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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. LAKE 79-217-M A.O. No. 33-00099-05006
v.	Docket No. VINC 79-100-PM A.O. No. 33-000099-05003
THE STANDARD SLAG COMPANY, RESPONDENT	Marblehead Stone Plant & Quarry

DECISIONS

Appearances: Linda Leasure, Attorney, Office of the Solicitor,
U.S. Department of Labor, Cleveland, Ohio, for
the petitioner William Ramage and Stephen Hedlund,
Esqs., Youngstown, Ohio, for the respondent

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals 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), charging the respondent with six alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations.

Respondent filed timely answers contesting the civil penalty proposals and requested a hearing. A hearing was convened on July 10, 1980, in Marblehead, Ohio, and, at the request of the parties, the hearing was conducted at the mine site in order to facilitate a visit to the areas where the alleged violations occurred for the purpose of visually familiarizing me and the parties with the conveyor belt which was cited for unguarded pulley areas and the gallery where the access citation was issued. The parties filed posthearing briefs, and the arguments presented have been considered by me in the course of these decisions.

Issues

The principal issues presented in these proceedings are:
(1) whether respondent has violated the provisions of the Act and implementing regulations

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as alleged in the proposal for assessment of civil penalties filed in these proceedings, 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 these decisions.

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, Pub. 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 C.F.R. 2700.1 et seq.

Stipulations

The parties agreed to the following (Tr. 2-4):

1. Respondent's mining operations constitute a "mine" within the meaning of the Act and respondent is subject to MSHA's enforcement jurisdiction.
2. Respondent has a good history of prior violations.
3. The scope of respondent's mining operations at the mine in question constitute a medium-to-large mining operation.
4. Respondent demonstrated good faith compliance in abating the citations which were issued in these proceedings.

Discussion

Docket No. VINC 79-100-PM

Citation Nos. 368786 and 368787, both issued by MSHA inspector Michael J. Pappas on August 2, 1978, cite violations of 30 C.F.R. 56.14-1, and the conditions described assert that guards were not provided on the head and tail pulley of the No. 18 conveyor belt.

Testimony and Evidence Adduced by the Petitioner

MSHA inspector Michael J. Pappas, testified that he conducted a spot inspection of the mine site on August 2, 1978, and upon observation and determination that the head and tail pulley of the No. 18 conveyor belt were not guarded he issued the two citations in question and cited a violation of the guarding requirements of mandatory standard 56.14-1. The head pulley pinch point was at the top of the pulley drum and the tail pulley pinch point was at the bottom of that pulley. The hazards involved at both locations involved persons becoming entangled by getting their clothing or hands and arms caught in the pinch points. The belt was not in operation at the time the cited conditions were observed and it was the inspector's understanding that electrical maintenance work was being performed on the belt, but he could not remember observing anyone around the belt areas in question (Tr. 5-8).

On cross-examination, Mr. Pappas confirmed that the belt was a new piece of equipment and that it was not in operation at the time the citations issued. However, he was made aware of the fact that the belt had been previously used and was in operation, but he could not recall to what extent it had been used to transport stone, and he confirmed that electrical maintenance work was being performed on the belt (Tr. 9-10).

In response to bench questions, Mr. Pappas stated that it was his understanding that the belt was not in full production because the electrical installation had not been completed. However, he stated that it is his practice to cite an operator for guarding violations if he does not observe any actual or obvious maintenance being performed. If he observes a guard off a piece of equipment which is down for maintenance he will not issue a citation. In this particular case, he observed no guarding devices at all (Tr. 10-12).

Respondent's Testimony and Evidence

Plant superintendent Joseph Lucas testified that the cited conveyor belt was installed in approximately March of 1978 and it was used to transport and load a particular type of stone being stored in the area. After the initial installation of the belt, work had been performed on it, and according to company records, it was first operated on July 27, 1978. However, electrical problems were encountered after an hour or so of using the belt. The belt was operated so as to check out its tracking during the actual loading process and to ascertain whether any adjustments were required. No guards were installed on the belt during this initial operational period because the system had to be checked out to determine whether it was functioning properly before any guards were manufactured and installed, and no one was around the pulley areas. Electrical problems were encountered as soon as the belt began to run, and according to company maintenance records, repairs were begun on July 27th, and subsequent maintenance work was performed on August 2, 4, 5, and 7 on the belt centrifugal switches. During this maintenance work, the power would be shut

off, the belt locked out, and another belt was used to transport the stone materials (Tr. 22-30; Exhs. R-1 through R-3(a)). The guards were installed on August 5th (Tr. 37).

On cross-examination, Mr. Lucas reviewed his maintenance records and testified as to certain maintenance which had been performed on the belt in question as reflected by those records during the periods July 27 through August 2, 1979, during which time the belt would have run empty and with no materials on it (Tr. 30-35). Aside from testing the belt while materials are on it, when actual electrical maintenance is performed on the belt it is locked out and not running (Tr. 38).

General superintendent Thomas Neopolitan testified that at the time the custom belt specifications were submitted for the fabrication of the conveyor itself, guards were not included because the conveyor had to be installed first in order to determine the types of guards required. He fully intended to install the guards, and he agreed that failure to guard such equipment would expose someone to danger. He confirmed that the conveyor in question was initially fabricated and installed in July 1978, and final installation took place in August. He also confirmed that other similar conveyors used at the mine were guarded (Tr. 38-42).

Docket No. LAKE 79-217-M

By motion filed June 26, 1980, petitioner moved to dismiss three citations on the ground that they were vacated by MSHA. The motions were granted at the hearing and the citations were dismissed (Tr. 2). The citations in question are as follows:

Citation No.	Date	30 C.F.R. Section
368909	3/21/79	56.11-2
368910	3/21/79	56.14-1
368911	3/21/79	56.14-1

Citation No. 368912, issued on March 21, 1979, by MSHA inspector Michael Pappas, charges a violation of 30 C.F.R. 56.11-1, and the condition or practice described by the inspector on the face of the citation states: "A safe means of access was not provided to the 4-A galleys [sic]. Buildup of material on walkway of approx. 8' -12' , 20" -24" ."

Testimony and Evidence Adduced by the Petitioner

Inspector Pappas confirmed that he inspected the mine site on March 21, 1979, and observed the conditions of the 4-A gallery. Access to the gallery is by means of an elevated walkway, and access to the catwalk area where the violation occurred was by means of a ladder leading down to the catwalk and work platform. He cited a violation of section 56.11-1 after finding an excessive buildup of materials on the catwalk leading to the work platform under the takeup belt pulley area of the gallery belt. The extent of the material buildup was some 6 to 7 feet to a height of 2 feet. The elevation of the work platform was approximately 90 feet off the ground and the hazard involved was that someone would have to walk over the buildup on the catwalk in order to reach the work platform. Abatement was

achieved by cleaning the catwalk (Tr. 13-16).

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On cross-examination, Mr. Pappas confirmed that the gallery area cited was the catwalk area reached by means of a ladder located at the top of the gallery. He believed the area should have been cleaned up by shoveling the material off the catwalk, and unless the material is cleaned periodically, the metal catwalk would in time be subjected to rust, rot, and corrosion. His principal concern, however, was the fact that a person walking on the catwalk would have to crawl over the buildup of materials, and he believed that such an area should be cleaned before anyone goes over it (Tr. 16-17).

In response to further questions, Mr. Pappas described the materials which were built up on the catwalk as fine stone particles which fall from the self-cleaning belt pulley located above the catwalk, and due to the dampness of the materials, it adheres together in a lumpy mass similar to mud. He did not know how long the materials had been on the catwalk and he made no inquiry of the respondent in this regard. He was not sure whether the belt had been running on the day in question and he observed no one in the gallery area, and no one was working in or around the area cited. Plant Superintendent Lucas was with him at the time and the conditions cited were discussed with him but he could not recall the specifics of that conversation. Mr. Pappas could not state how frequently any employee is required or likely to be in the cited area in the normal course of his duties and he checked no plant maintenance records to ascertain the frequency of any maintenance work being performed in the cited area. He reiterated that his concern was over the fact that someone walking over the catwalk to reach the work platform would have difficulty climbing over the buildup and would likely fall off the catwalk to the ground below (Tr. 17-21).

Respondent's Testimony and Evidence

Plant Superintendent Lucas described the operation and function of the gallery and indicated that it is part of a belt-conveyor system used to transport and store washed stone at the stockpiles beneath the gallery. He identified Exhibits R-4 and R-5 as photographs showing the access way to the gallery. A person would be required to go the top of the gallery area in order to grease rollers, and a person would have occasion to walk the top area once or twice a week to see that the system is working properly. Access to the work platform area cited by Mr. Pappas is by means of a ladder, and he could not remember the last time someone was in that area. The only reason one would have for being in the cited area would be to change out the conveyor boot pulley or in the event of a major breakdown, people would have to go there. The boot pulley has been changed out within the last year or two, but lubrication can be performed from the top and greasing is performed when the conveyor is shut off and locked out. He identified Exhibit R-6 as a photograph of the inside of the gallery, and he confirmed the fact that materials do build up on the work platform and they result from fine wet materials falling off the end of the belt after the bulk of it has been dumped to the storage piles below the gallery.

Mr. Lucas indicated that the belt usually runs 24 hours a day during its regular operation, and he estimated it would take less than a week for any

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accumulation or material buildup of the size described by the inspector. However, he also indicated that under standard plant procedures, material buildups are cleaned off before anyone goes to the platform area. He identified photographs of the ladderway, work platform, and material buildup (Exhs. R-7 through R-10). He indicated that materials continually build up at a fast rate and a person cannot be stationed there while the conveyor is running. The conveyor should be shut down when materials are being cleaned up, and it is in fact locked out when maintenance is being performed, and except for someone going up to the gallery to check on the materials tripper, no one is there while the conveyor is running (Tr. 42-50).

On cross-examination, Mr. Lucas stated that the wash plant operator would have occasion to walk through the area for the purpose of visually observing the belt rollers and tripping device, but he would have no reason to climb down the ladder to the work platform area in question since everything can be observed from above that location. However, if one had reason to go to the work platform area under the belt pulley he would have to use the ladder to get there. Mr. Lucas confirmed that he understood the fact that the inspector was citing the work platform area where the materials were built up (Tr. 50-52).

In response to bench questions, Mr. Lucas stated that the work platform was apparently installed to facilitate access to the conveyor belt tripper from underneath the belt, but that the tripper is usually changed out from the other end of the belt. Although he indicated that the belt could function without the work platform, he also admitted that it might have to be used. In the event the platform is used, the belt is shut down and someone will clean the platform area in advance of anyone going there and this would be the responsibility of the maintenance foreman on each shift. However, any work required to be performed in that area usually entails major problems taking more than 8 hours to correct and no one has any reason to perform any maintenance work there which might take 5 or 10 minutes. The person who walks the area to observe the belt in operation has no reason to routinely climb down the ladder and walk around the work platform, and in the 4 years that he has been superintendent he has never had any occasion to walk into that area, but he could not confirm that anyone else has been there in this time period (Tr. 53-56).

Findings and Conclusions

Docket No. VINC 79-100-PM

Fact of Violations--Citation Nos. 368786 and 368787

In this case, respondent is charged with violations of section 56.14-1 for failure to have guards at the head and tail pulley of one of its conveyor belts. Section 56.14-1 provides as follows: "Mandatory. Gears; sprockets; chains; drive; head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts

which may be contacted by persons, and which may cause injury to persons, shall be guarded."

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Mandatory safety standard section 56.14-6, provides that "Except when testing the machinery, guards shall be securely in place while machinery is being operated."

Petitioner argues that section 56.14-1 mandates guarding on various machine moving parts, including head and tail conveyor pulleys, to preclude contact with the pinch points, and that the facts establish that prior to the inspection, the respondent operated the conveyor without the guards in place. Even assuming that the "testing or repairs" exceptions set forth in section 56.14-6, are applicable here, petitioner asserts that the exception refers to curing specific mechanical malfunctions rather than to the testing phase of plant setup. In support of this argument, petitioner maintains that any electrical repairs performed by the respondent in this case were at locations removed from the unguarded pulley areas and that such testing for electrical problems would not have necessitated removal of the guards. In short, petitioner takes the position that the exception found in section 56.14-6, simply does not apply to the facts presented in the instant proceeding.

In support of its position, petitioner cites a decision by Judge Fauver in MSHA v. Union Rock and Materials Corporation, Docket No. DENV 78-579-PM, March 5, 1980, where he affirmed a violation of section 56.14-6, after concluding that the phrase "except when testing machinery" is limited to the testing or repairing of the equipment's mechanical parts due to a malfunction rather than to the testing phase designed to align the conveyor belts and to check their rotation. Judge Fauver found that "testing machinery" is not synonymous with a "testing phase" because the first situation involves curing a mechanical malfunction while the second involves assuring the smooth running of the complete operation. He observed that in the latter instance, which could last as long as 6 to 7 days, the moving parts of the conveyor would be in operation creating a hazard which the safety standard is designed to prevent, but that when a piece of equipment is malfunctioning, the guards would have to be removed only for short periods of time while making the repairs.

Respondent's defense to the citation centers on its assertion that at the time Inspector Pappas inspected the newly installed conveyor, it was not in operation but had been shut down, with the power locked out, for maintenance, and that it was impossible for anyone to have been injured by the unguarded pulleys. Further, respondent asserts that the only time the conveyor had been run prior to the inspection of August 2, was for the purpose of testing it. Since section 56.14-6, provides an exception to and limitation of the guarding requirements of section 56.14-1, respondent concludes that during the testing of equipment, whether newly installed or after maintenance, it would not be practicable or necessary to have guards in place on the pulleys. In support of its interpretation, respondent points out that in Docket No. LAKE 79-217-M, two of the three citations vacated and dismissed at the hearing on motion by the petitioner also concerned alleged violations of section 56.14-1, cited by Inspector Pappas March 21, 1979, for failure to provide guards

for the A-20 stacker conveyor drive motor belts and tail pulley,
and that the petitioner moved to dismiss them after it was

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pointed out that the stacker was out of service because maintenance was being performed at the time of the inspection.

Petitioner's written motion of June 26, 1980, for the dismissal of the two March 21, 1979, citations for violations of section 56.14-1, simply states that they were vacated by MSHA, and no further information was presented by the parties during the hearing with respect to the facts and circumstances surrounding MSHA's vacation of those citations. However, in its answer and notice of contest filed September 14, 1979, respondent states that at the time the equipment was cited it was in scheduled maintenance, that work had commenced on March 13, 1979, and was completed on April 2, 1979, 9 working days after the inspection of March 21, 1979, and that the inspector was informed at that time by the mine superintendent that the stacker was being worked on and was not ready for production. In support of its contentions in this regard, respondent included copies of its daily maintenance time records which reflected the hours that were worked on the stacker, and aside from the general remarks on most of the time sheets, four of the records of March 26, 29, and April 2, 1979, specifically show work performed on the guards and belt. Under these circumstances, respondent's assertion that the circumstances surrounding petitioner's vacation of the two section 56.14-1 citations of March 21, 1979, present identical situations requiring consistent application of the standard has merit and there is a strong inference that petitioner's rationale for vacating the citations and moving for dismissal of the charges was based on its acceptance of respondent's contentions in this regard.

Inspector Pappas had no independent knowledge as to how long the belt in question had been operated in an unguarded condition. At the time the citation issued, he was told that the belt had not been fully operational and in production because the electrical installation taking place nearby the belt had not been completed, and he indicated that the area where the electrical maintenance was taking place was separate and apart from the physical location of the cited unguarded belt pulleys (Tr. 10). He was aware of the fact that the belt had been previously in operation for the purpose of loading and transporting stone to a boat (Tr. 9). When asked whether he observed the belt being worked on when he cited it, he answered "There was electrical work being done on the electrical system" (Tr. 9). However, with respect to his being advised that the belt had been used sometime in the past to some degree, he did not know whether the use of the belt in this regard was for testing or production (Tr. 10).

In explaining his interpretation and application of section 56.14-1, Mr. Pappas stated that he recently observed actual maintenance taking place in a similar situation as the one presented in this case and the guards were off the equipment. He did not issue a violation because he actually observed the men performing the work. He also indicated that he would not issue a citation in such a situation if he is advised that maintenance is in progress but that the men are simply taking a lunch break. In short, if he does not actually observe the maintenance taking

place, and has no personal knowledge of this fact, he will issue a citation for unguarded pulleys. In the instant

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case, no guards were in place or near the equipment and he saw no evidence of any maintenance being performed (Tr. 12). He was aware of the fact that the equipment was new, that it was not in operation at the time he cited it, and that he observed no one in the area of the unguarded pulley pinch points.

Respondent's testimony and evidence clearly indicates that the installation of a workable conveyor system to accommodate the specific needs and requirements of the operator in the conduct of his daily mining operations is no easy task. Respondent has established through credible testimony of its plant superintendents that the guards ultimately installed on its conveyors once they become fully operational as an integral part of its production process are fabricated and manufactured in accordance with specifications drafted by respondent's engineering department after analysis of the types of materials which have to be moved. Since the respondent's mining operation involves the movement of different types of materials over great distances to the boat-loading dock, each part of the conveyor system must necessarily be tailored to its specific needs and requirements.

Superintendent Neopolitan's testimony reflects that the conveyor belt in question is a customized conveyor installation made up of stock parts such as head pulley gear reducers and motors, and head pulleys and guards which have to be shop-fabricated and machined. Once the belt system is put together, the guards cannot be fabricated and installed until such time as the operator is satisfied that the system will work under normal production conditions (Tr. 38-41). I find this practice and procedure to be a reasonable and common sense approach, and Mr. Neopolitan himself candidly agreed that aside from testing, failure to guard the conveyor parts in question, in the normal course of business, would expose someone to a danger (Tr. 40). Mr. Neopolitan also testified that similar conveyor belt operations at other mine locations which operate the same way as the conveyor which was cited are guarded, but he did not know whether the other equipment guards were fabricated or installed following the same procedures he described because that equipment was installed and operational before his employment at the mine (Tr. 41). However, he did state that the plant belt lines are not purchased on the open market with manufacturer's guards already installed on them (Tr. 41).

Plant Superintendent Lucas testified that the conveyor belt in question was first operated on July 27, 1978, that work had been performed on the belt from the day it was initially installed sometime in March 1978. It was initially installed at that time for the purpose of handling a particular type of stone being stored in that area. Prior to this time, the plant was operating with other conveyor systems, and work was being performed on the conveyor right up to the time it was put in operation on July 27. However, the belt was only operated for an hour or so before electrical problems developed causing it to be buried while it was loading a boat, and this was the first time it had run since it was put together (Tr. 23-24). The purpose

for running the belt with loaded stone was to ascertain whether it was operating properly and to determine whether the belts were "tracking" properly on the belt rollers. If the tracking is not working properly, work has to be done on the pulleys, rollers, and on the motor taper locks and shivs, and the pulley itself may have to be replaced.

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Mr. Lucas conceded that no guards were in place when the conveyor was first used because it had to be operated to ascertain that everything was in proper working order while the material was being loaded. An inoperable switch failed to cut another feeder belt off and the material kept running and buried the conveyor belt in question (Tr. 26), and company maintenance records reflected that work began to correct that problem on August 2, 1978, and the next time the belt was used to load a boat was on August 7, 1978, and the guards were installed before that time, namely, on August 5, 1978 (Tr. 28). He conceded that the belt was tested again on and off before the guards were installed to insure that it was functioning properly, but did not know how many times it was run (Tr. 28).

Mr. Lucas testified that during the time work was performed on the conveyor, the power would be shut off, the equipment is locked out, and the person that locks it out retains the key. During this testing period, loading is conducting by means of another belt-conveyor route, but in order to determine whether the conveyor is tracking properly, it has to be done with materials on it and it necessary that a ship be present so that the materials are not dumped in the lake (Tr. 29). However, he was unsure whether the belt ran between July 27 and August 2, but if it did, it would have been empty because the next time a boat was loaded was on August 8 (Tr. 31).

After careful review of Judge Fauver's findings of fact in Union Rock and Materials Corporation, supra, it seems clear to me that the facts in that case are somewhat different from those presented in this case. There, the entire existing plant equipment consisting of 15 conveyor belts had been completely moved to a new mine location for set up some 6 to 7 days before the inspection, and the conveyors would normally not be operated without the guards around the tail pulleys and belt drives except in those instances where the guards had to be removed to allow belt adjustments to be made. Since the existing equipment was simply being moved from one location to another, I assume that it included existing guards which had also been removed during the moving process but not reinstalled at the time the inspectors arrived on the scene. Observation of materials stockpiled at the end of the belt led the inspectors to conclude that the belts had been running without guards in place for about an hour or so to check their rotation and alignment.

On the facts presented in this case, the conveyor belt cited by Inspector Pappas was a newly installed single and fairly short and isolated conveyor which was not in operation when Mr. Pappas observed it. He saw no stockpiled materials and had no basis for concluding that the belt was used for production other than a statement made by some unidentified person that stone was moved on the belt sometime in the past during a period of time when the belt was not in full production because the electrical installation had not been completed. Mr. Pappas also confirmed that electrical work was being done nearby on the electrical system, and he pointed out the area where it was being done during the site visit (Tr. 9-11).

Petitioner argues that any repair to the conveyor electrical system could have been performed with the guards in place, and that the only necessary alteration in its procedures to insure compliance with section 56.14-1, would be to fabricate and install guards early on during the conveyor hook-up sequence. Such a broad and general conclusion flies in the face of the specific facts of this case, and acceptance of petitioner's rigid application of section 56.14-1 would place the cart before the horse, and would require an operator to manufacture and install guards during the initial conveyor installation without really knowing whether the system will work. I simply cannot accept this as a rational and reasonable interpretation and application of the standards in question. I conclude that on the facts of this case, the requirements of section 56.14-1 cannot be divorced from the exception stated in section 56.14-6. I conclude further that the term "testing machinery" as found in section 56.14-6, includes the initial setup of the equipment, including its operation with loaded materials to determine whether it will function properly. Once this initial testing phase is completed, and the equipment is put into normal production, an operator would be required to insure that the guards stay on the equipment as required by section 56.14-1, as well as section 56.14-6. I reject Judge Fauver's narrow interpretation that the section 56.14-6 exception applies only to actual mechanical breakdown of the equipment. In my view, there is little or no practical distinction between a mechanical and electrical breakdowns insofar as the requirements of the standards in question are concerned. Any repair work necessary to render the equipment operational again would have to be done in accordance with the requirements of section 56.12-16, which mandates deenergizing and locking out the equipment before any mechanical work is undertaken.

In view of the foregoing findings and conclusions, I conclude and find that at the time Inspector Pappas observed the conveyor belt in question, it was down and locked out for repairs and testing, and he was aware of this fact because he observed maintenance being performed on the conveyor's electrical system nearby. I conclude further that since the conveyor was newly installed and undergoing tests to determine whether it was operating and functioning properly, it was not required to be guarded until such time as those tests were completed and the conveyor system was put into normal production. The fact that the conveyor was operated in the past for an hour or two with stone on it does not detract from the fact that respondent has established through credible evidence that it was operated only during the testing phase. Accordingly, the exception applied at that time, and petitioner has not convinced me otherwise. I find that petitioner has failed to establish a violation, and Citation Nos. 368786 and 368787, issued August 2, 1978, are VACATED.

Findings and Conclusions

Docket No. LAKE 79-217-M

In this case, respondent is charged with one violation of

the provisions of mandatory safety standard section 56.11-1,
which provides as follows:

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"Safe means of access shall be provided and maintained to all working places." Citation No. 368912, on its face, alleges a violation of the "safe access" provision of section 56.11-1, in that there was an alleged buildup of material on the walkway of the 4-A gallery. As part of its posthearing arguments, petitioner includes a motion to amend its civil penalty proposal to charge the respondent, in the alternative, with a violation of mandatory standard section 56.20-3, which provides 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.

In support of its motion to amend, petitioner relies on Rule 8(e)(2) and 15(b) of the Federal Rules of Civil Procedure, and asserts that the amendment is proper inasmuch as it neither alters nor increases the facts or issues in dispute, that respondent is not prejudiced, and that an amendment to conform to the evidence is appropriate.

On October 20, 1980, respondent filed an opposition to petitioner's motion to amend the charges to cite an alternative violation of section 56.20-3, and argues that to permit such an amendment after all of the evidence and testimony is in, and after the hearing has been concluded, is basically unfair since respondent has no opportunity to offer new evidence to meet such a charge. Respondent points out that Inspector Pappas' reason for issuing the citation in the first place was his concern that a person could have fallen from the area cited due to the buildup of materials. Further, respondent asserts that while Mr. Pappas made a passing reference on cross-examination to his concern that the walkway could rot over a period of time due to weather, there is no evidence that he ever inspected it for rotting, and while petitioner had ample opportunity to amend its pleadings at the hearing while the witnesses were present, it did not do so.

After consideration of the arguments presented, petitioner's motion to amend at this late date is DENIED. The thrust of petitioner's case is the asserted hazard of someone tripping and falling from the walkway in question due to the material buildup. Petitioner's attempts to transform a tripping and falling citation into an after-the-fact housekeeping violation is rejected. In my view, piecemeal enforcement through posthearing amendments based on an inspector's testimony a year or so after his initial observations and issuance of a citation is not the best way to insure compliance with any mandatory safety standard. It seems to me that if the inspector in this case really believed that rot was a problem, it was incumbent on him to inspect the walkway for that condition and to include it as part of the

condition cited on the face of the citation. In this case,
petitioner is bound by the

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citation as issued and I will consider only the alleged violation of section 56.11-1.

Fact of Violation--Citation No. 368912, 30 C.F.R. 56.11-1

Respondent is charged with failing to provide and maintain a safe means of access to a working place. Although the description of the condition cited by the inspector on the face of the citation is not a model of clarity, I believe it is clear that the respondent knew the precise area which concerned the inspector and the testimony of Mr. Lucas and the photographs he introduced confirm this fact. Having viewed the site of the alleged infraction, the area cited by Inspector Pappas is a narrow catwalk leading to a work platform under the conveyor belt on the 4-A gallery. Access to the top of the gallery itself is by an elevated inclined metal grated walkway as depicted in photographic Exhibits R-4 through R-5, and access down to the catwalk is by means of a metal ladder normally protected by a piece of chain as depicted in Exhibits R-8 and R-9. Accordingly, the issue presented is whether the buildup of materials on and about the catwalk area in question constituted a violation of section 56.11-1.

In support of its case, petitioner asserts that the evidence establishes that respondent failed to remove a buildup of consolidated wet limestone particles measuring approximately 2 feet in height and 6 to 7 feet in length which were present on the catwalk leading to the work platform under the gallery conveyor belt. Petitioner asserts further that the buildup materials effectively blocked ingress and egress to the platform area, that the fall distance from the catwalk to the ground below was some 90 feet, and that employees regularly utilize the platform to perform maintenance on the takeup pulley located under the gallery conveyor.

Respondent argues that section 56.11-1 should be read in light of the definition of the term "travelways," which is the regulatory heading under which the section is found. Coupled with the definition of the term "working place," respondent maintains that it is clear that working places and other areas to which safe access is required are for areas regularly used by mine personnel. Since the evidence establishes that the area in question is not regularly used by personnel, and is in fact used very infrequently, respondent argues that a requirement that this area be kept clean at all times is a totally unreasonable application of section 56.11-1, and is contrary to the purpose of that section. Respondent also maintains that no one is compelled to attempt to cross the area before it is cleaned, that the only foreseeable danger would be in the cleaning operation itself, and by requiring respondent to repeatedly shut the conveyor down in order to clean the area, the chances of injury are greatly increased due to the instances in which someone would have to be in the area to shovel off the debris. Regarding the inspector's concern that an employee might inadvertently wander into the area, respondent maintains that this is extremely unlikely due to its location which requires an employee to walk all the way to

the end of the gallery, remove a chain, go down six or seven steps, and then proceed across a walkway which leads to no other place frequented by employees.

Respondent does not dispute the fact that there was a buildup of materials on the catwalk in question and it is clear from the testimony presented that the material existed as stated by Inspector Pappas. It is also clear that Mr. Pappas did not know how long the materials had been present, and since he did not review any maintenance records he had no basis for determining how often anyone is required to climb down the ladder and walk across the catwalk to the platform adjacent to the underside of the conveyor belt, and he candidly admitted that he had no knowledge of the frequency of travel along the catwalk. Further, it is also clear to me that Mr. Pappas cited section 56.11-1, out of a concern that someone using the catwalk would have to climb over the material buildup and that this presented a tripping or falling hazard. His off hand remark concerning possible rusting and rotting of the catwalk, even if true, would still in my view constitute a condition to be cited under section 56.11-1, since the existence of a rotted or rusted catwalk, if proved to be in that condition and in fact contributed to the weakening of the structure, would not constitute a safe means of access. However, the inspector was not concerned with any such condition at the time he issued the citation, and in fact, made no inspection of the catwalk to determine whether it had been corroded or rusted. He clearly believed that the obstruction caused by the materials on the catwalk precluded safe access to the platform area beneath the conveyor.

The un rebutted testimony of Plant Superintendent Lucas is that during the normal operation of the conveyor there is no need for anyone to climb down the ladder and walk across the catwalk in question. Visual inspections, greasing, and other lubrication of the conveyor is performed from above the platform above the area in question. Any cleanup or maintenance work is performed while the conveyor is shut down or locked out, and company procedures dictate that when anyone is required to descend the ladder to reach the work platform adjacent to the underside of the conveyor, someone is dispatched to the area in advance to clean up the area. Mr. Lucas also indicated that the only time anyone has any occasion to descend the ladder and cross the catwalk is when there is a major break down of the conveyor or when the conveyor boot pulley is changed out, and that while the pulley has been changed in the last year or two, he could not remember the last time anyone had occasion to be in the catwalk area and he personally has not been there in the last 4 years.

Petitioner's conclusions at pages 6 and 7 of its brief that the catwalk was used on a regular basis to gain access to the work platform to perform maintenance on the takeup pulley is unsupported by any credible testimony of record. Having walked the entire length of the gallery in question with the parties during the site visit, including climbing down the ladder which was protected by a chain for the purpose of viewing the catwalk in question, it seems clear to me, and I conclude that the area cited is not a regularly used passage, walk, or way regularly used and designated for persons to go from one place to another in the mine.

Section 56.11-1 requires that a safe means of access be provided and maintained to all working places. The phrase "working place" is defined by section 56.2 as "any place in or about a mine where work is being performed."

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The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." Petitioner's suggestion that the phrase "travelway" is somehow part of the specific safety standard cited in this case is rejected. The term is simply used as a heading under which are found specific standards, including requirements for painting ladders.

After review and consideration of all of the evidence and testimony adduced in this case, I conclude that in order to establish a violation of section 56.11-1, petitioner must establish by a preponderance of the evidence that the catwalk and platform area beneath the gallery conveyor was in fact a working place as that term is defined by section 56.2. In short, petitioner must establish that work was taking place at the time the conditions were observed. Here, Inspector Pappas conceded that no work was taking place and he mentioned not one shred of evidence that he observed any indication of recent or ongoing maintenance or other work being performed along the catwalk or platform area which he cited. Under the circumstances, I conclude and find that petitioner has failed to establish a violation of section 56.11-1, and the citation is VACATED.

ORDER

On the basis of the foregoing findings and conclusions, IT IS ORDERED that Citation Nos. 368786 and 368787, August 2, 1978, for alleged violations of 30 C.F.R. 56.14-1 (Docket No. VINC 79-100-PM), be VACATED; and that Citation No. 368912, March 21, 1979, citing an alleged violation of 30 C.F.R. 56.11-1, (Docket No. LAKE 79-217-M), also be VACATED.

George A. Koutras
Administrative Law Judge