would find ordinary negligence.

The penalty I will assess is, in this instance, $20. That completes my decision on this citation. (Tr. 91-93).

Citation No. 212900

This is my decision on Citation No. 212900.

The inspector charged as the condition or practice he saw: "Mandatory standard 56.12-32 was not being complied with in that the cover plate was not replaced on electrical equipment over Flour Bagger." I have previously quoted the standard referred to and I will not repeat that.

As to the fact of the violation, the only evidence received shows that the cover plate was not in place, as alleged, on the box over the Flour Bagger. Accordingly, I find that there was a violation of 30 CFR 56.12-32. The prior findings on the points applicable have already been made and they would not be repeated here. They are applicable to this citation. As has been pointed out, this violation is very similar to the previous citation, and I will decide it on the same basis, and I will not repeat all of the comments that I have made there.

I think this should be noted, however. I agree with counsel to an extent that as we proceed, a picture of a large number of violations seems to be emerging. However, I think it should be noted that these violations, so far as I can see, are all found on the same date. If the conditions were such that they were found over a period of time, I think it would be much more significant. I agree, however, that there is some significance in the large number, but not to the extent it would be had this been a continuous series of violations over a period of time.

Accordingly, as to gravity, I find a slight seriousness, and as to negligence, ordinary negligence.

Taking into account all the facts that I have previously mentioned, I hereby assess the same penalty as I did for the previous citation, namely, $20.

(Tr. 102-104).

Citation No. 212907

This decision is on Citation No. 212907.

The condition or practice cited by the inspector was as follows: "Mandatory standard 56.12-32 was not being complied with in that the cover plates were not replaced on electrical equipment in dryer control room." The standard cited has been previously quoted.

The evidence shows, and there has been no evidence to the contrary, that the cover plate was missing as charged. Accordingly, I find a violation of 30 CFR 56.12-32.

As noted by counsel for MSHA, this violation is more serious than the others in that the electrical junction boxes were accessible, and there was more than one involved. I find, in the circumstances, it was a serious violation. For reasons previously stated, I find, in this instance, ordinary negligence. However, I do take into account in the assessment those factors previously mentioned as to other citations where applicable.

In all the circumstances, I find and assess a penalty for this violation of $35.

(Tr. 112-113).

Citation No. 212909

This is Citation No. 212909.

The inspector charged as the condition or practice as follows: "Mandatory standard 56.12-32 was not being complied with in that the cover plates were not replaced on electrical equipment at dryer." I have already quoted the standard referred to and will not repeat it here.

The evidence shows, and there has been no evidence to the contrary, that there was a violation as charged in this citation, namely, that a cover plate was not in place on the electrical equipment at the dryer. Accordingly, I find, as to this citation, a violation of 30 CFR 56.12-32, as charged.

A finding as to the generally applicable criteria are incorporated with reference to this citation.

On "gravity," it appears that this may not have been quite as serious a violation, due to the fact that the electrical box was relatively inaccessible. I will take that into account. Nevertheless, I find this to be a relatively serious violation. I include in this finding, however, my remarks previously made as to the gravity of these junction box violations.

On "negligence," I also include my prior remarks. In general, it is the kind of violation which the operator knew or should have known about, and I find ordinary negligence.

Taking into account the various considerations mentioned, I hereby assess the penalty for this violation of $25.

(Tr. 123-124).

Citation No. 212911

This is the decision on Citation No. 212911.

The inspector charged as the condition or practice as follows: "Mandatory standard 56.12-2 was not being complied with in that the electrical cover plates were not replaced on electrical equipment in hawk shed." It should be noted here that the inspector testified that citation 56.12-2 was an error. The number "3" was omitted, and it should read, "56.12-32."

This standard has already been quoted and will not be repeated here.

The first question is whether or not there was a violation of the standard. I accept the evidence, there being nothing to the contrary, that this was an inactivated or deenergized circuit. It had no electricity in it, and, therefore, could not have harmed any miner. The issue, obviously, is the fact of violation, however, and whether that takes it outside of the standard. Counsel for MSHA contends that even though the circuit is inactive, the standard continues to apply, and Mr. Blodgett's safety director for the operator contends that it should not apply in such circumstances.

It seems to me that the clear wording of the standard would make it applicable to a deactivated circuit. If the circuit is abandoned, as I understand it, it should be removed, otherwise the standard does apply. I can appreciate that that may appear to be a strict interpretation--perhaps it might even be described as technical. However, I would note that we are here dealing with a number of

> instances in which electrical boxes have been removed and not replaced. There is, therefore, considerable reason to believe that had this circuit been reactivated, it would have been without the cover box. Thus, it is not as technical as it may seem.
>
> I do find, therefore, under those circumstances, that that standard is applicable, even to a circuit that is temporarily out of use. The evidence is, and there is no dispute, that the cover plate or cover plates were missing. And I find that to be a violation as charged of 30 CFR 56.12-32.
>
> I need not repeat here my finding on all those criteria generally applicable. I will mention only those having to do with gravity and having to do with negligence. As to gravity, it is clear, as I found, that the circuit was inactive, that there was no hazard. Accordingly, I find this to be nonserious.
>
> As to negligence, I find that, in general, it was either known or should have been known that this cover was missing. However, I incorporate my previous findings, which include certain mitigating factors as far as negligence is concerned.
>
> In light of all those circumstances, I don't believe that the full penalty requested by the Assessment Office or that requested by counsel is merited. The fact that there was no likelihood of injury is a direct factor in this instance, and I will fine the nominal penalty of $10 for this violation.
>
> (Tr. 139-142).

The above bench decision with reference to citations 212896, 212898, 212899, 212900, 212907, 212909 and 212911 is hereby AFFIRMED.

Citation Nos. 212897 and 212912, issued July 11, 1978

The following is the bench decision on these citations found at pages 183-189 of the transcript.

> The citations here being considered are Nos. 212897 and 212912.
>
> In the first such citation, the inspector charged: "Mandatory standard 56.4-11 was not being complied with in that the abandoned electrical wiring in the oil storage shed was not removed." He charged a violation of mandatory standard 56.4-11.

In Citation No. 212912, the inspector charged: "Mandatory standard 56.4-11 was not being complied with in that the abandoned electrical wiring was not removed from the hawk shed."

The standard so referred to reads as follows: "Abandoned electrical circuits shall be de-energized and isolated so that they cannot become energized inadvertently."

The inspector, as to both of these citations, testified in effect, at least to his view, that these were abandoned electrical circuits. Furthermore, there appears to be no dispute that the circuits in question in both of the citations were deenergized.

The inspector further testified that in his view, the circuits should have been completely removed to be considered as isolated. There is testimony, and I don't believe it is disputed, that in both instances there was a separation between what you might call the incoming energized wires and the circuits that are in question. In one instance it is not clear whether energy was coming into that particular building or not. And in the other instance--that is, 897--it is clear that there were live wires in the building.

In the case of Citation No. 212912--that is the circuit in the hawk shed--the evidence is that it was, subsequent to this citation, activated and put in service. The initial question, therefore, is whether, in that instance, that was an abandoned circuit. It is evident, I think, that whether or not a circuit is abandoned would have to be judged on the circumstances of a case involving, I suppose, circumstances like the length of time it had been not used and other circumstances which would indicate the likelihood it would ever be used. We have few, if any, such circumstances as shown here except the time it had [been out of use which was], as I understand it, or at least counsel argued--for something like 6 months. The fact of the matter is that it was not ultimately abandoned, because it was restored to use.

It would be my conclusion as to that citation that there is just not a sufficient preponderance of the evidence to show the abandonment at the time the citation was made. In fact, I would think that the evidence would tend to show to the contrary, that it was not abandoned.

Accordingly, as to Citation No. 212912, I find there was no violation, and that citation should be vacated, and the petition dismissed as to that citation.

Citation No. 212897 is in a different category. There is no evidence that it was restored to use. I don't recall there being any real dispute that this, in fact, was an abandoned circuit, and I will so find.

It was deenergized. The sole question is then, whether in these kind of circumstances, with the separations involved, and considering that it had not been removed, was it, in fact, isolated?

I suppose I would have to agree with counsel for MSHA that the circumstances would surely vary as to whether or not a particular abandoned circuit was, in fact, isolated or not isolated. The situation that he mentioned of wires actually crossing each other would not strike one as isolation, even though they might be separated by some insulation. In this case, there was a much greater gap. The live circuit was separated from the deenergized and abandoned circuit by about a foot or foot and a half of space. Now, the energized circuit was in a conduit, and as I understood the testimony, which was not disputed, covered by some sort of a plate.

Preliminarily, I would find--and this is subject to reconsideration if cases are found to the contrary--but I would find that the isolation required is not necessarily removal. I would concede that in perhaps some cases removal would be the only way to complete the isolation. But the question is whether that was required in this instance. I further note that the standard, itself, does not absolutely require removal, nor should it.

It seems to me that the operator in this instance had, at least in a certain sense, isolated--that is, separated--quite clearly the energized from the abandoned circuit. The question is, had it been isolated sufficiently to satisfy this particular standard? I don't think the showing here is adequate to show, by a preponderance of the evidence, that it had not been so isolated sufficiently. In other words, the two circuits were clearly separated. It would, in all probability, take an electrician to rewire--and the evidence supports that--the particular circuitry.

The circuitry in this instance was, according to the testimony--not hidden or concealed. It is difficult for me to understand how, at least in the kind of circumstances, MSHA could reasonably justify that this could be inadvertently energized. My ultimate or general conclusion would be that if MSHA would require a greater isolation than was employed in this instance, that the regulations would have to be made clearer.

Accordingly, in light of that, I find also that Citation No. 212897 was not proved, and I therefore vacate that citation and dismiss the petition as to it.

As I stated, however, I make that decision subject to a reconsideration if there is a body of law holding to the effect that, in general, isolation means a complete removal.

If I am asked to reconsider this, it should be brought to my attention as quickly as possible, and before the transcript is finished and received.

That completes my decision on these two citations.

The above bench decision is hereby AFFIRMED.

Citation No. 212901, issued July 11, 1978

The following is the bench decision on the above citation found at pages 199-201 of the transcript.

This is Citation No. 212901.

The inspector found the condition or practice as follows: "Mandatory standard 56.9-11 was not being complied with in that the P & H crane had cracked windows." And the mandatory standard cited reads as follows: "Cab windows shall be of safety glass or equivalent, in good condition, and shall be kept clean."

The evidence received, which has not been disputed, shows that the window in the crane was shattered. That, therefore, is a violation of this standard, and I so find. In other words, I find a violation of 30 CFR 56.9-11.

The finding as to the general criteria has already been made.

I have limited this to findings on criteria and gravity, and what degree. First, the gravity.

The inspector testified that this could affect a miner or the operator of the machine in two ways. He could be cut from broken glass. Also, it could affect his visibility. It seems to me that in the circumstances, and based on the testimony, this is a serious violation. On "negligence," the inspector testified that, in his view, the operator should have been aware of the condition. This is somewhat inconsistent with his statement made on his report at the

time of the citing of the citation, in which he stated that it could not have been known or predicted. The inspector, as previously noted, has explained this or attempted to explain this difference or inconsistency.

It seems to me that, in general, the fact of the shattered glass is readily noticeable, and should be observed or made known by someone. In this instance, the inspector did not know how long the glass had been shattered. There is the possibility that this may have happened just before it was observed and had not been reported, although there is no evidence to that effect.

But considering all the circumstances, and also taking into account the good faith and rapid abatement, it would be my belief that the sum assessed by the Assessment Office would be appropriate, and I hereby assess a fine of that amount, namely, $26.
That ends my decision on this citation.

The above bench decision is hereby AFFIRMED.

Citation No. 212902, issued July 11, 1978

The following is the bench decision on the above citation found at pages 245-249 of the transcript.

This concerns Citation No. 212902, wherein the inspector testified that he found a condition or practice as follows: "Mandatory standard 56.12-68 was not being complied with in that the transformer enclosure was not locked."

The standard so referred to reads as follows: "Transformer enclosure shall be kept locked against unauthorized entry."

The first consideration is whether or not a violation occurred. The testimony received indicates that there was a large overall enclosure, and as I understand it, it was separated into two parts by a fence. On one side, which is owned and operated and maintained by the power utility company, there was what might be described as a transformer. I don't think that it is really disputed. On the other side, which is operated and maintained by the company, there is other equipment, and this has been generally described as a cutoff switch. The inspector did not go into the enclosure. He did not feel it was safe to do so and so he did not testify as to what precise equipment was on either side. That information comes from the testimony of Mr. Partridge, a witness for the operator.

The testimony further shows, and there is no dispute, that the utility side of the enclosure was locked, and on the company side of this fence or outside enclosure, the lock was not secured. In other words, it was open to entry. However, the equipment within that company side, according to the testimony, was in a locked container or separate enclosure.

I suppose the issue becomes perhaps somewhat technical at this point. I think that the argument of the representative of the operator here is ingenious, in a way, although I would say that I could not accept that, in my view. This general enclosure was a transformer enclosure within the meaning of this Act. It is true that there was this separation, but I don't believe, and I so find, that that keeps it from being an enclosure as defined in or within the meaning of the regulation.

There is some testimony that there would be no danger in going into that enclosure on the company side. However, that testimony came from Mr. Partridge, who is not an electrician. I have to believe that that entire apparatus was enclosed for a purpose, and that was to keep people out from possible danger, and of course, in addition to that, to the general security of the area. I think it is an integrated whole. I don't see how you could separate the elements of this whole in this kind of a situation. There has to be some connecting link. I don't think the evidence is clear as to what the dangers might or might not be on that connecting link, should there be an unauthorized entry. But even so, as counsel for MSHA has stated, the general danger around such an installation is so great that it would seem to me that it would be flirting with possible injury to construe this regulation so narrowly that it would not cover such an enclosure as a transformer enclosure.

In other words, to be more specific, I would interpret it as the transformer and all appurtenances thereto, as covered by this regulation. Since it was not locked, it did violate the standard, and I so find.
I find here that the failure to keep this enclosure locked violates 30 CFR 56.12-68.

There are only two criteria I have to make findings on, the others having already been made heretofore. The first is the gravity. I believe it is very serious, and I so find, because of the danger of electrocution.

> So far as negligence is concerned, it is a condition which I believe the operator knew or should have known in such enclosures. There would seem to me to be very few excuses for it remaining unlocked. Accordingly, I find that this was more than ordinary negligence on the part of the operator.
>
> I should add, as far as the negligence is concerned, there was no evidence put in as to why this particular enclosure remained unlocked, or any information which might tend to mitigate the negligence.
> In all those circumstances, I would not assess as high a penalty as the Government counsel has asked. I again consider the operator's good faith and rapid abatement in this matter. I will assess a penalty of $100 for this violation.

The above bench decision is hereby AFFIRMED.

Citation Nos. 212905, 212910, issued July 11, 1978, and Citation No. 212913, issued July 13, 1978

Citation No. 212905 alleged a violation of 30 CFR 56.12-2 which states that electrical equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed. The parties agreed to settle this case for the amount originally assessed, $24. I hereby approve the settlement.

Citation No. 212910 alleged a violation of 30 CFR 56.11-2 which states that crossovers, elevated walkways, elevated ramps and stairways shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided. The parties agreed to settle this case for $24, the amount originally assessed. I hereby approve the settlement.

Citation No. 212913 alleged a violation of 30 CFR 56.4-23 which states that firefighting equipment which is provided on the mine property shall be strategically located, readily accessible, plainly marked, properly maintained, and inspected periodically. Records shall be kept of such inspections. The parties agreed to settle this case for $26, the amount originally assessed. I hereby approve the settlement.

I hereby REAFFIRM my approval from the bench of these settlements.

Docket No. WILK 79-70-PM

Citation No. 212914, issued July 13, 1978

The following is the bench decision on this citation found at pages 264-266 of the transcript.

This is Citation No. 212914.

The inspector cited, as the condition or practice, the following: "Mandatory standard 56.14-1 was not being complied with in that the guard for the flour screw V-belt drive was not guarded completely."

The inspector cited 56.14-1, which reads as follows: "Gears, sprockets, chains, drive, head, tail and take-up pulleys, fly wheels, couplings, shafts, saw blades, fan inlets, and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded."

As I previously indicated, the only evidence received is the testimony of the inspector, as well as the documents and that indicates that a part of the V-belt on this flour screw drive--V-belt drive--that is the motor end of the drive, was not guarded. Clearly, it seems to me the standard covers that. There was an exposure of moving parts, which, if contacted by persons, could cause injury.

Accordingly, I find there was a violation of mandatory standard 30 CFR 56.14-1, as charged.

These are consolidated dockets. I have already made the findings as to all of the statutory criteria except for gravity and for negligence.

On gravity, I agree with counsel for MSHA that this is a serious type of violation, and I so find, that it is serious, because an operator or any miner or person near the machine may become entangled, either through his clothing or his person, and become injured seriously. The inspector testified that the operator should have been aware of the violation, because a complete inspection had been made previously. I do note the comments and contentions of Mr. Blodgett, that the operator did have some question under some circumstances about the parts of the machines to be covered. And he does--and he also emphasized the fact that this V-belt was partly covered. However, on the basis of the evidence that has been received in this record, it seems clear to me that it should have been covered, and I find no ambiguity, really, in--or any question, really, about whether or not that end should have been covered. And under the circumstances, the operator should have known about it, and I find, therefore, ordinary negligence.

I take into account those factors of mitigation applicable that I previously mentioned. I believe that the penalty assessed by the assessment officer, which was $38, is appropriate for this violation, and I will make the same assessment.

That completes the decision on this citation.

The above bench decision is hereby AFFIRMED.

Citation No. 212915, issued July 13, 1978

The following is the bench decision on the above citation found at pages 320-323 of the transcript.

This is Citation No. 212915. The inspector cited as the condition or practice the following: "Mandatory standard 56.5-3 was not being complied with in that the loose material on the quarry face was not scaled after blast."

I have to make a correction on that. As I read the inspector's condition or practice statement, it starts, "Mandatory standard 56.5-5." The inspector has testified that that is not a 5, and should read "56.3-5."

Now, then, that particular standard reads: "Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the area shall be barricaded and posted." That's the end of the quotation.

The first question is the fact of the violation. The evidence that has been received on this was described by Mr. Kramer as somewhat confusing, and I will agree with that. I think it is confusing, and in some respects contradictory and difficult to follow. However, it seems to me that there is no doubt that on this quarry face there was, at some point, loose material, and that was recognized by the operator. The evidence shows, by the testimony, as well as in documentary form, that a backhoe on the 12th did do some scaling work. The inspector also testified that he did see a backhoe on the 12th.

Furthermore, as I understand the inspector, there was a backhoe on the 13th, when he wrote his citation. The citation was written on the 13th at 9:30, and it was abated on the 13th at 1500 hours, which would mean 3 o'clock. In order for that to be done, it was necessary to have heavy equipment on the face. I have to deduce from the circumstances or imply from the circumstances that the equipment had already been ordered and was there. In fact, the inspector did testify that when he observed the condition, the

operator was in the process of correcting the condition.

I should note, or I should have noted previously, that there is no question concerning the part of the standard which would require, in the alternative, that areas shall be barricaded and posted. The inspector made clear that was not applicable, because no one could get near, in the circumstances, and this apparently would have been an unnecessary action.

The only issue, therefore, is whether the correction was promptly done.

The only questions at all that I can see, in considering the question of promptness, was the fact that some day or so had elapsed, which is the point made by counsel for the Government. In the circumstances, it does not seem to me that that little time span is that significant. The testimony and the evidence, in general, strikes me as indicating that the operator was doing all that it could reasonably be expected to, in the circumstances, and was in the process of correcting this loose material on the quarry face.

In light of those circumstances, I conclude that the Petitioner has not carried its burden in this particular instance, and, accordingly, I would vacate this citation and dismiss the petition as to Citation No. 212915.

The above bench decision is hereby AFFIRMED.

A summary of the dispositions in this case follows:

Citation No.	Action Taken or Assessment
212903	withdrawn
212894	dismissed with prejudice
212895	dismissed with prejudice
212904	dismissed with prejudice
212906	dismissed with prejudice
212908	dismissed with prejudice
212896	$ 10
212898	$ 25
212899	$ 20
212900	$ 20
212907	$ 35
212909	$ 25
212911	$ 10
212897	vacated
212912	vacated
212901	$ 26
212902	$100
212905	$ 24

~2179

212910	$ 24
212913	$ 26
212914	$ 38
212915	vacated
Total	$383

ORDER

IT IS ORDERED that Respondent pay the penalties totaling $383 within thirty (30) days of the date of this decision.

Franklin P. Michels
Administrative Law Judge