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

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. WEST 80-457-M A.O. No. 35-02479-05002
v.	
JOHN PETERSEN, D/B/A TIDE CREEK ROCK PRODUCTS, RESPONDENT	Tide Creek Pit

DECISION

Appearances: Faye Von Wrangel, Attorney, U.S. Department of Labor, Seattle, Washington, for the petitioner; Agnes Marie Petersen, Esquire, St. Helens, Oregon, for the respondent

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated 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), seeking a civil penalty assessment for six alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. Respondent filed a timely answer and notice of contest and a hearing was convened in Portland, Oregon, October 27, 1982. The parties appeared and participated fully therein, and they waived the filing of posthearing proposed findings and conclusions. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter, as well as respondent's arguments set forth in its trial memorandum submitted at the hearing.

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

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties filed in this case, 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 are identified and disposed of where appropriate 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.

Stipulations

The parties stipulated to the admissibility of exhibits C-1 and C-3 through C-6. Respondent objected to photographic exhibit C-2 is that it purports to show an acetylene bottle, whereas the citation cited oxygen bottles (Tr. 10-11). The parties also stipulated to the admissibility of respondent's exhibits R-1 through R-4 (Tr. 15), and that citation no. 349567 may be amended to reflect the correct standard.

Respondent's request for a visit to the mine site was brought to my attention for the first time on the day of the hearing. In view of my trial docket which called for me to travel to Medford, Oregon, on the afternoon of the conclusion of the hearing in this case respondent's counsel was advised that I would not be able to visit the mine site as requested since time would not permit (Tr. 114).

Discussion

The citations issued in this case are as follows:

Citation No. 349567, (as amended) May 8, 1980, 30 CFR 56.15-2:

> The owner, John Peterson and also the truck driver were not wearing hard hats around the plant area.

Citation No. 349568, May 8, 1980, 30 CFR 56.16-5:

> 3 Oxygen bottles were in the plant area and were not secured in any way. Two were lying on the ground, one was leaning against the frame work of a conveyor belt.

Citation No. 349569, May 8, 1980, 30 CFR 56.14-3:

> The self cleaning tail pulley on the conveyor belt to the storage hopper was not completely guarded. The pulley was approximately 5 feet above ground level. Employees were occasionally in the area when the plant was operating.

Citation No. 349570, May 8, 1980, 30 CFR 56.15-4:

> The owner was breaking a rock in the jaw crusher with a sledge hammer without any eye protection to prevent injury to his eyes from flying rock particles.

Citation No. 349571, May 8, 1980, 30 CFR 56.14-3:

> The V-belt drive on the Rolls crusher was not completely guarded. The belt was approximately 5 feet above ground level.

Citation No. 349572, May 8, 1980, 30 CFR 56.14-3:

> The V-belt drive on the small Jaw crusher was not completely guarded. Employees were occasionally in the area while the plant was in operation.

Petitioner's testimony and evidence

MSHA Inspector Patrick Bodah testified as to this background and duties, and he confirmed that he conducted an inspection as the respondent's mine site on May 8, 1980. He indicated that he had inspected the site on several previous occasions, and that he knew the owner John Petersen. On May 8th he met Mr. Petersen at the mine and he accompanied him during his inspection rounds. Mr. Bodah described the mining operation as a rock crushing operation, and the "plant" comprised approximately 1/2 acre of ground, and he considered this to be a small operation. There were approximately three people in addition to Mr. Petersen working there when he inspected it, and he indicated that the entire operation could be viewed from one location (Tr. 16-20).

With regard to his citation for failure to wear hard hats, Mr. Bodah confirmed that he issued it because Mr. Petersen was not wearing a hard hat when he met him, and he did not have one on during the inspection rounds. In addition, a truck driver near the crusher loading hopper was not wearing a hard hat when he got out of his truck during the loading process. Mr. Petersen performed work breaking up a large rock and he was not wearing a hard hat. The truck driver was out of his truck and around the loading area without a hat on. Mr. Bodah believed that the hazards involved in not having a hard hat on were being struck on the head by falling objects or rocks or running into, or bumping into, low

overhead beams. The plant belts and crushers were in operation and they were located above the truck driver's head, and he would be subjected to being struck by falling rocks. He indicated that occasionally, a large rock will pop out of a crusher. Mr. Petersen was in the crusher area and he would be subjected to the same hazards. Mr. Bodah discussed the matter with Mr. Petersen, and Mr. Petersen indicated that he instructed his employees to wear hard hats, but that he personally would not wear one (Tr. 20-24).

Mr. Bodah identified exhibit C-1 as a photograph of the unsecured oxygen bottles which he cited. He observed them to the left side of the jaw crusher area as he walked from his automobile, and while his recollection was not clear, he believed that one was lying on the ground and the other was leaning against something. He considered the unsecured bottles to be a hazard because "oxygen bottles are under high pressure; and if a truck should run over one or if something should fall on one and knock the neck out of it, it becomes sort of a missile. It can do a lot of damage." (Tr. 25). MSHA's counsel withdrew the photograph after conceding that the bottles depicted therein were in fact acetylene bottles (Tr. 28). However, the inspector clarified the matter by stating that the oxygen bottles were compressed gas and that the standard cited deals with compressed and liquid gas (Tr. 28).

Mr. Bodah identified exhibit C-3 as a photograph of the self cleaning tail pulley which he cited, and indicated that it was located on the rubberized conveyor belt to the storage hopper. He believed that the unguarded tail pulley was an area which would be accessible to anyone wandering around the plant, and that it would have been easily contacted by a person who could catch clothing or an arm in the unguarded area. He and Mr. Petersen were in the area during their inspection rounds. He drew a circle on the exhibit depicting the unguarded area, and he indicated that it was four and one-half-to-five feet off the ground (Tr. 31). He discussed the condition with Mr. Petersen, and Mr. Petersen cleaned the area out under the tail pulley and this made it inaccessible. That is, by cleaning out the area, the ground level was lowered to a distance of seven feet from the unguarded pulley, and it placed it at a point where it could not accidently be contacted (Tr. 31).

With regard to the safety glasses citation, Mr. Bodah confirmed that he issued that citation after he observed Mr. Petersen break a rock with a sledge hammer without using safety glasses. The rock would not go through the crusher, and that is why Mr. Petersen broke it up with the hammer. However, by doing so, he exposed himself to a hazard of being struck in the eye or head from flying chips of rock or steel from the hammer. He discussed that condition with Mr. Petersen, and glasses were provided for "whoever was breaking rocks" (Tr. 33-34).

Mr. Bodah identified exhibit C-4 as a photograph of the V-belt drive for the rolls crusher, placed an arrow where he believed a pinch point existed, and he indicated that the lack of

a guard over the pinch

point presented a hazard in that someone could get caught between the pulley and the belt. He and Mr. Petersen were in the area, and the unguarded area was approximately five feet above ground level. He discussed the matter with Mr. Petersen, and Mr. Petersen cleaned the area below the V-belt drive by removing rock which had spilled, and this made the drive inaccessible. After it was cleaned up, the area from the ground to the drive was seven or eight feet (Tr. 35-36).

Mr. Bodah identified exhibit C-5 as a photograph of the V-belt drive for the small jaw crusher, and he cited it because it was only partially guarded. The belt was located on an elevated work platform near where the plant operator works and he believed it was accessible to anybody in the area. The drive was about a foot and one-half above the platform level, and he believed that one could suffer severed or broken fingers if he came in contact with the partially guarded belt drive. He drew an arrow on the exhibit showing the partially guarded area which concerned him, and he indicated that access to the V-belt drive was from both sides. He discussed this citation with Mr. Petersen, and Mr. Petersen erected a barrier to prevent access to the unguarded belt (Tr. 38-39).

Respondent's counsel declined to cross-examine Inspector Bodah. However, in response to questions from the bench, he confirmed that he did not make any actual determination that the oxygen bottles which he cited were full or empty. Although he accepted Mr. Petersen's word that they were empty, Mr. Bodah stated "they're never empty. There's always pressure in one." (Tr. 40). The normal procedure for storing such bottles is to chain or fastened them in an upright position so they can not tip. The bottles are normally used for cutting and welding, and when they are used for this purpose they are at the work site, but Mr. Bodah could not state whether the area where he observed the bottles was a regular storage place (Tr. 42).

Regarding the unguarded self-cleaning tail pulley, exhibit C-3, Mr. Bodah confirmed that it was partly guarded by the sides of the conveyor frame. He also confirmed that the rock spillage had gradually built up under the machine to the point where the ground was elevated and placed the pulley area five feet from the top of the rock spillage pile. Had the spillage not been there, the pulley would not have been accessible to anyone walking on the spillage, and he would not have issued a citation. He believed that anyone walking along the spillage to clean up or to grease the equipment would likely pass through the area (Tr. 45).

Mr. Bodah stated that the crusher was not running when Mr. Petersen broke the large rock without wearing safety glasses. The rock would not go through the crusher, and the operator shut the machine down so that Mr. Petersen could break the rock up. Mr. Bodah could not recall whether Mr. Petersen had safety glasses on his person, but he did confirm that he did have them on when he broke up the rock (Tr. 47).

With respect to the hard hat citation, Mr. Bodah indicated that he issued the citation because Mr. Petersen would not wear a hat during the walk-around with him on the inspection. Hard hats were available at the site, but Mr. Petersen told him it was his policy that employees must wear them, but that he does not have to. Mr. Bodah stated that Mr. Petersen is at the plant site most of the time, and in response to a question as to what he would do if I were to go to the site for a "view" and was not furnished a hard hat while on the premises, he replied "if the plant were running and you did not have a hard hat on, I would cite Mr. Petersen for allowing you on the property without a hard hat" (Tr. 50). With regard to the truck driver, Mr. Bodah indicated that he is not required to wear a hat while in the truck because he has overhead protection, but that once he leaves the truck he has to wear his hard hat (Tr. 51). However, he stated that the driver has to operate the gate to let the material out of the hopper and into the truck (Tr. 51).

Mr. Bodah confirmed that while the standard states that hard hats should be worn to protect one from falling objects, he was equally concerned over the possibility that Mr. Petersen could strike his head while going under low areas, and his concern about being struck from objects was based on "danger from a rock flying from the pressure part of the operation through the air, and occasionally rather large rocks do become airborne" (Tr. 52).

With respect to the partially guarded rolls crusher, Mr. Bodah confirmed that the crusher is mounted on a trailer, and when not actually operating the equipment, the driver would probably be assigned clean-up chores and shovelling would be done while the equipment was still in operation. The most likely accident would occur if someone were to stumble near the pinch point and reach out and grab for the V-belt (Tr. 54). As for the small jaw crusher, exhibit C-5, while the operator would normally be stationed away from the machine while it was operating, he could walk right up to it from the adjacent walkway to grease or clean-up, and he believed the platform was provided to facilitate ready access to the equipment (Tr. 56). Had the spillage not been present, he would have considered the self-cleaning pulley and V-belt drive to be "guarded by location" since they would have been seven feet off the ground and out of the reach of anyone, and the citations would not have been issued (Tr 56).

Respondent's testimony and evidence

John A. Petersen, the mine operator, identified exhibit R-1 as a photograph of the switch panel where one stands to operate the entire plant. He identified an overhead tin roof, and he indicated that when the plant is running there is no need for anyone to be around any of the conveyors or belts. The operator's control panel is elevated some seven feet off the ground, and the unguarded jaw crusher V-belt shown in exhibit C-5 is on the ground level below the operator and some 8 to 10 feet behind him. The only time anyone walks by the belt is to get to the elevated panel to turn the crusher on, and to come back down after it is turned off, and the area is some 60 feet from where

the truck is located (Tr. 91-92). The self-cleaning tail pulley shown in exhibit C-3 is about 15 feet from the truck (Tr. 92).

Mr. Petersen stated that the circle drawn by Inspector Bodah on the photographic exhibit C-3, reflecting the location of the self-cleaning tail pulley which he believed was unguarded is inacurrate. Mr. Petersen indicated that the area circled by the inspector is in fact the back end of the frame from which the conveyor is hung. Mr. Petersen indicated that the actual tail pulley in question is 12 inches in diameter and that it is located higher up on the photograph. The conveyor and pulley run up a very large hopper, and the truck and driver are positioned to the side of the hopper as shown in photographic exhibit R-2 (Tr. 92-94).

Mr. Petersen stated that the truck driver would be under the hopper conveyor belt, and while the largest stone on the belt would be a half-inch in diameter, the conveyor itself is "a trough", and that would be the only means of keeping rocks from falling off the conveyor. He did not believe that the driver could be struck by any rock because any spillage would occur at the back of the belt where the truck driver has no business being (Tr. 95-96). With regard to his hard hat, Mr. Petersen stated that when he is operating the "cat" he is protected by an overhead canopy, and the only time he would leave the "cat" would be to break the rocks if the crusher were broken down or plugged up (Tr. 96).

With regard to the rolls crusher shown in exhibit C-4, Mr. Petersen stated that water and mud is under the piece of equipment and someone would have a difficult time reaching the pulley area which was cited (Tr. 96). Mr. Petersen confirmed that he has had no on-the-job injuries since he has operated the business (Tr. 99). He also indicated that when he was breaking the rocks with a hammer, he was using a flat, double-ended "rock hammer" and not a sledge hammer, and in the 10 years he has used such a hammer to break rocks he has never suffered an eye injury from flying rock (Tr. 99). He considers himself to be skilled in the use of such a hammer, and he believed that the use of safety glasses would not have made his operation any safer "because if you beat on the rocks right, you don't get chunks in your face" (Tr. 100). When asked "how do you know that?", he replied "from using a sledge hammer and having them hit you in the legs and everywhere" (Tr. 100). He also indicated that company policy dictates that he is the only one who is to break rocks with the hammer, and none of his employees have ever had an on-the-job injury (Tr. 101).

Mr. Petersen testified further that he advised Inspector Bodah that the oxygen bottles which he cited were empty, but that Mr. Bodah indicated that it didn't make any difference whether they were empty or full (Tr. 102, 106), and that they had to be secured. Mr. Petersen conceded that the bottles would be hazardous if they were full, but he knew of no danger if they are empty. He also indicated that someone would have to "kick it pretty hard to tip it over" (Tr. 106).

Petitioner's arguments

Petitioner argued that it has established jurisdiction in this case, and that it is clear from the testimony of Mr. Petersen that his crushed

rock product is used to build city, county, and State roads, all of which are instrumentalities of commerce. In addition, petitioner states that most of Mr. Petersen's equipment was produced outside of the State of Oregon, and that it is clear that at the time of the inspection, as well as in 1980, Mr. Petersen was operating a crushed stone operation employing himself, family members, and other employees. As for the fact of violations, petitioner asserted that the testimony and evidence adduced at the hearing establishes that the conditions and practices observed by the inspector at the time the citations were issued establishes each of the cited violations (Tr. 109-111).

Respondent's arguments

Respondent's counsel opted to rest on her arguments made in her Trial Memorandum filed at the hearing (Tr. 111). The memorandum is a part of the record in this case, and the arguments presented therein have been considered by me in the course of this decision.

In her trial memorandum, counsel asserts that "[u]nder Title 43, Section 4.1155, the burden of proof in civil penalty proceedings is upon OSM to go forward to establish a prima facie case and the ultimate burden of persuasion as to the fact of a violation and as to the amount of any claimed penalty. Respondent believes that the burden is one of beyond a reasonable doubt since this is a quasi-criminal proceedings and what is sought is a fine" (pg. 6, Memorandum).

Respondent had previously argued that these proceedings were criminal in nature, and counsel had also requested attorney's fees. These arguments were rejected in my pretrial rulings made on August 20, 1981, and served on the parties. My reasons in this regard were stated in those rulings, which are a part of the record in this case, and they are reaffirmed. Respondent's request for attorney fees is denied, and her arguments concerning the "burden of proof" are likewise rejected.

As pointed out to counsel during the hearing, the references to "OSM" and the regulations issued thereunder are not applicable in these proceedings. The Office of Surface Mining (OSM) is an agency of the U.S. Department of the Interior, and not the U.S. Department of Labor which has enforcement jurisdiction under the Act in issue in these proceedings. MSHA's mandatory safety and health standards, and the applicable civil penalty procedures are found in Title 30, Code of Federal Regulations. Further, the applicable Commission Rules of Procedure are found in Title 29, Code of Federal Regulations, Part 2700, et seq., 44 Fed. Reg. 38226, June 29, 1979. A Judge's decision with respect to the asserted violations in cases of this type is determined by a preponderance of all of the reliable, credible, and probative testimony and evidence of record, and the Commission's standards for discretionary review of a Judge's decision are detailed at 29 CFR 2700.70.

Respondent's defenses to each of the citations are discussed and disposed of in my findings and conclusions concerning each of the cited violations.

Findings and Conclusions

Jurisdiction

Respondent's initial answer to MSHA's proposals for assessment of civil penalties denied that the respondent's crushed stone operation was subject to the Act or to MSHA's enforcement jurisdiction. During the course of the hearing, respondent's position had not changed on this issue and counsel asserted that MSHA must establish that the operation is subject to the Act (Tr. 59).

MSHA's counsel confirmed that Mr. Petersen's operation had an MSHA "Mine ID" number, and she indicated that the production tons or man hours per year are shown as 6,000 (Tr. 62). Counsel confirmed that Mr. Petersen must have filed an MHSA "legal identity form" as required by the regulations since he has never been cited for failure to file such a form (Tr. 62).

Inspector Bodah testified that the crushed rock is trucked from the storage area at the mine to customers who may want to purchase it. He believed that the crushed rock is used for road base, concrete rock, fill, or for drainage rock. He confirmed that he does not inspect the site when its not in operation, could not recall how many previous times he inspected it, and indicated that in addition to Mr. Petersen and his son, three other employees were working at the site when he inspected it (Tr. 57).

Inspector Bodah disagreed with the respondent's assertion that his operation is not subject to the Act. He maintained that "we've been inspecting them for quite some time, and they're a producer of a product that enters into interstate commerce" (Tr. 59). He supported this conclusion by his observing the trucks hauling the crushed rock off the mine property, and this indicated to him "he's selling that rock to somebody" (Tr. 60). Mr. Bodah also indicated that the mine site is located in Columbia County, Tide Creek, Oregon, but he did not know whether the rock is actually shipped out of the state (Tr. 60). He believed that all crushing operations are considered under MSHA's jurisdiction.

John A. Petersen was called as a witness by the petitioner, and he confirmed that he is the president and owner of the controlling interest in Tide Creek Rock Products, Incorporated. The other stockholders are his wife and counsel Agnes Petersen, and his mother-in-law. He described the size of his rock product as ranging from a half-inch to three and a half-inches, and the raw materials are obtained from a hill located adjacent to the "plant". The hill is leased, but he owns all of the plant equipment and machinery. The actual worksite, including the hill, the storage stockpile, and the plant encompasses an area of an acre and one half (Tr. 65-68).

Mr. Petersen confirmed that at the time of the inspection in 1980, he and two of his sons were working at the plant. He would

occasionally

hire other people to help out, but he was operating the "Cat" and his son was driving a truck. Mr. Petersen could not estimate his annual dollar sales volume in 1980, and he indicated that in 1980 he operated "a third of the year" (Tr. 70). Since that time, the plant has been in operation less time, and he confirmed that the only product he produces is rocks of varying sizes. During 1980, he sold the rock primarily to St. Helens Paving, and the product was used to pave streets and highways, including county, city, and state highways, and driveways (Tr. 71). Other customers would "come and go, different ones at different times", but he could not recall the names of any of them. His primary employment at that time was with his company (Tr. 72).

With regard to his equipment, Mr. Petersen stated that the truck used to haul his product was manufactured by "Peterbuilt Truck", and while he did not know where it was manufactured, he believed it was the State of Washington. The "Cat" or Caterpillar was produced in Illinois, and the jaw crusher was manufactured in Cedar Rapids, Iowa (Tr. 87-89).

On the basis of the foregoing testimony and evidence adduced here, it seems clear to me that respondent's strip mining operation is subject to the Act, as well as to MSHA's enforcement jurisdiction. Respondent's sales of rock products, as well as the use of equipment manufactured out of State, certainly affects commerce within the meaning of the jurisdictional language of the Act. Accordingly, its arguments to the contrary are rejected.

Failure to secure compressed and liquid gas cylinders - Citation 349568

30 CFR 56.16-5, provides as follows:

> Compressed and liquid gas cylinders shall be secured in a safe manner.

Respondent takes the position that the cited compressed gas cylinders were empty and that the petitioner offered no credible proof that they were full or unsafe at the location where they were found.

Section 56.16-5 requires that compressed and liquid gas cylinders be secured in a safe manner. Petitioner has established that the cylinders in question were not secured, and that one was standing upright and the other was lying on the ground. Respondent does not dispute this fact, and takes the additional position that there is no "safety advantage to hanging up an empty oxygen bottle". The standard cited makes no distinction between full or empty cylinders, and respondent's defense on this ground is rejected. Respondent's arguments go more to the seriousness or gravity of the violation, rather than to an absolute defense to the cited standard. Accordingly, this citation IS AFFIRMED.

Gravity

The inspector failed to determine whether the cited

cylinders were full or empty. I accept Mr. Petersen's testimony that they were in

fact empty. Mr. Petersen conceded that the bottles were simply placed outside the shop area some 15 feet away while awaiting to be taken to town to be refilled, and while he also conceded that employees walked by the area, I cannot conclude or find that the bottles posed any real hazard. The bottles which were filled and in use in the shop were apparently secured since Mr. Petersen indicated that they were in fact chained up when in use. I conclude and find that this citation was nonserious.

Failure to Wear suitable hard hats - Citation 349567

30 CFR 56.15-2, provides as follows:

> All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

As I observed during the course of the hearing, the language of the "hard hat" standard does not state "All persons whall wear suitable hard hats when in or around a mine or plant". A condition precedent to the requirement that a hard hat be worn is a finding that falling objects may creata a hazard. Respondent argues that the language of the standard is not intended to guard against one bumping his head against a low beam or piece of equipment. Insofar as any "falling objects" are concerned, counsel argues that when the inspector arrived at the scene, Mr. Petersen has just finished doing some work in the caterpillar pushing rocks from the hill into the chute below it, and while engaged in this activity he was fully protected by the machine overhead canopy. This being the case, counsel argued that there was no possibility or likelihood of his being struck by a falling object. Counsel advanced this same argument in defense of the failure by the truck driver to have his hard hat on, and also made the additional argument that no rocks ever fall out of the overhead conveyor where the truck was located.

Inspector Bodah indicated that when he came on the property Mr. Petersen was not wearing a hard hat, that he refused to wear one during the entire inspection, and was not wearing one when he broke up the rock which had jammed in the crusher. As for the truck driver, Mr. Bodah indicated that the truck driver was out of his truck, was around the hopper loading area, and that his job was to open the hopper chute to allow the rock materials to load onto the truck. He also indicated that rocks have on occasion been propelled from the crusher, or they could fall out of the overhead conveyor belt leading up into the hopper.

While it may be true that one is not expected or required to wear a hard hat while inside a vehicle which has an overhead cab or canopy, the truck driver was not in his vehicle at the time the inspector observed him at or near the overhead conveyor belt. Since the driver's duties include activating the chute which opens the hopper and loads the truck, I believe there is a strong possibility that the driver could be struck by overhead rocks falling out of the chute, off the truck, or being

propelled out of the hopper itself. Respondent's assertions that events like this never occur are rejected, and I conclude that the failure by the truck driver to have his hard hat on constituted a violation of the cited standard and IT IS AFFIRMED.

With regard to Mr. Petersen's failure to wear a hard hat, even though he may have been protected while in the cab of the cat, his routine practice and refusal to wear a hard hat at all times while working around the plant also constitutes a violation of the hard hat requirement. Respondent has not established that there are never any falling objects such as rocks or other materials or equipment at the plant, and the petitioner's evidence establishes that there is a potential for the rocks to fall from overhead conveyors. While one may agree that the language of the standard is inartfully drawn, on the facts here presented Mr. Petersen's refusal to ever wear a hard hat while the plant is in operation constituted a violation of section 56.15-2. Although the inspector could have cited two separate citations for Mr. Petersen and the truck driver, he opted to incorporate both incidents into one citation, and I see nothing improper with this procedure.

Gravity

I conclude that the failure by Mr. Petersen and the truck driver in question to wear their hard hats while in and about the plant area while the equipment was in operation was serious. The truck driver is close to the overhead conveyor when he activates the lever or mechanism forcing the coal into the hopper, and it is possible for him to be struck by rocks falling out of the conveyor. As for Mr. Petersen, while it may be true that he was protected while under the cab of the equipment he was operating, there is no assurance that he is always protected while walking and working around the plant.

Failure to wear protective safety glasses - Citation 349570

30 CFR 56.15-4, provides as follows:

> All persons shall wear safety glasses, goggles or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Respondent's defense to the safety glasses citation rests on its assertion that Mr. Petersen has worked for 30 years in dangerous occupations, 10 years of which have been spent breaking up rocks with an appropriate rock hammer that is specifically designed to prevent splintering, and in all of this time he has never suffered any eye or other injuries. Further, counsel pointed to the fact that Mr. Petersen never allows other employees to break rocks, and that the likelihood that safety glasses would have improved safety is very remote. Counsel also asserted that the law clearly requires more for the meaning of the word "could" as used in the standard.

There is no question but that Mr. Petersen was not wearing any eye protection at the time Inspector Bodah observed him breaking up the rock which had jammed in the crusher. In my view, the fact that Mr. Petersen is experienced at breaking rocks, used the proper tool for that purpose, and instructed his employees that he was the only one to break rocks, does not establish an absolute defense to the citation, and counsel's interpretation as to the application of the use of the word "could" is rejected. While Mr. Petersen's safety record is commendable, I for one would not like to see his luck run out. In my view, there is always a chance that the most experienced miner in the world will be injured by his failure to completely protect himself. Here, Mr. Petersen admitted that when he used a sledge hammer in the past, flying rocks often struck him in the legs. I realize he said that to justify his use of a flat rock hammer, but one mis-strike of that hammer, just as one slip of a scapel in the hands of a skilled surgeon, could prove disastrous. This citation IS AFFIRMED.

Gravity

Although the use of a flat-headed rock hammer in the hands of a skilled and experienced miner may mitigate the seriousness of any hazard, on the facts of this case, I conclude that the citation was serious. At the time of the citation, Mr. Petersen had in his employ two of his young sons who helped out at the plant, and Mr. Petersen was not always present when work had to be performed, and I am sure he is not present every time the crusher jammed. In these circumstances, even though he ordered no one else to break up rock, I believe that it was reasonable to assume that someone could follow his example and attempt to break up a jammed rock in his absence, thereby exposing themselves to a possible eye injury. Mr. Petersen's practice and routine breaking up of rocks without wearing safety glasses is just as serious as the actual act which the inspector observed at the time the citation issued.

Failure to completely guard the storage hopper self-cleaning conveyor belt tail pulley - Citation 349569; the rolls crusher V-belt drive - Citation 349571; and the jaw crusher V-belt drive - Citation 349572.

30 CFR 56.14-3, provides as follows:

> Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley.

Respondent's defense to the self-cleaning conveyor belt citation is that since it is 5 or 6 feet from the ground and no one is around it when it is running, there is no way anyone can accidently reach behind the guard and become caught between the belt and the pulley. Respondent points out that when the conveyor is running the closest person to it

is 10 to 15 feet away, that the placement of the belt is too high for any one to "accidentally reach behind it", and any injury at the cited location would have to be done deliberately and intentionally.

With regard to the crusher V-belt drive citation, respondent maintains that the equipment is so high above the ground level and surrounded by a "thigh deep moat and about 2 or 3 feet of mud and water", that a fool would have to wade out and jump or reach very high to even get to the location in question. Respondent concludes that there is no way anyone could accidentally get injured at the cited location.

Respondent's defense to the jaw crusher V-belt citation is that the piece of equipment is covered up, that the chain which the inspector recommended be put up was meaningless, and that when the crusher is running no employees are there.

Mr. Bodah believed that the guarding standard he cited requires that partially guarded converyor pulleys be inaccessible, and since the accumulated rock made them accessible, the standard was violated (Tr. 44). In my view, the standard requires that guards be extended a sufficient distance to prevent a person from accidentally reaching behind the guard and getting caught between the belt and the pulley. It seems clear to me that any consideration of the standard must take into account the question of whether the existing guarding is sufficient.

On the facts of this case, the determining factor in the mind of the inspector as to whether the standard was violated is not whether any existing guard was sufficient, but rather, whether or not the terrain beneath the pulley was elevated enough to cause one to accidentally reach into the pulley and injure himself. In short, the elevation of the spillage in direct relationship to the overhead height of the pulley is the determining factor, and this may change from day to day. What is a safe distance on one day may not be the next. What is "guarding by location" in one inspector's mind, may not be sufficient for another inspector. In short, the regulatory language leads to some highly subjective judgment calls by an inspector.

It seems to me that if MSHA's intent in promulgating the standard is to prevent and preclude accidents in connection with unguarded or partially guarded pulley pinch-points, then it should seriously consider amending its standards to require all such areas to be guarded without qualification or any conditions precedent. The use of open-ended and broad language such as that found in section 56.14-1 through 56.14-3, i.e., "may be contacted", "sufficient distance", "accidentally reaching", results in some rather strained interpretations, and I sympathize with inspector's who have to grapple with the guarding standards, and with the solicitor's who have to defend the numerous guarding citations issued under these sections.

Inspector Bodah conceded that the self-cleaning belt tail pulley and rolls crusher V-belt drive pulley would normally be guarded by location since they were approximately seven feet above ground level and out of the reach of anyone. The basis for the citations was his concern that rock spillage in and around the area beneath the pulley locations raised the level of the ground to a point which would bring anyone walking on the spillage directly under the pulleys into close proximity or reach of the pinch points which were partially guarded. Mr. Bodah indicated that someone would normally walk across the "flattened out" spillage since the area "was the means of access to get inside the plant area" (Tr. 45). The gradual spillage elevated the area to a point at approximately four and a half to five feet below the overhead pulleys, and Mr. Bodah was concerned that someone walking through the area to grease the equipment or to clean up could stumble, and if he did, he would somehow instinctively reach out for something, and he knows of instances where someone reached out for a V-belt (Tr. 54).

In this case, the respondent has established to my satisfaction that when the equipment is running each employee is assigned to a specific location to keep the "plant" moving. The "plant" includes a hopper, a crusher, a truck, a stockpile, and a hill from where the raw rocks are taken. I simply can find no support for the proposition that when everything is moving, someone will leave their assigned work station, walk over a two or three foot mound of rocks under an overhead pulley and attempt to grease that machine. Neither can I believe that in this same scenario, someone will take a shovel and start shovelling rocks while he is supposed to be at his normal duty station. In the instant case, since the rock spillage obviously accumulated over a long period of time, no one had been in the area cleaning up. Further, one of the elevated pulleys is self-cleaning, and there is no indication that anyone had to go into that equipment to clean it. In addition, Mr. Bodah candidly conceded that if there are any equipment problems the plant is shut down (Tr. 47).

I accept Mr. Petersen's testimony that the actual location of the storage hopper self-cleaning tail pulley was at a point higher on photographic exhibit C-3, than that stated by Mr. Bodah. The area circled by Mr. Bodah is the frame from which the conveyor hangs, and the actual pulley area in question is higher up and behind the tail pulley shaft as shown in the photograph. Having viewed the photograph and after careful consideration of all of the testimony in this case, I cannot conclude that the alleged insufficiently guarded tail pulley in question was located in such a position where anyone could accidentally reach in and become entangled in the pulley. Of course, if someone deliberately jumped up and reached into the area, or placed a ladder against the conveyor frame and climbed up and stuck their hand in the pulley, they would undoubtedly be injured. If that is the type of situation MSHA is attempting to guard against, then they should say so in clear and precise regulatory language. Citation No. 349569 IS VACATED.

Although Mr. Bodah indicated that the jaw crusher operator could walk up to the V-belt for greasing and clean-up, the fact is he really did not know that this was the case (Tr. 55). Mr. Bodah's testimony that employees grease and clean-up around unguarded tail pulleys and pinch-points must be taken in context. He suspected and speculated that an employee would grease and clean-up around the V-belt because he observed a platform around the equipment. Since he believed the platform was there for a specific purpose, he concluded that it was obviously used to provide ready access to the equipment, and this is a logical assumption on his part. However, absent any credible evidence that the equipment is in fact greased and cleaned while it is running, and absent any evidence that any employee is required to be in close proximity to the moving parts of the crusher as a routine normal part of his job, or that miners regularly pass by the area, there is no support for me to make any of these inferences. As a matter of fact, abatement of this citation was not achieved by placing a guard over the asserted pinch-point. Mr. Petersen installed a chain or fence across the area away from the pinch point.

Mr. Petersen's testimony is that the only time anyone goes to the crusher platform area is when the equipment breaks down or plugs up, or while going up and down while shutting the equipment down or turning it on. The equipment is shut down when it is plugged up or broken down. In addition, the crusher operator is at some distance from the actual pinch point when he is running the crusher, and he is the only person there. Further, Mr. Petersen's description of the area where the asserted pinch-point was located, including the photographic exhibits, leads me to conclude that one would have to make a deliberate and conscious effort to first reach the area, and then deliberately reach in and contact the partially guarded pinch point. Given these circumstances, I conclude and find that the existing partial guarding was adequate enough to prevent an accident, and that the petitioner has not established that the location of the jaw crusher V-belt drive was such that a person could accidentally reach in and get caught in the drive pulley. Accordingly, Citation No. 349572 IS VACATED.

With regard to the rolls crusher V-belt, Mr. Bodah first stated that the entire V-belt drive was unguarded, but that the pinch point which concerned him most was where he drew in the arrow in the photographic exhibit C-4 (Tr. 34). However, his citation reflects that the drive "was not completely guarded", and his later testimony is that the pulley area was partially guarded by frame on the backside of the machine (Tr. 52). At first Mr. Bodah indicated that the truck driver may be assigned clean-up duties when he is not driving his truck, and that "usually they put them cleaning here or doing some little repair work or whatever" (Tr. 43). However, he later indicated that "I don't know what Mr. Petersen's procedure is which the truck driver" (Tr. 52). It seems to me that the best evidence as to what the driver does when he is not driving, is to speak with him. Mr. Bodah apparently did not do so. Therefore, absent any credible evidence that the driver is near the pulley in question

performing clean-up duties while the rolls crusher is in operation, I cannot conclude that the unguarded area which concerned the inspector, as shown on photographic exhibit C-4, was an area which posed a hazard in this case.

Respondent's arguments that the rolls crusher was surrounded by "a moat of water" is an exaggeration. The testimony by Mr. Petersen is that one would have to "wade in water and mud up to your knee or walk on a little berm of rock two or three feet high" to become tangled up in the area which concerned Mr. Bodah. Mr. Petersen concluded that one "would be a damn fool" to go into that area (Tr. 84).

On the basis of all of the facts and evidence adduced in this case, I cannot conclude that the pinch point at the rear of the pulley shown on exhibit C-4, constituted an area where someone could accidentally reach in and become entangled. The facts show that no one is stationed in that area, has no reason to be there, and the frame, wheels, and general machine confirugation, provide adequate protection. Citation No. 349571 IS VACATED.

Size of business and the effect of any civil penalties on the respondent's ability to remain business.

Although the respondent is obviously not too enchanted over the prospect of paying civil penalties for conditions and practices which he abated, no evidence was forthcoming that the assessment and payment of reasonable civil penalties for the citations which have been affirmed will adversely affect his ability to continue in business. Accordingly, I conclude and find that they will not.

The record in this case establishes that the respondent's rock crushing operation is a very small family-owned operation, operating more or less with three or four workers, and I have considered this in the civil penalty assessments made by me for the citations.

History of prior violations

MSHA's computer print-out, exhibit C-6, reflects that for the period May 8, 1978, to May 7, 1980, the mine had one assessed violation (Tr. 58).

Good faith compliance

Petitioner conceced that the respondent corrected all of the cited conditions and acted in good faith in achieving compliance within the time periods fixed by the inspector (Tr. 105), and I so find.

Negligence

I find that all of the citations which have been affirmed in this case resulted from the respondent's failure to exercise reasonable care to prevent the conditions or practices which resulted in the issuance of the citations. As the mine owner and operator, Mr. Petersen had an obligation to be aware of the requirements of the standards cited, and to prevent the conditions and practices cited. His failure to so constitutes

ordinary negligence as to each citation.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
349567	5/8/80	56.15-2	$ 50
349568	5/8/80	56.16-5	20
349570	5/8/80	56.15-4	75
			$ 145

ORDER

Respondent IS ORDERED to pay civil penalties in the amounts shown above within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge