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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

KAISER STEEL CORPORATION,
RESPONDENT

Civil Penalty Proceeding

Docket No. DENV 79-245-PM
A.O. No. 04-02511-05001

Eagle Mountain Mine & Mill

DECISION

Appearances: Judith G. Vogel, Attorney, Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the petitioner Daniel B. Reeves, Esquire, Oakland, California, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), on January 26, 1979, charging the respondent with six alleged violations of certain mandatory safety standards found in Part 55, Title 30, Code of Federal Regulations.

Respondent filed a timely answer contesting the civil penalty proposals and requested a hearing in Indio, California. A hearing was convened on November 6, 1979, and the parties appeared and participated fully therein. The parties waived the filing of written proposed findings and conclusions but were afforded an opportunity to present oral arguments in support of their respective positions.

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 penalties filed

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

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

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 CFR 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 1-2):

1. Respondent has no prior history of violations for the period June 16 to 29, 1978, the dates of the inspection in question, and the effective date of the Act, March 9, 1978.

2. The civil penalties assessed for the violations in question will not impair respondent's ability to remain in business.

3. The mine in question produces 4 million tons of iron ore per year.

Dismissal of Citation

Petitioner's motion to dismiss Citation No. 375455, June 27, 1979, 30 CFR 55.14-6, on the ground that petitioner cannot sustain its burden of proof as to the fact of violation was granted (Tr. 2) and the citation is vacated.

Petitioner's Testimony and Evidence

Citation No. 375204, June 28, 1978, citing 30 CFR 55.20-3, states: "The take-up pulley balcony was not clean and prevented safe access for 2 maintenance employees who were changing a counterweight bearing."

MSHA inspector James W. Shroyer confirmed that he issued the citation in question after inspecting the balcony area at the take-up pulley on the H-4 conveyor belt. He observed an accumulation and buildup of encrusted materials that covered the entire balcony, and it had built up to a height of some 18 to 20 inches from the edges of the center of the platform. The encrusted materials fell off of the conveyor belt as it came around the counterweight sloping outward and even with the toeboard. Employees have access to the balcony by an open door which provides maintenance and lubrication for the pulley and moving parts. The unclean balcony with the buildup of materials, and the presence of tools, presented slipping and tripping hazards to employees on the balcony as well as the area below the balcony where tools could fall off and injure employees. Lubrication grease was also present on the balcony and this presented a slipping hazard in that employees could slip through the handrailings and fall to the area below injuring themselves against metal structures. Employees may receive a range of injuries from broken bones to fatal injuries, and the respondent should have known about the material buildup on the balcony. The hazardous conditions were abated within the time specified after respondent pulled employees off of one job and assigned them to clean up the balcony, and he was present shortly after the hazardous conditions were corrected (Tr. 4-12).

On cross-examination, Inspector Shroyer testified that the function of the conveyor belt is to transfer ore waste from one plant area to another, and he believed that the hardened materials came from the conveyor belt. The materials consisted of ore waste one-quarter to three-eighths inches thick located outside the plant building. The materials had hardened because they had not been disturbed by employees doing repair work, and the presence of the materials on the iron balcony surface made it more of a tripping and slipping hazard to employees because it was not packed in some areas, and this could cause an employee to loose his footing. As the material was dumped, part of it would stick to the conveyor belt, and after it dried, the materials dropped off on to the balcony area. In order to prevent accidents, a 42-inch guardrail enclosed the balcony and 3-inch toeboards were also there to prevent employees and materials from being knocked off the balcony into the area below. Toeboards are required in platform areas which are elevated and when men and equipment are in the area below.

Inspector Shroyer stated that employees are on the balcony in question only when they are performing maintenance and repair work, and employees usually travel in the area directly below the balcony. If an employee were to fall, the toeboard may prevent him from slipping over the edge, but based on the type and slope of material, an employee might have a difficult time holding onto anything to prevent his fall if he had been working with lubrication grease. There was no grease on the floor and it is not probable that an employee would fall off the 20-foot balcony. The balcony is not a normal work area and in a normal production shift employees would be there only to perform maintenance. He observed no one working on the balcony, but a supervisor told him

that two men had been working there, and he observed tools and equipment present which indicated to him that men had been working there shortly before he arrived on the scene (Tr. 12-21).

Inspector Shroyer stated that the presence of the material on the iron balcony presented slipping and tripping hazards, and when an employee walks out the door going towards the take-up pulley, the material buildup presents a tripping hazard. The material buildup area was 18 to 20 inches up around the conveyor belt sloping downward to 3 inches to the right of the toeboard on the outside, and the balcony itself is 4 feet wide and 7 feet long (Tr. 22). In view of the buildup of materials, he did not believe the toeboards were serving the purpose of keeping materials or tools from falling off the balcony (Tr. 23-26).

In response to bench questions, the inspector testified that he believed the violation was more of a housekeeping problem, and had the balcony been cleaned he would not have issued a citation. He did not believe there was a violation of any "safe access" standard, and he observed no other violations of safety standards in the balcony area (Tr. 27-28).

Respondent's Testimony

Plant superintendent M. A. Gaines testified that the material found on the iron balcony came from two 6-inch openings of the metal housing which built up on the grating of the platform, and the buildup resulted from the scraper belt wash system on the conveyor being down. The bottom of the trough had corroded away, and the belt wash system could not be repaired while it was in operation during production. The belt wash system could be repaired on two regularly scheduled days per week, and material spillage from the conveyor belt is cleaned up on a routine basis depending on the area and how frequently the equipment is required to be greased. If the scraper belt system was working, laborers would not be required to clean up the material spillage. Laborers apparently neglected to clean the area because it is not a normal work area but is only used while mechanics are changing and lubricating bearings. After the inspection, the material buildup was knocked down to a flat surface to 2-1/2 feet wide between the take-up pulley and the handrail. The two mechanics in question were standing on the built up material while changing the bearings. If there is a material buildup on the platform, the normal procedure is to contact the maintenance employees to clean the area first before they go in (Tr. 29-33).

On cross-examination, Mr. Gaines described the belt conveyor wash system and indicated that the material accumulations buildup was caused by the fact that the belt wash system was down, but that it could also have been caused by a pump located at the discharge end of the conveyor. On the day in question, both conveyor belts were down for maintenance and the walkway beneath the conveyor is used twice a year by maintenance employees while replacing belt idlers and performing clean-up duties. After the spillage was leveled out, it was 6 inches high and 4 inches at the outside and even with the 4-inch toeboards (Tr. 34-37).

William E. Eastgate, respondent's industrial safety manager, testified that he accompanied the inspector during the inspection

and observed the conditions on the balcony in question. He did
not believe a tripping hazard

existed because the materials were very fine and did not contain any rocks or significant mass which would cause one to trip. He conceded there was a buildup and one could leave footprints in it while walking over the area. He did not believe there was a slipping hazard present even though the surface material was damp, and he indicated that one would use due caution when walking over the footing conditions (Tr. 38-39).

On cross-examination, Mr. Eastgate estimated the height of the materials to be approximately 10 to 12 inches at the take-up pulley frame, and that it was not level throughout the balcony aea. He did not believe someone could trip or slip because "when you walk in an operation like this, you are always observant of footing conditions" and "there is no such thing as an idyllic situation" (Tr. 40).

In response to bench questions, Mr. Eastgate stated that maintenance was being performed on the equipment and that two mechanics were present (Tr. 41).

On redirect examination, Inspector Shroyer testified that he could not recall that two mechanics were present when he arrived at the scene and since there were so many people in the inspection party, he may have assumed they were part of that party. The amount of buildup of materials present increased the possibility of tools falling off the balcony to the area below (Tr. 42-43).

Citation No. 375450, June 27, 1978, citing 30 CFR 55.20-3(a), states:

> The walkways on the C-1 conveyor were not kept clean of loose materials that restricted the passage on the walkways. Material spills and sections of used metals were blocking access on the walkways in the tunnel section and on the outside sections of the walkways on the conveyor.

Petitioner's Testimony and Evidence

MSHA inspector Arthur S. Carisoza confirmed that he issued the citation in question after observing material spills and sections of used metal material blocking the access on the walkways inside the conveyor tunnel and the inclined elevated area outside the tunnel. The C-1 conveyor has a walkway on both sides which is encircled by a headboard, and the walkway is 24 inches wide with toeboards, handrails, headrails, and a graded metal floor. The conveyor is elevated in excess of 20 feet starting from ground level, and the spillage he observed on the walkway on the outside section of the C-1 conveyor consisted of precrushed iron ore and sections of the iron frame structure used to support the braced end. The spillage was scattered beyond the width of the walkway running one-third down from the headpoint of the conveyor, and the edge of the toeboards ranging from 2 to 8 inches. The spillage inside the tunnel consisted of iron ore near the chutes and jagged and straight-edge metal lying on the

tunnel walkways. The tunnel is 8 feet high with a walkway on one side running down into the tunnel 150 feet, and employees used this walkway to service the conveyor and check for spillage.

Inspector Carisoza testified that while he did not see any employees near the conveyor, there were footprints in the tunnel, and it appeared that employees went inside the tunnel to clean up the spillage and to repair the conveyor roller (Tr. 45-50). The spillage on the inclined elevated section outside the walkway created a slipping, falling, and stumbling hazard to employees walking down the walkway. The spillage inside the tunnel created several hazards to employees, including restricted head clearance, tripping, falling, and stumbling. In order to walk through the tunnel, employees would have to climb over the material piles, and there was not enough room to walk cleanly around the material piles. An employee could slip on the loose material on either section of the tunnel and receive a sprain, fractures, lacerations, and a concussion if he struck his head. The water on the floor, the wet conditions between the piles, loose dust, and the practice of employees wearing dark sun glasses are conditions that increased the likelihood of accidental injury inside the tunnel. He believed the respondent should have known that loose materials, including the iron and metal pieces, were located on the conveyor walkways, and employees should be instructed to inspect the area for spillages at least once per shift, and materials should be removed as soon as the repair work is completed. Respondent began to clean the materials off of the walkways on the day of the inspection, and the citation was abated within the time specified (Tr. 50-53).

Citation No. 375451, June 27, 1978, citing 30 CFR 55.20-3, states:

> Material spills in the C-2A tunnel were restricting the passage on the walkway. Material spills were causing workers to expose themselves to tripping hazards and limiting head clearances while traveling through the tunnel.

Inspector Carisoza confirmed that he issued a second citation after observing material spills in the C-2A tunnel area, and this material consisted of a fine type of iron ore that rose from 3 feet from the draw chutes to the top of the conveyor. Although he did not see any employees inside the C-2A tunnel, there were footprints present. Employees are in the tunnel to repair the conveyor and unplug the draw chutes. The loose material and spillages in the C-2A tunnel posed the same type of hazards to employees as the C-1 tunnel, including lack of head clearance, injuries, and falls. Water on the walkway, bad illumination from burned-out bulbs, and a dusty atmosphere were conditions that increased the likelihood of accidental injury and the conditions were subsequently abated by the respondent within the time specified (Tr. 53-56).

On cross-examination, Inspector Carisoza agreed that belt spillage will occur during mining operations, but that methods should be utilized to insure a cleanup to minimize the problem. He did not believe that the presence of cleanup crews in the tunnel while the belt was operating presents a hazard, but a better practice would be to clean up while the belt is down. He

described the walkways in the C-1 conveyor tunnel and the spillage which he observed. The loose spillage on the elevated east walkway ranged from 2 to 9 inches. The walkways were guarded by guardrails and toeboards and it was

not probable that anyone would fall off the elevated walkway. He clarified the statement made on his inspector's statement at the time the citation was issued by stating that the probability of one slipping and falling was present and he slipped while on the conveyor belt walkway. If one did not walk with extreme caution it would be more likely than not that he would slip. He saw no one on the walkway and an employee should be able to observe the obstructions.

Inspector Carisoza stated that he found more than three areas on the C-1 conveyor feed point chutes which had accumulated materials present, and the accumulations at those points were as high as the conveyor belt itself, in excess of 2-1/2 feet sloping at an angle. A person could slip if he tried to walk over those obstructions. Persons in the inspection party had to walk over the obstructions, but none of them slipped or fell, and this was because they exercised extreme caution in climbing over the areas. The tunnel is 8 feet high and employees are required to wear hard hats. The accumulated materials consisted of iron ore and dirt and it was not flammable or explosive, and the metal materials consisted of used materials, including a belt idler. He observed no work being performed in the tunnel while he was there, but believed that work had been performed there before he arrived (Tr. 57-64). With regard to the C-2A tunnel, the accumulated materials consisted of a spill in excess of 2-1/2 feet and several obstructions (Tr. 64).

Mr. Carisoza indicated that the extraneous materials cited were found in the C-1 tunnel and not the C-2 tunnel. The materials were blocking the access and presented a tripping hazard. One employee is usually in the tunnel walkways to check the flow of materials, but they are not regular walkways or travelways used by all employees. The citations were abated in good faith (Tr. 64-67). The citations were personally served on respondent at the conclusion of the post-inspection conference each day (Tr. 82). While he recalled more than one piece of loose material on the C-1 walkway, he could not specifically remember what they were but indicated they consisted of used metal parts which he believed constituted tripping hazards which obstructed an employee's travel access through the area (Tr. 82-84).

Respondent's Testimony

Superintendent Gaines explained the functions of the conveyors in question and he testified that no one is allowed in the C-1 tunnel while the conveyor is running. Employees are issued clear glasses and sun glasses for use in the tunnel, and cleanup crews are sent in to clean up the walkways while the conveyors are down before maintenance personnel go in. In the C-2 tunnel, designated personnel are present while the conveyor is running, and except for the tail pulley locations, cleanup is normally done while the conveyor is down. Due to the restrictions in the amount of room in the tunnel, cleanup is not performed while the conveyors are running. Although there are two walkways in the C-1 tunnel, under normal circumstances only

the east one is used and this would be infrequently while maintenance is being performed (Tr. 67-71).

Mr. Gaines confirmed that an idler frame and roller was in the C-1 tunnel on the west walkway. It was left there after an idler was changed and had not been removed, but it was subsequently immediately removed. The inspector complained about dust and small pebble materials on the inclined walkway, and if one is not careful he could slip on it. Mr. Gaines also confirmed the presence of an obstruction at one location in the C-1 tunnel, and he described it as "14 inches across the face and six inches deep." It was halfway down the tunnel and pushed under the conveyor belt. He could not recall any 2-1/2-foot obstructions in the feed chute. Cleanup is performed once a week in the C-1 tunnel and as required in the C-2 tunnel. He also confirmed the presence of the obstructions in the C-2 tunnel which were caused by material buildup at the bottom of the skirtboard, and he indicated that an employee would have to maneuver his way around the pile of spillage, but he could do so safely (Tr. 71-73).

On cross-examination, Mr. Gaines testified that there is no occasion for employees to be in the C-1 tunnel while the conveyor is operating. A chain barricade is in place while the conveyor is running, and following the inspector's suggestion, a sign was also put up at the tunnel entrance. The material buildup was not on the tunnel walkway but under the conveyor belt, but the used idler and roller were on the walkway. There was a 2-1/2-foot buildup of material at the bottom of the skirtboard near the south feeder in the C-2 tunnel, and he and the inspector had to walk over it (Tr. 73-77).

In response to bench questions, Mr. Gaines stated that other than the idler frame and roller, he saw no other used metal materials in the C-1 tunnel. However, at the tail end of the C-2 tunnel, pan liners were leaning against the wall and they were left there from the previous day when maintenance was performed. The C-2 tunnel had been cleaned the day of the inspection, but he could not recall when the C-1 tunnel was last cleaned, but both are cleaned at least once a week on the down days. He did not consider 2-1/2 feet of spillage to be normal (Tr. 78-79, 80).

Citation No. 375452, June 27, 1978, citing 30 CFR 55.17-1, states:

> Sufficient illumination to provide safe working conditions and travel through the C-2A tunnel conveyor were not maintained due to broken and burned out bulbs in the tunnel section of the conveyor. Several areas in the tunnel were not illuminated sufficiently and limited a person's visibility while in the tunnel.

Citation No. 375453, June 27, 1978, citing 30 CFR 55.17-1, states:

> Sufficient illumination to provide safe working conditions and travel through the C-2B tunnel conveyor were not maintained in the tunnel section of the conveyor. Several bulbs were broken and the area at the tail section was not illuminated to provide safe

visibility in that section.

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Petitioner's Testimony

Inspector Carisoza confirmed that he issued two citations for illumination violations on June 27, 1979. With regard to the C-2A tunnel, he stated that he did not count the number of broken and burned-out light bulbs, but there were at least three which were broken. He walked the entire length of the tunnel and his visibility was impaired due to the broken and burned-out bulbs. He did not have clear floor vision in the dark areas and he had to take extra precautions when walking from area to area so that his eyes could focus. He had no additional lighting source with him because he was not aware of the conditions present when he entered the tunnel. In his opinion "sufficient illumination" is that illumination which provides enough illumination for a person to walk safely and travel where his visibility is not impaired and this was not provided in the C-2A tunnel because one could not see the travelway, walkway, or structures in certain areas without straining the eyes. The hazards presented included tripping and falling over spillage, obstructions, and wet areas, and water was on the flooring. Although he saw no employees in the tunnel, he observed footprints which indicated that employees had been there. He believed the respondent should have known about the conditions cited because the tunnel illumination should be checked at the beginning of the shift and burned-out bulbs should be reported. The conditions were abated within the time specified by replacing the defective light bulbs (Tr. 85-88).

With regard to the C-2B tunnel, Inspector Carisoza stated he could not recall the number of broken bulbs, but there was an excess of three. Due to the restricted visibility, he could not tell whether there was any light in the tunnel tail section which measured some 15 to 20 feet. He walked to the tail section and since the lighting was bad, he exited the tunnel and advised mine management to "fix the lighting before we go in there." He observed two employees coming out of the tunnel, and in his view, the illumination was insufficient to provide safe working conditions. The sufficiency of the lighting is determined by the mine operator, and once installed, it must be maintained in operable condition to provide sufficient illumination. Had all the light bulbs been operating, the illumination would have been adequate. Employees are in the tunnel to check rollers or perform maintenance and the hazards of lack of sufficient illumination consist of tripping, stumbling, or striking solid objects and the head clearance is restricted. The respondent should have known about the conditions cited because routine inspections would have disclosed the conditions. The defective bulbs were timely replaced (Tr. 88-93).

On cross-examination, Inspector Carisoza testified that some bulbs in both tunnels were on, but he did not know the bulb wattage. He did not determine the light fixture intervals, and he indicated that had twice the amount of light been provided there would still be a violation if every other light is out. He determines a violation on the basis of the effect of the illumination on visibility. As an exmple, if 20 lights are installed and one is burned out, if visibility is affected in the

area of the burned-out light, that is a problem. A tunnel is
approximately 150 feet long and

while he did not know how many light bulbs were on in the tunnels in question, there were more than three in each one. He saw no one working in the C-2A tunnel, but if someone were there to perform work and took in a portable light to provide sufficient illumination, that would comply with section 55.17-1. He did not have a light meter and could not estimate the foot-candles of illumination in the tunnels (Tr. 93-97).

Inspector Carisoza testified that the hazards in the C-2A tunnel were higher than those in the C-2B because of excessive spillage and the lighting at the location of the spills at two chutes was insufficient. While the locations where there were defective bulbs were not pitch black, one had to be there awhile in order to see, and even then visibility was marginal (Tr. 97-100).

In response to bench questions, Inspector Carisoza confirmed that he cited the violations because respondent failed to maintain the illumination as installed. Once an operator determines his lighting needs and installs light fixtures, they are required to be maintained. He determined the lack of sufficient illumination on the basis of the fact that light bulbs were burned out and in those locations he could not see. At the time the citations were issued, the requirement that work places be routinely inspected was not a mandatory standard (Tr. 102-105).

Respondent's Testimony

Superintendent Gaines confirmed that he was with the inspector when the conditions cited were observed. He described the tunnel areas in question and indicated that the light fixtures are spaced approximately 20 to 22 feet apart and that each light bulb generates 200 watts. He observed burned-out bulbs but did not recall any two in a row being out. The work activity performed in both tunnels is the same and the normal work activity in the tunnels is very low. In his view, the hazards requiring visual detection are slight, and while the heater areas would be the only problem areas, the company is very conscious of the lighting in those areas. Bulbs are kept in stock and replaced on a regular basis, and portable lights are stocked and used as necessary. With the exception of the broken light fixture at the tail pulley of the C-2B tunnel, he did not believe the burned-out bulbs presented a visibility hazard. No one was working at the tail pulley and portable lights were available if work had to be performed at that location. Due to the great deal of vibration in the tunnels, lights can go out at any time. Allowing for eye adjustments from the outside natural light and the tunnel artificial light, he believed there was sufficient lighting to detect any obstructions along the walkway, and employees carry their flashlights into both tunnels (Tr. 106-110).

On cross-examination, Mr. Gaines testified that no portable lighting was provided when he accompanied the inspector, and while he usually carries a flashlight, he could not recall

whether he had one with him. Employees may or may not carry
flashlights and this depends on their judgment as to

the need for one at any given time. He confirmed that there was no lighting in the tail section of the C-2B tunnel due to a broken fixture, but the walkway stopped at that location. The broken fixture was in a room which encloses the tail pulley, and the only person who would have a need to be there is a lubrication man (Tr. 115-117).

Findings and Conclusions

Fact of Violation

Citation No. 375204, June 29, 1978, and Citations 375450 and 375451, June 27, 1978, charge the respondent with violations of the provisions of 30 C.F.R. 55.20-3 and 55.20-3(a), and the cited safety standards state as follows:

> At all mining operations: (a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. (b) The floor of every workplace shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable. (c) Every floor, working place and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

Citation No. 375204 concerns alleged accumulations of materials in a balcony area of the H-4 take-up pulley conveyor belt, and Citation Nos. 375450 and 375451 concern accumulations of materials on the walkways in the C-1 and C-2A conveyor belt tunnels. In each instance the inspector found that the materials impeded safe access for the employees and constituted dangerous slipping and falling hazards. With regard to Citation No. 375204, the inspector indicated that it was more or less a "housekeeping" violation, did not believe it was a "safe access" violation, and he observed no other conditions constituting violations on the balcony area in question. The other two citations resulted from used metal parts which were apparently not removed from one tunnel area after maintenance, and relatively small amounts of spillage which apparently resulted from a faulty conveyor belt.

With regard to the existence of the conditions as cited in each of the three citations, I conclude and find that MSHA's evidence and testimony supports each of the citations and that the conditions cited constitute violations of the cited standards. The testimony of the witnesses produced by the respondent does not rebut the crucial testimony of the inspector as to the existence of the materials accumulations in question, but rather, goes to the question of the seriousness of the conditions presented. Under the circumstances, I find that MSHA has established the fact of violation as to each of the three cited citations. The cited standard requires that all working places and passageways be kept clean and orderly, and based on the testimony and evidence that work is in fact done at each of

the locations

cited, the areas in question were "working places" within the meaning of that term as found in 30 C.F.R. 55.2(d). Under the circumstances, all three citations are AFFIRMED.

Negligence

With regard to Citation No. 375204, respondent's witness Gaines attributed the buildup of accumulations on the balcony area to a malfunctioning scraper belt washer and a corroded trough. Although he indicated that repairs could not be made while production was going on, I cannot conclude that the accumulations were something that occurred over a short period of time or that respondent was totally unaware of them. To the contrary, I find that the conditions cited should have been corrected earlier without the need for a citation and that respondent failed to exercise reasonable care to prevent the violation which it knew or should have known existed, and that its failure to do so constitutes ordinary negligence.

With regard to Citation Nos. 375450 and 375451 concerning the failure to keep the cited tunnel walkways clean of material spills and extraneous materials, I conclude that the testimony and evidence adduced in these proceedings supports findings that the respondent was aware of the conditions and that it failed to exercise reasonable care in correcting the conditions. Superintendent Gains conceded that certain excess conveyor parts such as rollers, an idler frame, and pan liners were left in the tunnels after prior maintenance had been performed, and while he alluded to certain cleanup procedures, I am not convinced that cleanup in the tunnels was performed in any regular or routine way. Under the circumstances, I find that the citations resulted from ordinary negligence.

Gravity

The citation issued by the inspector concerning the balcony (375204) states that failure to clean the balcony area "prevented safe access." However, this conclusion is contradicted by the inspector's testimony which indicates that this was not the case. Further, the inspector testified that it was not probable that one would fall off the balcony, that he observed no one there when he cited the violation, that employees are not normally in the area while production is going on, and he characterized the citation as a "housekeeping" infraction. Under the circumstances, I cannot conclude that the conditions cited were serious, and I find they were not.

With regard to Citation Nos. 375450 and 375451, I find that the testimony and evidence adduced supports a finding that these were serious violations . Respondent's own witness (Gaines) conceded that persons could slip on the inclined tunnel walkways if they were not careful and that one would have to maneuver his way around some of the spillage which was present. The fact that he could do it safely is beside the point. The presence of accumulations which requires one to climb over or around them presents additional hazards which would not be present if the

accumulations had been cleaned up.

Although Mr. Gaines indicated that employees are not permitted in the C-1 tunnel while the conveyor is running, certain designated employees are present while the conveyor is running in the C-2 tunnel, and to this extent, the presence of employees in a tunnel walkway area which is obstructed increases the hazards presented. Coupled with the limited clearance in both tunnels, and the inspector's testimony concerning the overall tunnel conditions he observed on the day in question, I can only conclude that the citations were serious and respondent's testimony and evidence has not convinced me otherwise.

Fact of Violations

Citation Nos. 375452 and 375453, both issued on June 27, 1978, allege violations of 30 C.F.R. 55.17-1, in that the inspector believed that sufficient illumination was not maintained in the C-2A and C-2B tunnels due to broken and burned out ligh bulbs. Section 55.17-1 provides as follows: "Mandatory. Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

In addition to the arguments advanced at the hearing with respect to these citations, the parties were afforded an opportunity to submit additional arguments in support of their respective positions, but they declined to do so. Accordingly, I have considered the arguments made at the hearing by the parties.

In support of its position, respondent argues that the mine in question also comes under the illumination standards established by California OSHA (Exh. R-2). That standard only requires as a minimum a very low level of illumination, or half-a-foot candle power. Since the cited MSHA standard only requires that "sufficient illumination shall be provided," respondent argues that this standard is too vague to provide any meaningful guidelines for compliance and that the OSHA standard is sufficient for compliance (Tr. 111). Respondent maintains that the intent of the cited standard deals with the number of light fixtures which are required to maintain sufficient lighting and not with the question of whether light bulbs are burnt out. The essence of respondent's defense is that MSHA must first establish a standard as to the amount of illumination required, i.e., a fixed number of light fixtures spaced at appropriate intervals to provide sufficient lighting, and if it can show that the required amount of illumination is not maintained, then it can support a violation.

Respondent maintains that the fact that a light bulb may be burned out is insufficient to establish a violation, unless MSHA can establish that the illumination which remains from the other fixtures is not sufficient to provide adequate candle power to insure sufficient lighting for the workplace in question. The question of whether a violation has occurred is dependent on the amount of lighting provided in an area where work is being performed, taking into account any hazards presented by the lack

of adequate lighting. Since the inspector failed to establish
the required illumination standard

in the first instance, and since he failed to make any tests with a light meter or other device to establish his conclusion that the lighting was not adequate, respondent maintains that MSHA has failed to carry its burden of proof.

MSHA takes the position that it is incumbent on an operator to establish his own illumination standards, and that once light fixtures are installed and maintained through the use of workable fixtures and bulbs which are burning, he has met the requirements of section 55.17-1. However, if a fixture is inoperative or a bulb is burned out, MSHA seemingly maintains that the standard is violated per se because sufficient illumination has not been maintained.

The inspector testified that he had difficulty in seeing where he was going in the tunnel because his vision was impaired by the burned out light bulbs and he did not have clear vision. Although some of the bulbs were burning, the inspector made no effort to ascertain the remaining wattage, nor did he utilize a light meter to determine the actual lighting and he made no estimate of the existing candle power of illumination in the tunnels in question. He simply concluded that the lighting was insufficient and the sole basis for this conclusion was the fact that bulbs were burned out at several locations and he had some difficulty seeing. Although he guessed that three bulbs were burned out, he did not count the number of bulbs which were in fact burned out and had no idea as to the total illumination which was in fact present in the tunnels on the day the citations issued. When asked whether he believed there was sufficient lighting for one to detect any obstructions along the walkway, the inspector replied "Once an individual will allow their eyes to adjust from the bright light outside to the artificial light inside the tunnel, I would say yes. Now, there is a transition period there" (Tr. 109-110). He also indicated that employees do carry flashlights with them while in the tunnels (Tr. 110).

Respondent's witness Gaines testified that while some bulbs were burned out, he could not recall any two in a row being burned out. Allowing for a period of time for the eyes to adjust from the outside natural light, he believed there was sufficient lighting to alert anyone as to any stumbling hazards or obstructions along the tunnel walkways. He conceded the fact that the light fixture at the tail section of the C-2B tunnel was broken and inoperative, but indicated that the walkway ended at that location. Further, he indicated that the fixture was located in a room which encloses the conveyor tail pulley and that the only person who had any need to be there would be a lubrication man.

After careful review of the evidence adduced and the arguments advanced by the parties with respect to their respective positions, I conclude that respondent's arguments are well taken. I agree with respondent's assertion that section 55.17-1, is very broad and somewhat vague in that the question of sufficient illumination leaves much to the imagination. I fail to understand how an inspector can determine that the existing

lighting is insufficient when he not only fails to take a light meter test, but also has not determined the amount of existing lighting. On the facts here presented, it

would appear that the lighting was sufficient enough to permit the inspector to walk through the tunnels to make his inspection. The inspector conceded that he had no problem with the visibility once his eyes adjusted to the tunnel conditions and that bulbs were in fact burning at least in every other light fixture which he observed, and respondent's evidence indicates that the existing light was sufficient enough to permit detection of any obstacles which may have been on the walkways. Under the circumstances, with respect to Citation No. 375452, I find that MSHA has failed to establish a violation by any credible evidence which establishes the inspector's assertion that the lighting along the C-2A tunnel walkway was insufficient, and that citation is VACATED.

With respect to Citation No. 375453, although I cannot conclude that MSHA has established that there was insufficient lighting along the walkway of the C-2B tunnel, it has established that there was no lighting at all in the room which housed the conveyor tail section due to the fact that the light fixture itself was completely broken. Although the walkway may have ended at that location, the broken light fixture provided no light at all and respondent has conceded this fact, as well as the fact that a lubrication man would be exposed to a hazard at that location due to the absence of any light. In these circumstances, I find that the failure to provide any lighting at all in the room in question constituted a violation of section 55.17-1, and to this extent the citation is AFFIRMED.

Negligence

With regard to Citation No. 375453, I find that the respondent should have been aware of the fact that the light fixture in the C-2B tunnel conveyor tail pulley room area was inoperative and provided no lighting at all. I find that the condition cited resulted from respondent's failure to exercise reasonable care to correct a condition which it knew or should have known existed and that this failure on its part constitutes ordinary negligence.

Gravity

I find that Citation No. 375453 is a serious violation. Respondent's witness Gaines conceded that the failure to provide any lighting in the conveyor tail room area presented a visibility hazard, and while it was true that no one was in the area on the day the citation issued, the fact is that a lubrication man is normally in the room performing work and the absence of any lighting increased the hazard presented and exposed him to potential injuries.

History of Prior Violations

The parties stipulated that the mine in question has no prior history of violations and I conclude that on the basis of the record in this proceeding any increased assessments on the basis of any asserted prior history is not warranted.

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

On the basis of the stipulated annual mine production of four million tons of iron ore, I conclude that respondent's mining operation at its Eagle Mountain Mine and Mill was a large mining operation, and the parties have stipulated that any civil penalty assessments levied in this matter will not adversely affect respondent's ability to continue in business.

Good Faith Compliance

The evidence and testimony adduced in these proceedings support a finding that as to all proven violations, the respondent timely abated the conditions, and I conclude that they were timely abated in good faith.

Penalty Assessments

On the basis of the foregoing findings and conclusions made in these proceedings, civil penalties are assessed for each citation which has been affirmed as follows:

Citation No.	Date	30 C.F.R. Section	Assessment
375204	06/28/78	55.20-3	$ 35
375450	06/27/78	55.20-3(a)	$125
375451	06/27/78	55.20-3	$200
375453	06/27/78	55.17-1	$ 90

On the basis of the foregoing findings and conclusions made in these proceedings, Citation No. 375452, June 27, 1978, alleging a violation of 30 C.F.R. 55.17-1, is VACATED.

On motion by the petitioner during the hearing, Citation No. 375455, June 27, 1979, alleging a violation of 30 C.F.R. 55.14-6, is VACATED.

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings in the amounts shown above, totaling $450 within thirty (30) days of the date of this decision.

George A. Koutras
Administrative Law Judge