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SOL (MSHA) v. MABEN ENERGY
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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. WEVA 84-400 A.C. No. 46-06378-03521
v.	Maben No. 6 Mine
MABEN ENERGY CORPORATION, RESPONDENT	

DECISION

Appearances: Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner; William D. Stover, Esq., Maben Energy Corporation, Beckley, West Virginia, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a civil penalty proposal 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), seeking a civil penalty assessment in the amount of $750 for one alleged violation of mandatory safety standard 30 C.F.R. 75.1722(b). The violation is in the form of a section 104(d)(1 citation, with special "S & S" findings, issued by MSHA Inspector James Christian on April 18, 1984.

The respondent filed a timely answer contesting the proposed civil penalty assessment, and a hearing was held in Beckley, West Virginia, on May 2, 1985. The parties filed posthearing briefs, and the arguments made therein have been considered by me in the adjudication of this case.

Applicable Statutory and Regulatory Provisions

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

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

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues

The principal issue presented in this proceeding is (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposal for assessment of civil penalty, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violation based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties 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 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 following (Tr. 5-6):

1. The respondent is owner and operator of the No. 6 Mine, and both the mine and the respondent are subject to the Act.

2. The presiding Judge has jurisdiction to hear and decide this matter.

3. At all times relevant to this case, MSHA Inspectors James Christian and Gary Taylor were acting in their official capacity as designated authorized representatives of the Secretary of Labor.

4. The citation in issue in this case was properly served at the mine on a representative of the respondent.

5. Mine production at the No. 6 Mine for the year 1984 was approximately 43,543 tons, and overall production for the respondent for 1984 was approximately 941, 936 tons.

6. Payment of the assessed civil penalty for the citation in question will not adversely affect the respondent's ability to continue in business.

Prehearing rulings

During a bench discussion concerning the issues presented for trial, the parties were advised that while the citation which gave rise to the civil penalty proposal by the petitioner is in the form of a section 104(d)(1) unwarrantable failure citation, with special "S & S" findings, the validity of the inspector's "unwarrantable failure" finding is not an issue, but that I would consider it as part of my civil penalty negligence findings. The parties were also advised that while the inspector issued a section 104(b) order after finding that the respondent failed to abate the citation in good faith, the validity of that order is not at issue in this case, and MSHA has not included it as a part of its civil penalty proposal (Tr. 6-8).

Petitioner's counsel stated that he was in agreement with my ruling concerning the reviewability of an unwarrantable failure finding by an inspector in a civil penalty proceeding (Tr. 11-12).

Respondent's counsel agreed with my ruling concerning the section 104(b) order (Tr. 8). However, he took the position that the "unwarrantable failure" finding by the inspector presented a question of lack of "notice" to the operator that it had prior knowledge of the violative conditions (Tr. 10). In support of his position, counsel cited the Price River Coal Company decision issued by former Commission Judge Virgil Vail on October 7, 1983, WEST 80-83, 5 FMSHRC 1766, 3 MSHC 1158 (1983). After further consideration of this issue, the parties were advised that for purposes of the trial, my rulings would stand, and the respondent's counsel was advised that he was free to take exception with my ruling and discuss it in any posthearing brief (Tr. 12).

After futher consideration of this issue, my pre-trial ruling that an inspector's unwarrantable failure finding is not reviewable in a civil penalty proceeding is REAFFIRMED. In the Price River Coal Company case, Judge Vail relied on

the Commission's decision in Cement Division, National Gypsum Company, 2 MSHC 1201 (1981), to support his conclusion that an inspector's unwarrantable failure finding is reviewable in a civil penalty case. In the National Gypsum case, the Commission decided the interpretation to be placed on a "significant and substantial" (S & S) violation, and while it did so in the context of a civil penalty proceeding, I cannot construe the decision as supporting authority for the conclusion that an unwarrantable failure finding is reviewable in a civil penalty proceeding. I do not construe the Commission's comment that unwarrantable failure findings "are important" as precedent for holding that such findings are reviewable in a civil penalty case. The Commission made no such ruling in the National Gypsum case. Further, in a recent decision issued by the Commission on August 5, 1985, in Black Diamond Coal Mining Company, Docket No. SE 82-48, the Commission affirmed my decision on this issue in that case.

Discussion

The section 104(d)(1) "S & S" citation issued by Inspector Christian at 9:04 a.m., on April 18, 1984, cites a violation of 30 C.F.R. 75.1722(b), and the cited condition or practice is described as follows:

> The number 1 belt conveyor tail pulley was not adequately guarded to prevent a person reaching behind the guard and becoming caught in between the belt and pulley; in that, conveyor belt was used as a guard at the back end of the tail pulley and such material was laying on the belt jack posts which allowed an opening of 18 inches vertical and 12 inches horizontally to exist behind the belt pulley; the side opening guards on the inby end of the belt conveyor tail pulley were gone, exposing the tail pulley to an opening of approximately 12 x 12 inches. According to the belt conveyor examiner book the belt conveyors are examined each coal producing shift and this condition appeared to have existed for weeks.

Petitioner's Testimony and Evidence

MSHA Inspector James Christian testified that he has been a mine inspector for 18 years and has 23 years of mining experience. He stated that he has fire boss and mine

foreman's certificates from the State of West Virginia, and that he has taken a 13 week mine training course at the West Virginia University.

Mr. Christian identified a copy of the citation which he issued (Exhibit P-1), and he confirmed that mine foreman Mike Ayers accompanied him during his inspection on April 18, 1984. The inspection began on the surface and continued underground, and it was conducted during the day production shift. The No. 1 belt conveyor was in operation conveying coal from the working section, and the height of the coal ranged from 30 to 32 inches, and the belt entry was approximately 20 feet wide. The belt had travelways on both sides, and they were approximately 12 to 13 feet wide on the "clear side", and 3 feet wide on the rib side. The travelway clearance on the rib side ranged from 18 to 36 inches between the rib timbers and the belt structure.

Mr. Christian identified a diagram of a "typical belt conveyor tail pulley," and indicated that it was representative of the tail pulley which he cited. He described the tail pulley operation, and he indicated that it consisted of one larger roller at the back end of the belt conveyor with a bearing holder which supported the tail roller at each side. He indicated that the pulley was not powered and that it simply supported the belt and turned with the belt as it moved over the pulley.

Mr. Christian stated that when he inspected the tail pulley he found that it was guarded at the rear by a piece of belt material approximately 12 inches wide and 18 inches long. The belting material was bolted to the top frame of the conveyor and it extended at an angle to the mine floor over two permanent belt conveyor jacks (No. 3 on Exhibit P-3). However, both sides of the rear of the pulley were not guarded by the belt material and these areas were exposed and open. He also observed two unguarded openings on each side of the belt conveyor structure, and he estimated that these "rectangular" openings were 12 inches by 12 inches. These openings were part of the conveyor structure itself and were in close proximity to the tail pulley. In his opinion, all of these unguarded openings were readily observable, and he estimated that the pulley "pinch points" were about 3 inches from the unguarded openings.

Mr. Christian stated that the unguarded pulley appeared to have been in this condition for weeks. The belt stands were rusty, and there was coal dust and float coal dust accumulated on the pulley. The area was required to be inspected

at least once a day, and he believed that one or two people would be exposed to a hazard. The belt examiner would be there for 5 minutes while visually inspecting the tail pulley area, and the belt cleaner would be there for approximately 15 minutes shovelling and removing coal from under the pulley on both sides. A mechanic would also have occasion to be in the area greasing the pulley bearings at least once during the shift.

Mr. Christian stated that it was possible for some one to reach into the unguarded openings to clean up loose coal or rocks, and the installation of guards to cover the openings would serve to remove this temptation. Mr. Christian also stated that the area around the pulley was damp and wet, and he observed a shovel adjacent to the pulley, as well as some coal materials which appeared to have been cleaned up and placed in a pile. This led him to believe that someone had been there earlier cleaning up coal accumulations.

Mr. Christian stated that when he pointed out the unguarded locations to Mr. Ayers, he conceded the violation and agreed that the tail pulley was inadequately guarded. Mr. Christian confirmed that he discussed the use of belting material as guarding, and suggested that metal guarding materials would be more permanent and could not be removed. Mr. Christian advised Mr. Ayers that he would prefer metal guarding, and he fixed the abatement time as the next morning. Mr. Ayers informed him that he could possibly obtain the metal guarding materials from another mine approximately 15 miles away, and once the material was obtained, it would take approximately an hour or so to install it.

Mr. Christian stated that when he returned to the mine the next day, he went to the tail pulley area at approximately 11:00 a.m., and the guards were being installed. Mr. Christian believed that the abatement work could have been completed in 2 hours during the prior shift, and he anticipated that this work would have been completed by the start of the shift the next morning (Tr. 15-41).

On cross-examination, Mr. Christian stated that he found the violation to be significant and substantial because the openings in the belt guards, and the unguarded openings on both sides of the conveyor, presented a reasonably likelihood that a person would reach in and behind the unguarded areas. In addition, he believed that someone could contact the unguarded tail pulley through carelessness, and that someone could slip and get their arm into the

unguarded areas while travelling by or while greasing or cleaning the pulley. However, he conceded that due to the low coal height, anyone in the area would be crawling on their hands and knees, and he confirmed that he and Mr. Ayers had to crawl in to inspect the pulley area.

Mr. Christian confirmed that he examined the belt examiner's books but found nothing noted about the tail pulley. He also stated that MSHA's guarding policy guidelines require that equipment guards be installed or bolted to the belt conveyor in such a manner as to require a wrench to remove them. He confirmed that he had inspected the mine in the past but had not previously observed the unguarded tail pulley and issued no prior guarding citations.

In response to further questions, Mr. Christian stated that he issued no citations for coal accumulations on the tail pulley or for any tripping or stumbling hazards in the tail pulley area. He also confirmed that he had no knowledge concerning the mine belt cleaning or maintenance procedures, nor did he know whether the belt was ever shut down when the pulley was cleaned or greased (Tr. 41-76).

MSHA Inspector Gary Taylor testified as to his mining experience, and he confirmed that he has been an inspector since 1975. He holds an associate degree in mining from the Beckley University, has received MSHA training, and has State of West Virginia mine foreman's papers.

Mr. Taylor confirmed that he was at the mine on April 19, 1984, and conducted an inspection with Mr. Christian. He was accompanied by mine electrician Paul Gillespie, and they went to the tail pulley area to determine whether the conditions cited by Mr. Christian the previous day had been abated. Mr. Taylor found that the guarding had not been installed and that the conditions as testified to by Mr. Christian still existed. The area was wet and muddy, and he detected a "slight dip" in the mine floor in the tail pulley area.

Mr. Taylor stated that when he inspected the tail pulley, he found no evidence that any work had been done to correct the cited conditions. Mr. Gillespie left the area to see about the guarding, and returned within 40 to 45 minutes to install the guards. Mr. Taylor helped him bring in the guards and assisted him in the abatement.

Mr. Taylor stated that before Mr. Gillespie left to find the material, he requested Mr. Gillespie to shut the belt down because the cited conditions had not been abated.

Mr. Taylor believed that a slipping and falling hazard still existed, and he agreed with Mr. Christian's determination that a hazardous condition existed at the unguarded tail pulley locations. Mr. Taylor believed that the respondent did not exhibit good faith compliance because the conditions were not abated within the time fixed by Mr. Christian (Tr. 77-89).

On cross-examination, Mr. Taylor confirmed that other conveyor belt locations had unguarded openings similar to the openings found by Mr. Christian on both sides of the tail pulley area, but he indicated that guards would not be feasible at those locations because the openings provided a means of ventilating the belt. The installation of guards at those locations would result in possible belt heating and would create a greater hazard. He also indicated that these other open areas were simply near the belt rollers which supported the belt and that if anyone reached in the "worst thing that could happen" would be a mashed finger or a broken hand or wrist. The injuries at the cited unguarded tail pulley in question, however, would be more severe, including the possible loss of a limb (Tr. 90-93).

Respondent's Testimony and Evidence

Fred E. Fergusen, testified that he is the principal stock holder of Maben Energy, and that he is familiar with the citation issued by Inspector Christian. Mr. Fergusen confirmed that he was formerly employed by MSHA as a supervisory inspector and that Mr. Christian and Mr. Taylor at one time worked under his supervision. He also confirmed that he was involved in the management of the mine, and he expressed concern over the lack of consistency among the inspectors as to the kinds of guards required by section 75.1722. He stated that the belt guarding used to guard the tail pulley in question had been previously installed on that same pulley before the belt was lengthened and moved to the location where Mr. Christian inspected it on April 18, 1984. Although the guarding had been previously cited as inadequate, after the belt was moved, Mr. Christian reinspected the pulley and found the belt guarding to be adequate.

Mr. Fergusen stated that he went to the cited tail pulley area after the belt was shut down by Inspector Taylor on April 19, 1984. In Mr. Fergusen's opinion, the guarding was adequate and he denied the existence of any hazardous conditions. He stated that the same exposed areas existed

along many belt locations, but that these areas had never been cited and guards have never been required.

Mr. Fergusen stated that the belt which moves over the cited tail pulley moves from the bottom to the top and over the pulley in a counter-clockwise manner, and he did not believe that an injury would result if anyone reached in. Mr. Fergusen stated further that while in the tail pulley area after the belt was shut down, he had to lie down and contort his body in order to reach in and contact the pulley and roller. He indicated that the tail piece is only 16 inches high, and he believed that it was guarded better than other walkway areas along the belt line. He also stated that grease hoses are installed at the tail pulley, and that anyone servicing or greasing the pulley would be 20 to 30 inches away. He also indicated that anyone cleaning in the area would use a shovel to reach any accumulations under and around the tail pulley.

Mr. Fergusen stated that it was his understanding that the expanded metal materials required to fabricate the guards had been ordered, but after Mr. Taylor shut the belt down and production ceased, he instructed that scrap metal be used to fabricate the guards so that the citation could be abated while awaiting the ordered materials (Tr. 93-99).

On cross-examination, Mr. Fergusen stated that the metal materials used to guard the belt would have been ordered through a local supply house that services most of Maben's mines. He indicated that Mr. Gillespie and another maintenance man work from 9:00 a.m. to 5:00 p.m., and that their shift overlaps the regular working shift which is from 7:00 a.m. to 3:00 p.m. Since Inspector Christian would not accept chain link fencing as adequate guarding material, Mr. Fergusen assumed that he would have allowed more time to order and install the expanded metal guarding. Since the order was issued shutting down production, Mr. Gillespie had to obtain scrap pieces of expanded metal and fabricate it into adequate guarding. Had Mr. Gillespie been allowed to use rubber guarding or fencing material, he could have abated the cited condition the first day (Tr. 100-102). He believed that Mr. Gillespie "did a quick job" of guarding in order to resume production (Tr. 103).

Mr. Fergusen stated that the rubber guarding on the belt in question had been installed after another MSHA Inspector (Simmons) indicated that he wanted it guarded that way, and that until Mr. Christian's inspection, it was always guarded in that fashion (Tr. 106). Mr. Fergusen identified a

citation issued by Inspector Robert Simmons, No. 2124785, issued on November 7, 1983, in which Mr. Simmons found that an 8 foot piece of belt had been placed over the tail roller in an attempt to guard it. Mr. Fergusen stated that abatement was achieved in that instance by simply bolting the rubber belting to the frame of the belt, and that Mr. Simmons accepted this as adequate (Tr. 109-111).

Mr. Fergusen confirmed that he had contacted MSHA's district office about his guarding problems and the fact that inspectors were requiring different kinds of guarding, but he denied that he had agreed to submit any guarding plans for MSHA's approval. He stated that he resisted efforts to require him to submit "big, vast drawings as to how to guard belt heads" (Tr. 115).

Mr. Fergusen stated that there are openings along the entire belt structure and that some MSHA inspectors want them guarded, while others do not (Tr. 118). He also alluded to other belt areas which in his opinion present hazards, but which are not required to be guarded (Tr. 120-122). He confirmed that in 1984, all of the mine belt heads were completely guarded with either chain link fencing, belting material, or expanded metal (Tr. 122).

Inspector Christian was recalled as the Court's witness, and he confirmed that he did speak with Mr. Ayers about the abatement. He stated that he told Mr. Ayers that the use of rubber guarding material was acceptable, as long as it was secure. He also told Mr. Ayers that something "more substantial" should be used (Tr. 131). Mr. Christian indicated that the use of a chain link fence could have been discussed, and that he would accept this as long as it was securely installed in such a manner to preclude one from reaching through and coming into contact with moving parts (Tr. 132).

Mr. Christian stated that when he fixed the abatement time, he was under the impression through a discussion with Mr. Ayers that the materials were readily available at the mine (Tr. 134). Mr. Christian stated that he issued the citation because the belting material did not cover the exposed part of the back of the tail roller, and because the belting was simply lying over the support posts, with an exposed opening in the back "where it could be got into" (Tr. 135). He confirmed that had the exposed areas been covered by belting material, he would have accepted it as adequate (Tr. 136). He stated that inspectors can "suggest" the type of guarding materials to be used for guarding

exposed belt areas, but they cannot "insist" that any particular type of material be used (Tr. 136-137).

Mr. Christian believed that Mr. Fergusen was well aware of the type of guarding required to comply with the cited standard, and he confirmed that Mr. Fergusen at one time worked as an MSHA supervisor. Mr. Christian saw no conflict in MSHA's guarding policy and Mr. Fergusen's knowledge as to what is required to achieve compliance (Tr. 139).

Inspector Taylor was recalled as the Court's witness, and he confirmed that when he returned to the mine on April 19th to abate the violation, he discussed the matter with Mr. Christian on their way to the mine. Mr. Christian told him that he had advised Mr. Ayers that while he could use rubber guarding to abate the citation, he (Christian) recommended that metal material be used. Mr. Christian also told him that either "Mr. Ayers or the supply man outside" told him that the metal guarding material had been ordered and would be installed the evening of the April 18th (Tr. 141-142).

Mr. Taylor stated that when he returned to the mine on April 19th, he spoke with the mine foreman in his office, and the foreman was under the impression that the abatement work had been done (Tr 142). Later, when he found that the belt opening had not been guarded, the person who accompanied him stated that he knew nothing about it. This person may have been Mr. Gillespie, and after he shut the belt down, the individual left and returned 30 or 40 minutes later with some metal materials to install as a guard. After some adjustments to the materials, Mr. Taylor helped to install the metal guarding in order to achieve abatement (Tr. 143-145). Although he saw Mr. Fergusen shortly after this work was done, he did not speak to him. However, he spoke with Mr. Ayers, and Mr. Ayers stated that he thought the condition had been taken care of (Tr. 146).

Mr. Fergusen stated that the material used to abate the condition was heavy corrugated metal, and since it was rusty in places, he assumed that it had been lying in a supply yard. The abatement work took 40 to 45 minutes (Tr. 147).

Mr. Taylor was of the opinion that had the cited condition been allowed to continue for any period of time, a reasonable man would expect a person to get caught at some time (Tr. 149). Mr. Taylor stated that while the belt was down, and while he was near the openings cited by

Mr. Christian, he did not attempt to reach in to determine if he could reach the exposed parts (Tr. 150).

Paul Gillespie testified that he is employed by the respondent as an electrician and that he has worked at the mine for 4 years. He is a union member, and has 20 years experience in the mines, including 15 years as an electrician. He confirmed that he is familiar with the tail pulley area and visited it once each week during his electrical inspection. He identified exhibit R-2 as a mine map which accurately reflects the mine workings. He stated that the tail pulley in question was located approximately 50 feet inby the green "X" mark on the map. He identified the areas marked in red on the map as those areas where coal was being mined. He also identified the "short yellow" line on the map as the No. 1 belt line, and the "long yellow" line as the No. 2 belt line. He also stated that miners did not normally travel past the tail pulley on their way in and out of the mine working areas.

Mr. Gillespie stated that the individual who serviced the tail pulley on a daily basis would be in the cited area for approximately 5 minutes, and while greasing the pulley he would be behind the pulley or "off to the side" approximately a foot away. The belt was equipped with 18 to 20 inch grease hoses for greasing the pulley, and the service man would be on his hands and knees while performing this work. Mr. Gillespie stated that the average height of the coal in this area was 24 to 25 inches, but at the immediate area of the tail pulley, it was 20 inches high, and the entry was 26 inches. The width of the travel way on the "clearance side" of the belt was 15 to 18 feet, and on the "rib side," the clearance was approximately 3 feet.

Mr. Gillespie estimated that the rubber belting material which was cited by Inspector Christian had been bolted on the frame of the belt conveyor for about a year prior to the issuance of the citation on April 18, 1984. Mr. Gillespie was of the opinion that the belting material was adequate to guard the tail pulley, and he did not believe that the guarding presented any hazards. He stated that he "could stay away from the pulley" in the event greasing or cleaning had to be done, but he conceded that "someone could get into it if they tried."

Mr. Gillespie stated that after the citation was issued, mine foreman Ayers instructed him to remove the belting material and to reguard the tailpiece. Although no particular type of material was mentioned as suitable for guarding,

Mr. Gillespie confirmed that he (Gillespie) suggested chain link fencing, and after locating some of this material, he cut it to size and arranged to transport it into the mine at approximately 11:00 a.m. that same day. However, when he informed Inspector Christian that he intended to set some timber posts in place and attach the fencing to the posts, Mr. Christian informed him that the fencing had to be anchored or fastened directly to the frame of the belt. Mr. Gillespie determined that this was not feasible, and that during his further discussion with Mr. Christian, the use of corrugated or expandable metal guarding material was discussed.

Mr. Gillespie stated that Inspector Christian informed him that the use of rubber belting material was not acceptable as a suitable guard because it did not provide for ventilation of the belt, and since it would contain any heat generated by the belt, it could be a hazard. Mr. Gillespie stated that he assumed that Mr. Christian preferred that some kind of metal material be used for guarding the tailpiece, and he agreed with the inspector's assessment that metal guarding would provide a better guard. However, since the metal material was not available at the mine, Mr. Gillespie had to order it from a supplier, and he did so. He left the rubber belting on the tailpiece pending the arrival of the ordered metal material, and since the belting had been in place for a year, Mr. Gillespie believed that "it was good enough."

Mr. Gillespie stated that when Mr. Christian returned to the mine on April 19, Inspector Taylor was with him. Mr. Taylor informed Mr. Gillespie that he wanted to inspect the tailpiece which had been previously cited, and they both proceeded to that area. When Mr. Taylor found the rubber belting still on the tailpiece, he informed Mr. Gillespie that it should have been replaced by 8:00 a.m. that morning. Mr. Gillespie stated that he explained to Mr. Taylor that corrugated or expanded materials were not available, but that he had ordered the material and was waiting for its arrival. Mr. Taylor then instructed him to shut the belt line down, and Mr. Gillespie immediately complied. Mr. Gillespie then informed the mine foreman that the belt had been shut down. In order to get back into production, Mr. Gillespie was later informed to find "some scrap metal" material and to fabricate a guard to suit the inspectors. Mr. Gillespie found some material, and after cutting it to suitable size, he brought it into the mine and installed the guarding completely around the tailpiece by bolting it to the belt frame. Mr. Gillespie estimated that once the metal guarding was cut and prepared,

it took him approximately 45 to 50 minutes to install it (Tr. 151-166).

On cross-examination Mr. Gillespie confirmed that grease hoses were in place on the tailpiece at the time the citation was issued, and he indicated that anyone servicing the pulley had to be on all fours or lying down. He also confirmed that on the "tight side" of the belt, the clearance was reduced to 12 to 18 inches because of the timbers which were in place. He stated that anyone on their hands and knees in the proximity of the tailpiece would be on "the same level" as the exposed tail pulley area. He agreed with Inspector Christian's estimate that the distance between the conveyor frame and the exposed pinch points was 3 inches. Mr. Gillespie could not recall where he obtained the scrap metal material used to guard the tailpiece.

In response to further questions, Mr. Gillespie stated that he had no knowledge as to the manner in which the belt location cited in the past by MSHA Inspector Simmons was guarded (Tr. 171). Mr. Gillespie was of the opinion that if anyone made a conscious effort to reach into the tail pulley openings, they would make contact and get caught in the pulley (Tr. 172). He confirmed that the belt would be running while he was greasing it or cleaning up around the tail piece. He confirmed that the tail piece is raised up off the floor, and that even though he is on his knees, he can use a shovel for cleaning up the coal around the tail piece. The belt is running while this cleanup takes place, and the coal which is cleaned up is simply placed on the belt (Tr. 173). Mr. Gillespie indicated that he is in the area once a week during his weekly electrical inspection, and he confirmed that he was not involved in the initial installation of the belting which was used to guard the tail pulley, nor was he involved in the moving of the tail piece (Tr. 174).

James Ayers testified that he has served as the respondent's mine foreman for approximately 3 1/2 years, and that he has worked in the mining industry for 19 years. He confirmed that he and Inspector Christian travelled together during the inspection of April 18, 1984, that he is aware of the citation, and confirmed that it was served on him.

Mr. Ayers stated that Inspector Christian informed him that both sides of the conveyor belt needed to be guarded at the places which were open and exposed and not guarded by the rubber belting material. Once the citation was issued,

Mr. Ayers left the matter up to electrician Gillespie, including the matter as to how it was to be guarded. Mr. Ayers denied telling Mr. Gillespie as to the type of material to use to guard the tail pulley, and he confirmed that Mr. Gillesie did suggest the use of chain link fencing material. Mr. Ayers believed that Mr. Gillespie would install the chain link fencing material sometime after 3:00 p.m., on April 18, during the maintenance period regularly scheduled each day between 3:00 p.m. and 5:00 p.m.

Mr. Ayers stated that the belt is inspected every day during the preshift inspection, and that he inspected it on the morning on April 18. Mr. Ayers was of the view that the existing belting material which was bolted to the conveyor frame, and which covered the rear of the tail piece pulley, was adequate and complied with MSHA's guarding regulations. Mr. Ayers stated that before the tail piece was moved during the lengthening of the belt line, the tail pulley had been guarded with the same rubber belting material over the end of the tailpiece, and that a previous inspector had approved of this guarding method. The previous inspector also advised him that as long as the tail piece was guarded at the rear, it was not necessary to guard the sides. However, Inspector Christian insisted that the sides, as well as the rear of the tail piece, had to be guarded. Mr. Ayers stated that he did not believe that anyone could have contacted any exposed belt moving parts unless they made a deliberate effort to do so.

Mr. Ayers stated that when Inspector Christian returned to the mine on April 19, Inspector Taylor was with him. Mr. Ayers accompanied Mr. Christian on his inspection rounds that day, and Mr. Taylor accompanied Mr. Gillespie. Mr. Ayers stated that he was not concerned about the cited tail pulley because he assumed Mr. Gillespie had taken care of it, and since Mr. Gillespie always does a good job, he assumed that he had taken care of the matter. Mr. Ayers stated that he first learned that the guarding had not been replaced when the belt was shut down. He and Mr. Christian went to the area at approximately 9:00 or 9:30 a.m., and Mr. Gillespie and Mr. Taylor were there. Mr. Gillespie informed him that the material necessary to repair the guarding was on its way (Tr. 175-184).

On cross-examination, Mr. Ayers stated that if anyone "really wanted to" stick his hand into the tail pulley, they could do it. He also agreed that the exposed portion of the pulley was on the same level as anyone crawling around on their hands and knees, and while he indicated that he has

never slipped in the 3 1/2 years he has worked in the pulley area, he could not state whether or not it was possible for anyone to slip while crawling around the area.

Mr. Ayers confirmed that he observed grease hoses on each side of the belt in question, but he did not know where Mr. Gillespie obtained the metal material used to guard the belt. He described the unguarded areas which concerned Inspector Christian, and stated that Mr. Christian was only concerned about the exposed and unguarded "side areas" of the belt (Tr. 186-188; 191-192). Mr. Ayers described how the guarding was attached to the belt to achieve abatement, and he conceded that there would be no reason to take the guarding off to perform maintenance or greasing on the belt (Tr. 194).

In response to further questions, Mr. Ayers stated that he and Inspector Christian had on prior occasions travelled the same belt tail piece, but that Mr. Christian never mentioned the lack of adequate guarding (Tr. 197).

Inspector Christian was called by MSHA in rebuttal, and he stated that he could not recall whether or not he observed any grease fittings on the belt at the time he issued the citation (Tr. 199). He also had no recollection of having observed the belt in that same condition during prior inspections (Tr. 200-201).

Mr. Christian stated that any guarding which would not permit one to come in contact with moving belt parts by getting in between the guarding material and the belt would be acceptable as compliance. He agreed that there was some disagreement among inspectors as to what is acceptable guarding, and he confirmed that MSHA's policy is that guarding simply nailed to a post which could be readily knocked down or removed is not acceptable. He also confirmed that in his district, corrugated materials and well-installed fencing materials are considered to be acceptable means for guarding belts (Tr. 206-208).

Inspector Taylor was also called in rebuttal, and he stated that he was present during a conference held sometime between November, 1983, and April, 1984, and that he overheard his supervisor suggest to Mr. Fergusen that he come up with a simple drawing as to how a belt guard would be fabricated so that MSHA could review it to determine whether it would be acceptable (Tr. 209).

Findings and Conclusions

Fact of Violation

The citation in this case charges the respondent with a failure to adequately guard a belt conveyor tail pulley. The cited mandatory safety standard, 30 C.F.R. 75.1722(b), provides as follows: "Guards at conveyor-drive, conveyor-head, and conveyor-tail pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley."

In defense of the citation, the respondent cites the case of Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, September 24, 1984, where the Commission upheld a citation for a violation of 30 C.F.R. 77.400(a), a surface mining standard requiring the guarding of mechanical equipment exposed moving parts "which may be contacted by persons, and which may cause injury to persons." Respondent asserts that the Commission ruled that the construction of the cited section contemplated a showing of a reasonable possibility of contact and injury. Respondent concludes that in the instant case, the petitioner must first establish that there was a reasonable possibility of contact and injury before a prima facie case of a violation is met.

In support of its argument that the petitioner has not established that there was a reasonable possibility of contact and injury in this case, respondent asserts the following:

1. The lack of worker activity in the area (5 minutes per day) which presented a very minimum worker exposure to whatever slight hazard was present.

2. The low seam height where the tail pulley was located necessitated a worker being on all fours and laying down while performing the work necessary to the tail pulley, which in turn made slipping a virtual impossibility during the performance of the work duties.

3. The travelway to the tail pulley had a 12' to 13' clearance.

4. Cleaning and greasing could be accomplished from a safe distance (24-30 inches).

> 5. The tail pulley was guarded from the rear by a piece of belt material anchored to the back frame by bolts (Tr 24).
>
> 6. The tail pulley was located off the main travelway to the working section of the mine and whatever hazard was present, slight, if any, was not exposed to workers entering or leaving the mine.

In the Thompson Brothers case, Judge Broderick rejected the operator's argument that it was virtually impossible for a person not suicidally inclined to contact the unguarded moving parts in question, and he accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission stated as follows at 6 FMSHRC 2097:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis. (Emphasis added.)

I take note of the fact in Thompson Brothers, the Commission fashioned its "likelihood of contact and injury" test after analyzing the "may cause injury" language of section 77.400(a). The comparable standard for underground mines, section 75.1722(a), contains identical language, and applies in instances where designated equipment is not provided with guards. However, in the instant case, the respondent is charged with a violation of subsection (b) of section 75.1722, which contains no such language. The cited standard here requires that guards provided for certain designated equipment be sufficient to prevent a person from reaching behind the guard and being caught between the belt and the pulley.

Inspector Christian testified that he issued the citation because the tail pulley in question was not adequately guarded at the back on both sides where a piece of belting had been installed over the pulley, and in two areas on either side and in front of the tail roller where the configuration of the belt framework resulted in openings which were not guarded. At the time of the inspection, the section was in production and the belt was running. Mr. Christian's unrebutted testimony is that the pinch points were about 3 inches from the unguarded openings, and that it was possible for anyone to reach in and contact the unguarded openings. He also believed that anyone in the area cleaning up, greasing, or inspecting the area could contact the pinch points through carelessness or slipping or tripping on the adjacent travelways. Inspector Taylor, who viewed the unguarded area the next day when he visited the mine to abate the citation, agreed with Inspector Christian's assessment of the hazards presented by the inadequately guarded pulley.

Mine electrician Paul Gillespie agreed with Inspector Christian's assertion that the unguarded pinch points were some 3 inches from the conveyor belt framework, and while he personally did not feel threatened by any hazard posed by the unguarded pulley and indicated that he could stay away from it while greasing it or cleaning up, he conceded that anyone could readily contact the pinch points if they tried. He also confirmed that the belt is running while cleanup and greasing is conducted. Although section foreman James Ayers was of the opinion that the pulley was adequately guarded, he conceded that anyone making a deliberate effort to contact the pinch points could do so, and he agreed that the exposed unguarded pulley was at the same level as anyone crawling around the area on their hands and knees.

Although the inspector agreed that the belt examiner would only be in the area for 5 minutes while visually observing the belt, he also indicated that belt cleaners are there for longer periods while cleaning up under and on both sides of the pulley, and that a mechanic would also be there at least once during each shift greasing the pulley bearings. Although Mr. Gillespie testified that grease hoses were provided to permit greasing from a distance of a foot or so from behind or to the side of the unguarded pulley, he also indicated that a service man would be on his hands and knees while performing this work. While the presence of grease hoses would reduce the likelihood of injury, the fact remains that the pulley was located in a rather confined area where the travelway inclined, and where men had to crawl around on their hands and knees. Given the fact that cleanup personnel, mechanics, and belt examiners were regularly in the area at least once a shift, and had to crawl around the unguarded area, the confinement itself added to the possibility of someone inadvertently coming in contact with the unguarded pulley pinch points located only 3 inches from the belt structure.

Although it is true that the low coal seam and confined area may have reduced the chances of someone tripping or falling, the fact is that the persons crawling around the area on all fours would be at the approximate same level as the unguarded pulley. Given the additional fact that clean up and greasing was done with the belt running, this increased the possibility of someone being seriously injured in the event they contacted the unguarded pulley, particularly with respect to the cleanup man, with shovel in hand, and on all fours, working around the unguarded pulley. In addition, since the area was wet and muddy, one can reasonably conclude that a person on his hands and knees performing work around the pulley would be in jeopardy of sliding or losing his balance.

On the facts of this case, while it seems clear that the back of the pulley was guarded with belting material, the belting did not extend to either side, and these areas were left exposed. The additional openings in the belt frame forward of the pulley were totally unguarded. Thus, I conclude and find that the petitioner has established by a preponderance of the credible evidence that the guarding was inadequate and constituted a violation of section 75.1722(b). Further, given the aforementioned circumstances with regard to the working conditions and the presence of miners in the unguarded areas with the belt running, I conclude and find further that it was reasonably likely that someone could inadvertently or through carelessness, come in contact with

the unguarded pulley pinch point while the belt was running, and that a serious injury would result. For these same reasons, I also conclude and find that the violation was significant and substantial. Accordingly, the citation IS AFFIRMED.

History of Prior Violations

Exhibit P-4, is a computer printout listing the respondent's civil penalty assessment record for the period April 18, 1982 through April 17, 1984. That record reflects that the respondent paid civil penalty assessments totaling $3,058 for 72 section 104(a) citations issued at the mine. Two of those were for prior violations of section 75.1722(b), and one was for a violation of section 75.1722. For an operation of its size, I cannot conclude that the respondent's compliance record is such as to warrant any additional increase in the civl penalty assessment for the violation in question in this case.

Size of Business and Effect of Civil Penalty on the Respondent's Ability to Continue in Business

From the information provided by the parties in Stipulation No. 5, I conclude that the respondent is a small-to-medium sized operator. I adopt as my conclusion the stipulation by the parties that the civil penalty assessed in this case will not adversely affect the respondent's ability to continue in business.

Negligence

Respondent argues that since the tail pulley in question was guarded to the satisfaction of another MSHA inspector 1-year prior to the inspection conducted by Inspector Christian, and since Mr. Christian inspected the pulley at least once on a prior mine visit and issued no citation, it was entitled to rely on an assumption that the tail pulley was adequately guarded. Respondent also argues that the unguarded openings in question did not create such a dangerous hazard as to put it on notice that it required attention. Under these circumstances, the respondent concludes that it was not negligent.

Petitioner argues that the violation resulted from a high degree of negligence by the respondent. In support of its argument, petitioner asserts that the location of the

pulley was subject to daily inspections and that its testimony reflects that the condition had existed for a substantial period of time and was readily identifiable to anyone looking at the pulley (posthearing brief, pg. 4). Further, petitioner points out that on November 7, 1983, the respondent received a citation for the same condition cited in the instant case because an 8 foot piece of belt had been placed over the tail roller in an attempt to guard it. That was also the condition of the tail pulley when Mr. Christian issued his citation, and the respondent stated at the hearing that abatement in the prior instance consisted only of bolting the belt at the top.

Petitioner points to the testimony of Mr. Christian that the previous citation was discussed at the MSHA conference held in this case, and that it was made clear by the inspector who issued the November 7 citation, that abatement was achieved by securing the belt material at the sides, and all the way around the back of the tail piece. That is no less than what was required in the instant case. Petitioner concludes that it is simply incredible that MSHA would have acted otherwise, and that it is equally incredible that mine operator Fergusen, who was an MSHA inspector and supervisor for 10 years, would have been confused about the proper guarding procedure.

In response to the respondent's suggestion that MSHA is somehow estopped from issuing a citation because of its failure to do so in the past, petitioner cites the decision of Judge Morris in Secretary of Labor v. Southway Construction Co., 6 FMSHRC 2420, October 10, 1984, 3 MSHC 1656 (1984), rejecting an identical argument with respect to a violation of the guarding requirements of 30 C.F.R. 56.14-1. Petitioner also cites the decisions in Bethlehem Mines Corporation v. Secretary of Labor, 2 MSHC 1039, 1040 (1980), and Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, 1588 744 F.2d 1411 (10th Cir.1984), in support of its conclusion that an operator's failure to know that a condition constituted a violation of the law is not a defense to negligence.

After consideration of the arguments presented by the parties, I conclude and find that the violation resulted from the respondent's failure to exercise reasonable care to insure compliance with the requirements of the cited standard, and that the respondent was negligent. Although I am cognizant of the fact that MSHA inspector's have differed as to the adequate guarding requirements of section 77.1722(b), particularly with respect to what constitutes a "sufficient

distance" for extending a guard, and what is a "suitable" guarding material, it nonetheless seems clear to me that the petitioner's arguments on the negligence issue is correct. Respondent's assertions that it was not negligent are rejected.

Gravity

I conclude and find that the failure to completely guard the cited tail pulley on the belt which was running constituted a serious violation, particularly at those locations where the pinch points were some 3 inches from the openings.

Good Faith Compliance

The parties differ as to whether the violation was abated in good faith. Respondent maintains that delays were encountered because of the inspector's personal preferences concerning the type of materials to be used to guard the tail pulley, and the unavailability of guarding materials. Respondent also maintains that requiring the abatement work to be done on the same shift as the citation was issued was unreasonable in itself. Petitioner asserts that the respondent did not abate the violation in good faith and in a timely manner, and only did so after a withdrawal order was issued. Petitioner suggests that Mr. Gillespie and Mr. Ayers may have been nonchalant and uncaring about the abatement. Petitioner concludes that despite the fact that material and personnel were available to do the job, the respondent failed to abate within the time fixed by the inspector, and that its excuses for the delay should be rejected.

On direct examination, Inspector Christian testified that when he discussed the citation with Mr. Ayers, he discussed the use of rubber belting material as a guard, but suggested that metal guarding materials might be more suitable since they were of a more permanent nature and could not be easily removed. He also advised Mr. Ayers that he would prefer metal guarding, and Mr. Ayers responded that it was possible that this material could be obtained from another mine some 15 miles away. When Mr. Christian returned to the mine the next day at 6:30 am., he dispatched Inspector Taylor to the pulley area to see whether the abatement had been achieved, and Mr. Christian did not arrive there until approximately 11:00 a.m. At that time the metal guarding was in the process of being installed. Mr. Taylor testified that when he arrived earlier at the tail pulley area he saw no evidence of any abatement work taking place.

Inspector Christian and Inspector Taylor were recalled by me after they and Mr. Fergusen had testified. Mr. Christian confirmed that he discussed the abatement with Mr. Ayers and advised him that the use of rubber belting guarding materials were acceptable, as long as it was secure. He conceded that he "suggested" to Mr. Ayers that something more substantial should be used, and while he could not recall mentioning the use of chain-link fencing materials, he indicated that he would accept such fencing as an adequate guard so long as it was securely installed. Mr. Taylor stated that he and Mr. Christian had discussed the violation on the way to the mine the day after the citation was issued and that Mr. Christian advised him that while he told Mr. Ayers he could use rubber belting as guarding, he recommended to Mr. Ayers that metal materials be used.

When called in rebuttal by the petitioner, Inspector Christian admitted that there was disagreement among inspectors in his office as to what is acceptable guarding, and he admitted that in his district corrugated materials and well installed fencing materials are considered to be acceptable means of guarding belts. Inspector Taylor testified on rebuttal that he overheard his supervisor suggest to Mr. Fergusen that he submit drawings to MSHA so that a determination could be made as whether the materials used for guarding are adequate.

By letter and enclosures of May 21, 1984, in response to my request made during the hearing, petitioner's counsel submitted a copy of MSHA's policy directive covering the mechanical equipment guards required by section 75.1722. The policy directive cites "substantial chains, cables, or the equivalent" as examples of guards which are presumably acceptable to MSHA. Included as an attachment to this directive are two sketches labeled "standardized guard for belthead" and "standardized beltheads sections," with notations and examples as to what may be required. I note that nowhere is rubber belting material, fencing material, or metal material specifically mentioned.

Mr. Gillespie testified that after the citation was issued, Mr. Ayers instructed him to remove the belting material, but that he did not mention the type of material he was to use to abate the citation. Mr. Gillespie stated that he (Gillespie) suggested chain link fencing material, and after measuring and cutting it to size, he made arrangements to take it into the mine that same day. However, he claims that when he advised Mr. Christian that he intended to

install chain link fencing on some posts around the tail pulley, Mr. Christian informed him that this could not be done and that the fencing material should be bolted directly to the belt frame. Mr. Gillespie stated that he advised Mr. Christian that this was not feasible, and after further discussion, Mr. Christian rejected the use of rubber belting materials because he believed it would be hazardous. At that point in time, Mr. Gillespie discussed the use of corrugated or expandable metal materials, and after determining that it would have to be ordered, he decided to leave the belting material in place pending the arrival of the metal materials.

Mr. Gillespie testified that when Inspector Taylor confronted him the next day and asked for an explanation as to why the belt had not been guarded, he explained that the materials were on order and had not arrived. Mr. Taylor reacted by immediately ordering the shutting down of the belt. When mine foreman Ayers learned of this, he immediately ordered Mr. Gillespie to find "some scrap metal" material to fabricate a guard to suit the inspectors. Once this was done, it took Mr. Gillespie 45 to 50 minutes to install it with the assistance of Mr. Taylor.

Having viewed Mr. Gillespie on the stand during his testimony, I find him to be a credible witness, and I believe his explanation of the events which transpired during the abatement period. Although the respondent did not produce any written invoices for the materials purportedly ordered, I have no basis for doubting that this was done. Petitioner suggests that the abatement was "forced" on the respondent only after the order was issued. While one may speculate as to why the "scrap material" was not used in the first place, Inspector Christian's somewhat equivocal testimony on direct, recall, and rebuttal as to what was acceptable to him to achieve abatement supports the responnt's suggestions that it did the best it could under the circumstances. Accordingly, I conclude and find that the petitioner has failed to establish that the respondent acted in bad faith, and its arguments in this regard are rejected.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that a civil penalty assessment in the amount of $400 is appropriate and reasonable for the section 104(d)(1) Citation No. 2124598, April 18, 1984.

ORDER

The respondent IS ORDERED to pay a civil penalty in the amount of $400 for the violation in question, and payment is to be made to MSHA within thirty (30) days of the date of this decision and order. Upon receipt of payment, this case is dismissed.

George A. Koutras
Administrative Law Judge