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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

N. L. BAROID-DIV/N.L.
INDUSTRIES, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 85-6-M
A.C. No. 16-00257-05505

Raymond Mill No. 1/2 or
Raymond Mill No. 1/2/3

DECISION

Appearances: Chandra V. Fripp, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
J.D. Fontenot, Safety and Health Manager, N.L.
Baroid Division, N.L. Industries, Inc., Houston,
Texas, 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 civil penalty assessments in the amount of \$870
for 11 alleged violations of certain mandatory safety standards
found in Part 55, Title 30, Code of Federal Regulations.

The respondent filed a timely answer and contest, and a
hearing was held in New Orleans, Louisiana, on August 6, 1985.
The parties waived the filing of posthearing briefs. However, I
have considered their oral arguments made on the record during
the course of the hearing.

Issues

The issues presented in these proceedings are as follows:

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1. Whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalty to be assessed for those violations based on the criteria found in section 110(i) of the Act.
2. Whether the inspector's "significant and substantial" (S & S) findings concerning the violations are supportable.
3. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of this decision.

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. Mandatory safety and health standards, Part 55, Title 30, Code of Federal Regulations.
4. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 6-8):

1. The respondent's barite mining operation is covered by the Act, and the respondent is subject to the jurisdiction of the Act.
2. Respondent's annual mine production in 1984 was 150,000 tons of barite, and the mine worked 120,000 man hours.
3. The citations issued by Inspector McGregor are accurate, and were duly served on the respondent.
4. The respondent's history of prior violations is accurately stated in MSHA's exhibits P-1.
5. The respondent operates 10 additional similar mining operations at various sites and locations in several states.

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6. The payment of the civil penalties assessed for the citations in question will not adversely affect the respondent's ability to continue in business.

7. The subject barite mining operation conducted by the respondent employed approximately 38 employees.

Discussion

Eight of the section 104(a) citations concern alleged violations of mandatory safety standard, 30 C.F.R. 55.14-1, which provides as follows: "Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded."

The conditions or practices cited by the inspector on August 22, 1984, are as follows:

"S & S" Citation No. 2237045. The No. 15 conveyor belt drive shaft is not guarded. Clean up and maintenance have to be performed in this area.

"S & S" Citation No. 2237046. Conveyor belt No. 90 head and tail pulley not guarded. Clean up and maintenance have to be performed in this area.

"S & S" Citation No. 2237047. The No. 91 conveyor belt tail pulley is not guarded. It is a flanged type pulley. Clean up and maintenance work have to be performed in this area.

"S & S" Citation No. 2237050. The drive shaft for the No. 3 dust collector is not guarded. This is in the mill building. Clean up and maintenance work has to be performed in this area.

"S & S" Citation No. 2237051. The drive shaft for the No. 2 dust collector in the mill is not guarded. Clean up and maintenance work have to be performed in this area.

"S & S" Citation No. 2237053. The No. 10 conveyor belt head pulley is not guarded. Clean up and maintenance work have to be performed in this area.

Citation No. 2237055 (Non-"S & S"). The No. 47 electric screw feed motor is not guarded. (The citation was modified

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on August 24, 1985, to show that the drive shaft of the motor was not guarded).

"S & S" Citation No. 2237056. The dock sylo (sic) dust collector motor drive shaft is not guarded. Maintenance work has to be performed in this area.

"S & S" Citation No. 2237048, issued on August 22, 1984, cites an alleged violation of 30 C.F.R. 55.11-12, which provides as follows: "Openings above, below, or near travelways through which men or materials may fall shall be protected by railways, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed."

30 C.F.R. 55.2 defines the term "travelway" as follows: "Travelway' means a passage, walk or way regularly used and designated for persons to go from one place to another."

The cited condition or practice is described as follows: "Holes have been cut in the top of the storage bin near the tail pulley of No. 91 belt. Clean up and maintenance work has to be performed in this area."

Citation No. 2237057, ("S & S"), issued on August 22, 1984, cites an alleged violation of 30 C.F.R. 55.20-3, which provides as follows:

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

30 C.F.R. 55.2, defines the term "working place" as follows: "Working place' means any place in or about a mine where work is being performed."

The cited condition or practice is described as follows: "The elevated walkways and declines underground along the

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conveyor belts at this plant are heavy (sic) burdened with rocks (ore), trash, tools, hoses, etc. This creates almost a plant wide trip and fall hazard."

Citation No. 2237058, ("S & S") issued on August 23, 1984, cites an alleged violation of 30 C.F.R. 55.9-61, which provides as follows: "Stockpile and muckpile faces shall be trimmed to prevent hazards to personnel."

The cited condition or practice is described as follows:

The stock pile at this plant is not trimmed to prevent a cave or slide situation which could cover the front-end loader or cat which move materials from the stock pile. An angle of repose should be established and maintained to prevent a hazardous cave or slide from occurring.

MSHA's Testimony and Evidence

MSHA Inspector Joe McGregor testified as to his background and experience, which includes approximately 3 years of inspecting surface ore and milling operations, and prior work as a miner. He stated that he conducts approximately 45 to 50 regular inspections a year, and he confirmed that he inspected the mining operation in question and that he issued the citations in issue in this case.

Mr. McGregor described the respondent's mining operation as a barite milling and grinding operation consisting of a relatively compact system of belt conveyors and storage bins. He believed it was a "fairly large" operation.

Inspector McGregor testified that he issued Citation No. 2237045, after finding the No. 15 belt drive shaft exposed and unguarded. The shaft is 1-1/2 to 2 inches in diameter and it powers the movement of the belt. The shaft is located approximately 4 feet above ground level and there is a walkway or travelway close by and directly below the shaft. No guard was provided for the shaft, and since he believed that the shaft bearings had to be greased from time-to-time, he was concerned that someone with loose clothing could become caught in the exposed shaft.

On cross-examination, and referring to respondent's photographic exhibit R-2, Mr. McGregor identified a handrail and a walkway, and he believed that it was reasonably likely

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that a maintenance person could stick his hand into the moving motor parts which were unguarded. He agreed that it would be difficult for a person to reach the unguarded area (Tr. 91-92). He also believed that a clean up person or someone monitoring the motor shaft could get close enough to fall into the unguarded shaft motor (Tr. 97).

Inspector McGregor testified that he issued Citation No. 2237046 after finding that the No. 90 belt conveyor head and tail pulley moving parts were not guarded. He identified a photograph (exhibit P-3) he took of the tail pulley at the time of the inspection, and confirmed that he took no picture of the head pulley because his flash was not working.

Mr. McGregor stated that the pinch point at the tail pulley is at the bottom of the belt drum and that it is approximately 2 feet above ground level, and approximately 18 inches from the barrier shown in the photograph. The walkway adjacent to the belt is approximately 18 inches from the tail and head pulleys, and since the bearings have to be greased, he was concerned that a maintenance man and the person who conducts the daily onshift examination of the belt could reach in or slip into the unguarded pinch points.

Mr. McGregor stated that the cited condition was obvious, and he did not know whether the belt was in operation at the time of his inspection. He confirmed that he had previously inspected the mill on at least one prior occasion.

On cross-examination, Mr. McGregor identified photographs R-4, R-5, and R-6 as the tail pulley as it appeared after the citation was abated. He could not state whether the belt was running, and he saw no cleanup people in the area. He could not recall anyone telling him that the guards had been removed to clean the belts because of the heavy rains prior to the inspection. Since no one was in the area, he had no reason to check to see whether the belt was locked out, and he did not do so (Tr. 101-106).

Mr. McGregor stated that the tail pulley pinch point was approximately 3 to 4 feet from the walkway. He conceded that there was a physical barrier or handrail alongside the belt structure as shown in exhibit R-3. He conceded that someone would have to reach over this barrier and under the belt to reach the pinch point (Tr. 110). He agreed that it may be awkward for someone walking along the adjacent walkway to fall over the barrier and get under the belt to the pinch point, but stated that "it can happen" (Tr. 113). He agreed that someone casually walking by would not be in any danger,

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but he was concerned with the person who has to grease the belt bearings. The belt was equipped with grease fittings, and if the belt is shut down, and the grease fittings are used, he would have "to go along" with the respondent's contention that there is no hazard. He then stated that he would still issue a violation in these circumstances because "people go by there when its operating," and even though a cleanup man is shovelling from the walkway, he could be injured "by getting into moving parts" (Tr. 117). He believed it was reasonably likely that a cleanup person could fall over the handrail for a distance of 18 inches and that his hand would go under the belt and into the pinch point (Tr. 118).

Mr. McGregor stated that he did not know the company procedures for performing maintenance on the tail and head pulley in question, and he did not ask (Tr. 120). He conceded that the only person in the area would be those who would be performing maintenance or inspecting the belt (Tr. 124).

Mr. McGregor testified that he issued Citation No. 2237047, after finding the No. 91 conveyor belt tail pulley unguarded. He stated that the pulley is a self-cleaning flange-type pulley which is more hazardous than a regular drum type. He identified a photograph of the pulley which he took during his inspection (exhibit P-4), and stated that the belt moves from left to right over the top of the pulley. He indicated that the pinch point is located at the bottom of the pulley, and that it is approximately 1 to 2 feet above ground level. He also indicated that the pulley is located on top of a bin and that a travelway was out and away from the pulley location. The condition was obvious and he was concerned that anyone performing cleanup or greasing the pulley could accidentally get into the pinch point.

On cross-examination, Mr. McGregor stated that the No. 91 conveyor tail pulley was located on top of a bin structure 40 or 50 feet off the ground and approximately 3 feet above a walkway. Referring to his photograph, exhibit P-4, he identified a grease hose extension used for greasing the pulley. Photographic exhibit P-10 (Citation No. 2237048) is the other side of the pulley, and that is the side where normal clean up would be performed. Access to that area is by a cross-over and steps which go over the belt. He considered the area to be a work area where one would go for clean up or inspection, but he did not know how often this occurred

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(Tr. 130-131). Mr. McGregor conceded that he issued the citation to cover every conceivable possibility of someone contacting the pinch point (Tr. 134-135).

Mr. McGregor testified that he issued Citation No. 2237050 after finding that the drive shaft for the No. 3 dust collector in the mill was not guarded. He stated that the drive shaft is "fairly small" in diameter, and that if contacted, a person may be injured. No pinch point was present, and Mr. McGregor's concern was with the exposed moving part. He took no picture of the drive shaft because his camera flash was not working.

Mr. McGregor described the shaft as smooth, approximately 1 1/2 to 2 inches in diameter, and approximately a foot long. The point of contact with the exposed shaft was approximately 3 feet off the floor, and the walkway was approximately 2 feet or less away. He was concerned that the mill operator, maintenance personnel, or the designated examiner would be exposed to a hazard of contacting the exposed shaft.

Mr. McGregor testified that he issued Citation No. 2237051, after finding an unguarded shaft on the No. 2 dust collector in the mill. His testimony with respect to the citation is identical to his testimony in support of Citation No. 2237057.

On cross-examination, Mr. McGregor examined respondent's photographs R-7 and R-8, which show the drive shaft for the No. 3 dust collector, and R-9, R-10, and R-11 which show a similar drive shaft for the No. 2 dust collector. He agreed that both shafts were located approximately 3 to 4 feet off the base plate of the adjacent motor (Tr. 139). Referring to photograph R-10, Mr. McGregor stated that the area behind the dust collector and to the wall was not a travelway or walkway. However, he considered the area in front of the collector under the ceiling duct to be a walkway, and he confirmed that one would have to bend down and reach in to contact the shaft (Tr. 144). He confirmed that there was a third dust collector with a similarly exposed shaft in the plant but could not state why he did not cite that one (Tr. 145).

With regard to both of the dust collector shaft guarding citations, Mr. McGregor conceded that it is doubtful someone casually walking by would become entangled in the shafts (Tr. 213), and that one would have to fall some 2 feet over the blower box in order to contact the shafts (Tr. 214).

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Mr. McGregor testified that he issued Citation No. 2237053, when he found that the No. 10 conveyor belt head pulley was not guarded. He confirmed that he took a photograph on the day of the inspection, and he pointed to the unguarded pinch point as the area where the belt and drum come in contact at the top of the pulley. He believed that it was reasonably likely that someone could get caught in the pinch point, and if this occurred, it could result in fatal injuries.

Mr. McGregor testified that the belt was 3 to 4 feet off the ground and that a travelway was below and adjacent to the belt, and some 3 to 4 feet below the pinch point. Since the bearings have to be greased and rock has to be cleaned up off the walkway, he believed someone could contact the pinch point.

On cross-examination, Mr. McGregor identified exhibit R-12 as a photograph of the No. 10 belt conveyor head pulley, and he conceded that his photograph, exhibit P-7, was taken from the other side. He identified a stop cord, two small rails above and below the stop cord, and a larger handrail in exhibit R-12, but did not consider these to be sufficient as guarding for the head pulley. He believed that there was access to the pulley from the side where he took his picture, and that someone would have reason to be there at least once a week to grease the pulley (Tr. 154). Conceding that someone would have to climb up several ladders or a catwalk, and then remove several chains to reach the head pulley area, Mr. McGregor still believed that it was reasonably likely that an injury would result by someone contacting the pinch point (Tr. 156).

Mr. McGregor confirmed that he issued Citation No. 2237055, after finding that the drive shaft of the electric feed motor was not guarded. He took the photograph, exhibit P-8, at the time of the inspection. He stated that there was an unguarded opening approximately 1 foot long by the shaft, and he believed that a person's clothing could be caught in the drive shaft. He stated that the unguarded shaft was located "up in the air," and believed that anyone walking by during an inspection could get caught in the shaft.

On cross-examination, Mr. McGregor confirmed that his photograph, P-8, is a top view of the No. 47 electric screw feed motor, and exhibit R-13 is respondent's front view photograph. Mr. McGregor estimated the distance from the front of the motor to the unguarded shaft as 8 to 12 inches. He did not consider that the violation would reasonably likely cause

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an accident (Tr. 159). He believed the motor was in the walkway and that a maintenance man would possibly be there once a month (Tr. 160). He knew of no injuries ever resulting from someone being entangled in a shaft motor of this size, but he still believed that it was required to be guarded (Tr. 161-162).

Mr. McGregor confirmed that he issued Citation No. 2237056, after finding that the dust collector motor drive shaft located on top of the silo bin was not guarded. He stated that the unguarded shaft opening was approximately 18 to 24 inches, and that a walkway was adjacent to and 4 feet below the drive shaft. He was concerned that someone greasing or inspecting the shaft could get their hair caught in the unguarded shaft.

Mr. McGregor stated that his principal concern with regard to the citation was that the unguarded moving parts presented exposed pinch point hazards. He believed that anyone caught in the exposed and unguarded moving parts with their clothing would suffer severe or fatal injuries.

Mr. McGregor indicated that his "S & S" finding was based on his belief that if the cited conditions were left unabated, it was reasonably likely that an accident would eventually occur. He also stated that all of the walkways which he identified are built into the belt frame structures and are provided with handrails. He observed barite materials on the walkways, and since it had rained and most of the cited areas are exposed to the elements, the footing along the walkways "was possibly bad." Although the walkway by the No. 10 belt head pulley (Citation No. 2237053) was included, the rest of the walkways were not.

Photograph P-9 is the dock silo dust collector motor drive shaft taken by Mr. McGregor, and R-15 through R-18 are the photographs taken by the respondent after abatement. On cross-examination, Mr. McGregor stated that the location of this shaft was some 50 feet off ground level, and he considered the area next to the motor as shown in respondent's photographs as a travelway, but conceded that he saw no one in the area. He believed that someone would be in the area once a day, once a week, or once a month during maintenance work (Tr. 166). Without the guard, it was reasonably likely that a person would suffer a disabling injury, but he has known of no injuries ever resulting from someone coming in contact with a drive shaft of this kind (Tr. 167).

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Mr. McGregor stated that he issued Citation No. 2237048, after finding some holes approximately a foot in diameter at the top of the storage bin near the No. 91 belt tail pulley. He took a photograph of the cited conditions at the time of the inspection. He stated that persons had to be in the area to grease the pulley or to clean up, and that they could fall thru the openings and onto the tail pulley. The tail pulley was the same one cited as Citation No. 2237047. He believed the citation was "S & S" because if left uncorrected, it was reasonably likely that an accident with injury would occur.

On cross-examination, Mr. McGregor confirmed that the holes in question were located on the same side of the No. 91 conveyor point as were the pinch points cited in that case, and that he crossed over the belt to take the picture (exhibit P-10). He was told that the holes were there to facilitate the shovelling of spilled material into the silo tank (Tr. 175). He considered the area to be a travelway because work had to be done there (Tr. 176). While he saw no one at the location during his inspection, he did see evidence that recent clean up had taken place, and this led him to conclude that people were at the cited location (Tr. 178). He conceded that the holes would cut down the necessity for someone going to the area to clean up, but he saw nothing to prevent anyone from stepping into the holes, and he did not consider the conveyor belt itself to be a barrier (Tr. 181).

Respondent's representative conceded that someone had to be in the area where the holes were observed to clean up any excess belt spillage that did not go down the holes, and that this person would probably be in the area at least once a month. However, he stated that this person would be tied to a safety line because the area is so high up (Tr. 222-223).

Mr. McGregor confirmed that he issued Citation No. 2237057 after finding loose ore rocks, trash, tools, and debris on the elevated walkways and underground declines. In view of the bad footing on the walkways, he believed that the cited materials presented a slipping and falling hazard. If a person slipped or fell on the metal walkways, different types of injuries could result.

Mr. McGregor stated that the inclines were at approximately 20 to 25 degrees, and while it was possible that someone could fall off the walkways, he did not believe that this was probable. He stated that there were places where a person could fall 50 to 75 feet, and since the cited areas were exposed to the weather and it had rained at least once during the day of the inspection, this contributed to the hazard.

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On cross-examination, Mr. McGregor did not deny that there were heavy rains everyday for approximately 3 weeks before his inspection, and he conceded that belts which handle wet ore presents a "messy" situation, particularly around head and tail pulleys. Although wet materials are more difficult to handle, he denied that such wet materials pose a similar problem for the walkways (Tr. 183). He conceded that wet barite material would cause other materials, such as rocks, to stick to it, but insisted that the rocks he observed on the walkways varied in size, and he believed that one person would probably be involved in any slip or fall accident (Tr. 186). He considered the one decline in question to be a passageway (Tr. 187).

Mr. McGregor testified that he issued Citation No. 2237058, on August 23, 1984, after finding that the stockpile of crushed barite was not trimmed to prevent it from sliding. He confirmed that he took photographs of the stockpile during his inspection.

Mr. McGregor estimated the height of the stockpile as 30 to 40 feet, and the angle of repose as 80 to 85 degrees. He described the barite material as "heavy and fairly compact," and he indicated that it "would not run as freely" as sand or gravel.

Mr. McGregor stated that the angle of repose shown in the photograph would be hazardous to anyone cutting into the pile. He believed that undercutting the pile at its edges and rainfall would contribute to the hazard. The tracks shown in the photograph are those of a bulldozer which passed by the area during the day. The only person he observed near the pile was the dozer operator who was pushing some of the material into a conveyor.

Mr. McGregor stated that the stockpile was located between the mill and the mine office, and that normally no one has occasion to pass the area on foot. His concern was that the stockpile presented a hazard to the dozer operator or anyone working near the pile.

On cross-examination, Mr. McGregor confirmed that he had no knowledge of anyone being injured by a barite pile cave or slide, but indicated that he had never seen it stacked as high or undercut as much as the pile which he cited. Referring to his photograph P-12, he estimated the height of the pile as 15 feet. Referring to respondent's photograph R-21,

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he stated that the pile by the caterpillar shown in the photograph is not the pile he cited, and he did not know whether a smaller caterpillar was working on the pile he cited. He explained that the material is moved by the blade of the caterpillar digging in to the edge of the pile, and even though the pile may not move or fall at that precise time, he never said that it would (Tr. 190).

Mr. McGregor described the consistency of the stockpiled barite, and he confirmed that he saw no one walking through the area on their way to the plant. He could not deny that the respondent had a rule prohibiting persons from walking through the stockpile area (Tr. 193).

Mr. McGregor could not remember issuing any citations during his inspections prior to August 22, 1984, and he would not disagree that he issued none (Tr 195). He was not aware that the respondent had a rule against employees wearing loose clothing, and he confirmed that for the year prior to his inspection, the respondent's facility had no accidents or incidents (Tr. 196).

Respondent's Testimony and Evidence

Barton Bradford testified that he has been employed for the past 17 months as the operations superintendent at the respondent's New Orleans plant, and that prior to that time he was employed by Amax. He has approximately 15 years of industry experience. He stated that all plant employees are required to report any hazardous conditions, and that he and his foreman conduct regular inspections of the plant and that any discovered hazards are repaired.

Mr. Bradford stated that his prior experience was in connection with OSHA safety requirements. He conceded that the plant was experiencing maintenance problems when he became superintendent, and that he regularly reviews accident reports in order to insure that similar conditions do not occur at the plant.

Mr. Bradford stated that he has never accompanied inspectors on prior inspections, but has accompanied company inspectors on "courtesy inspections." Although some hazards were pointed out during these inspections, they were corrected, and none of these were similar to those cited by Mr. McGregor.

With regard to Citation No. 2237045, concerning the No. 15 conveyor belt drive shaft, Mr. Bradford stated that he never considered it as a hazard because of its location. He

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stated that the drive shaft in question was at an elevated location which was not accessible to anyone. It was mounted on some ceiling supports and the walkway was located beneath it. He stated that the motor "would see no activity for a long time" and that it was "most likely" shut down while it was being serviced. He did not believe that the motor would be in close proximity to anyone at its location.

With regard to Citation No. 2237046, concerning the No. 90 conveyor head and tail pulley, Mr. Bradford stated that he could not recall Mr. McGregor taking any photographs. He stated that the belt was not in operation and was locked out. He also stated that the guard had been removed to perform maintenance, but that it was not replaced when the citation was issued because Mr. McGregor indicated that it did not conform with MSHA's recommended guards as depicted in exhibit ALJ-1. The guard was reconstructed and then replaced. He conceded that the area was "cluttered."

With regard to Citation No. 2237047, regarding the No. 91 conveyor belt tail pulley, Mr. Bradford conceded that the exposed flange pulley as shown in photographic exhibit No. P-4, was a hazard because anyone could simply reach in and contact the pinch point. However, he stated that the guard was taken off and not replaced because Inspector McGregor would not accept it as an "acceptable" guard.

With regard to Citation No. 2237048, concerning the three holes on top of the storage bin, Mr. Bradford stated that while he recognized that the holes were a hazard, work was taking place at the time and everyone there was "harnessed off" or "secured by ropes." The holes were there to facilitate the removal of any material spillage into the storage bin below. He also stated that workers were never there "routinely" and that the holes were eventually closed.

With regard to Citation Nos. 2237050 and 2237051 concerning the dust collector drive shafts, Mr. Bradford conceded that they were not guarded. However, he believed that these smooth drive shafts were guarded by location and he did not recognize them as hazards. Although someone could walk by the areas where the shafts were located, they are not subjected to any regular or routine maintenance, and if they are, the equipment would be shut down and locked out before any work was performed. He stated that comparable OSHA regulations do not require that such "smooth" shafts be guarded, and he is not aware of any injuries ever resulting from such unguarded drive shafts. He confirmed that another identical

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drive shaft at another location was not cited by the inspector.

With regard to Citation No. 2237055, concerning the unguarded drive shaft of the electric screw feed motor, Mr. Bradford believed that "partial guards" were provided on the structure by the manufacturer. However, once the citation issued, similar motor guards in the plant were voluntarily installed in order to comply with Mr. McGregor's citation and to avoid other citations. He stated that comparable OSHA regulations did not require that such "straight" drive shafts be guarded as long as they contained no "protrusions." Since these motor shafts were never previously cited by other MSHA inspectors during prior inspections, he assumed that guards were not required.

Mr. Bradford stated that the motor was located at the end of a catwalk, that no one is in the area on a day-to-day basis, and the motor is remotely started by a control panel.

With regard to Citation No. 2237056, concerning the unguarded motor drive shaft on the dock silo dust collector, Mr. Bradford stated that this motor was located on top of a 50 foot silo and that one would have to climb up two ladders and over some hand rails to reach the motor. He did not believe that the motor drive shaft presented a hazard because of its location, and he stated that the motor is started remotely and would be shut down when work was performed on it.

With regard to Citation No. 2237057, concerning the accumulation of rocks, trash, tools, hoses, etc., on the walkways and declines, Mr. Bradford conceded that the conditions existed as described by Mr. McGregor. He explained that the decline pits were not cleaned up and were a problem. He explained further that the day before the inspection there was a significant amount of rain and that he assigned several people to clean up the areas where the wet fine materials clogged the belts. He conceded that the tools and hoses were apparently left in place by the clean up crew when their work shift ended.

With regard to Citation No. 2237058, concerning the angle of repose on the stockpile, Mr. Bradford stated that it is no larger today than it was when the citation was issued. He stated that the material does slide down when it is cut down and removed by the dozer, and that while it "appeared" to be hazardous in the MSHA photograph, it is not. He explained that the consistency of the material is such that

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it will not slide like a sand or gravel pile, and that one can walk on it without causing it to slide. He stated that it is common to have sheer faces at the stockpile, and that the experienced dozer operators do not consider the stockpile to present a hazardous slide condition. The material is so dense that it simply will not slide. He also indicated that an attempt was made to "trim" the pile by the use of a pipe attached to the dozer blade but that this proved to be unworkable. The pile was eventually trimmed down by removing the material from the face in order to abate the citation.

On cross-examination, Mr. Bradford stated that the respondent has a safety program which includes regular weekly meetings which he conducts. In addition, annual refresher training is given to all employees and they are provided with the company safety rules. He also stated that he stresses safety awareness to all employees and conducts bi-weekly safety inspections of the plant.

With regard to Citation No. 2237048, concerning the three holes on top of the storage bin, he stated that the regular walkway was on the opposite side of this location and he did not consider the area where the holes were located as a walkway.

Ward F. Stumpf, testified that he is employed by the respondent as operations manager of its Lake Charles baroid plant. He has 23 years experience in the industry, and previously served as the warehouse superintendent and safety coordinator at the New Orleans operation. He confirmed that he has accompanied at least six MSHA inspectors on prior inspections when he was at the New Orleans operations, but that he has never accompanied Inspector McGregor. The only question raised by the inspectors on prior inspections was the angle of repose of the material stockpiles, and no questions were ever raised about the specific conditions cited by Inspector McGregor. He conceded that prior inspections did result in prior guarding citations, but not at the locations cited by Mr. McGregor.

With regard to the angle of repose issue, Mr. Stumpf stated that due to the weight and heavy consistency of the raw barite material, the stockpiles do not present a slide hazard, and he has demonstrated this to the inspectors during past inspections.

Mr. Stumpf stated that he has accompanied company safety inspectors and engineers and insurance inspectors on prior inspections and while some hazardous conditions were pointed

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out to him and corrected, none of these concerned the kind of alleged hazardous conditions cited by Mr. McGregor. Mr. Stumpf confirmed that the last lost time accident at the New Orleans operation occurred in 1981 and 1982, and two incidents were reported.

Mr. Stumpf stated that he is aware of no accidents or "near misses" resulting from any of the conditions cited by Mr. McGregor, nor is he aware of any instances when these conditions were ever pointed out as hazardous by previous inspectors. With regard to Citation No. 2237057, concerning the alleged tripping and fall hazards throughout the plant, Mr. Stumpf pointed out that due to the inclined metal walkways, rocks will fall off the belt.

On cross-examination, Mr. Stumpf confirmed that he served as safety coordinator at the New Orleans operations from approximately November, 1980 to July, 1981, and that his last inspection there was made sometime in 1982. He conceded that prior guarding citations were issued at that operation, and he also conceded that he is no expert in "soil mechanics" and has never conducted any studies in material stockpile stability.

Paul Davenport testified that he has served as the plant manager of the respondent's New Orleans milling operation for the past year and one-half. Prior to that time, he served as the operations superintendent. Based on his experience, he is able to recognize safety hazards, and in his opinion he never considered or recognized any of the conditions cited by Mr. McGregor as hazardous. He confirmed that he has accompanied other MSHA inspectors on their inspection rounds, but has never accompanied Mr. McGregor. He also confirmed that previous inspectors never cited these conditions as hazardous.

Mr. Davenport stated that he has accompanied company safety inspectors and engineers on safety inspections, but none of the conditions cited by Mr. McGregor were ever pointed out by these inspectors as hazardous. However, other conditions were pointed out as hazardous, but they were promptly corrected. He is aware of no accidents or "near misses" resulting from any of the conditions cited by Mr. McGregor in this case, and he has never read about or reviewed reports citing accidents resulting from similar conditions as those cited by Mr. McGregor.

Mr. Davenport stated that the last accident at the plant in question occurred in October, 1981. In 1984, seven or

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eight "doctor visit" type injuries occurred at the plant, and that the plant worked approximately 115,000 man-hours that year.

Mr. Davenport stated that he would never knowingly jeopardize the safety of any of his employees, and if he believed the stockpile was unsafe, he would not permit any employee to work near it. He stated that the two employees who work on the stockpile are experienced employees and that they know what the safe angle of repose is and act accordingly. He also indicated that company policy requires that all equipment be locked out and tagged out when work or maintenance is performed.

Mr. Davenport stated that prior to Mr. McGregor's inspection, it rained for several weeks and that rain adversely affects the mill operations because the material fines collect on the belts, causing jamming and mechanical problems.

Mr. Davenport stated he is unaware of any stockpile collapses or equipment damage resulting from such collapses at any of the respondent's operations. Although he could not recall the exact cost for abating the citations issued by Mr. McGregor, he estimated that the company spent "hundreds of dollars" to achieve compliance. He confirmed that some of the citations issued by Mr. McGregor were abated the same day before he left the plant, and that others were corrected before the dates actually shown on the terminations. Those dates reflect the days he returned to the plant to issue the termination notices.

On cross-examination, Mr. Davenport confirmed that he did not accompany Mr. McGregor during his inspections of August 22 and 23, 1984. With regard to the stockpile citation, he confirmed that the dozer operators have the flexibility to determine whether they believe the stockpile to be hazardous and whether they are "frightened" by their work around the stockpile.

Findings and Conclusions

Fact of Violations Regarding the Eight Equipment Guarding Citations

In *Secretary of Labor v. Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, (September 24, 1984), a case involving the guarding requirements of section 77.400(a), a surface

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mining standard containing language identical to section 55.14-1, Judge Broderick rejected an operator's contention that it was virtually impossible for a person not suicidally inclined to contact the unguarded moving parts in question. In affirming the violation, Judge Broderick 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 interpreted the application of the guarding standard 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.

Inspector McGregor identified exhibit ALJ-1 as a booklet containing MSHA's recommended guarding devices for belts, pulleys, etc. He conceded that these recommendations are not mandatory and are not part of the mandatory guarding standards, but confirmed that he follows them when conducting his inspections and issuing citations for guarding violations. He also confirmed that in issuing the guarding citations in this case, his intent was to cover "all eventualities" and to preclude anyone from deliberately or accidentally coming in contact with an exposed pinch point. Although he rejected

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the respondent's contentions that the belt and machine structures presented "built in barriers" to the pinch points which concerned him, Mr. McGregor was of the view that the unguarded locations which he cited were required to be guarded with the types of guards depicted in MSHA's guidelines and recommendations.

Citation No. 2237045--No. 15 Conveyor Belt Drive Shaft

Exhibit R-2 is a photograph of the location of the unguarded conveyor belt drive shaft cited by Inspector McGregor. Mr. McGregor had some difficulty in identifying the shaft in question (Tr. 82-84), but he indicated that it was behind the expanded metal mesh guarding which is bolted to the frame adjacent to the motor shown in the upper left hand portion of the photograph.

Inspector McGregor described the shaft as 1 1/2 to 2 inches in diameter, and he expressed concern that someone greasing the shaft bearings or someone with loose clothing could become entangled in the exposed shaft. However, no evidence was produced to establish that anyone with loose clothing would ever be near the shaft, and Mr. McGregor had absolutely no idea as to how frequently the shaft was greased, nor did he have any information regarding the respondent's maintenance schedules or procedures. Further, he conceded that it would be difficult for a person to reach the location of the unguarded shaft in question. He also conceded that the area directly in front of the motor has limited space for anyone to stand on (Tr. 98).

Superintendent Bradford testified that he did not consider the motor shaft in question to be hazardous because of its location. He stated that the shaft in question was at an elevated location mounted on some ceiling supports and that it was not accessible to anyone.

During a colloquy with MSHA's counsel, he agreed that unguarded machine parts which are inaccessible would be considered guarded by location and that no violation would occur. He also conceded that had he and the company "had gotten together on this, worked out--some of these violations may not have been brought today" (Tr. 218).

After careful consideration of the testimony and evidence concerning this citation, I conclude that MSHA has failed to establish a violation. The photograph and testimony of Mr. Bradford establish that the cited motor shaft was rather isolated and not readily accessible. I take note of

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the fact that in each of the guarding citations, Inspector McGregor noted that "clean up and maintenance have to be performed in this area." However, Mr. McGregor admitted that he was not familiar with the respondent's clean up and maintenance procedures, did not inquire as to the equipment lock-out procedures, and he made no attempts to speak with any miners to ascertain the precise nature of the work they perform, or are expected to perform, around the equipment locations which were cited. I believe it is incumbent on an inspector to develop these critical facts during his inspection so that he may make an informed judgment as to whether or not any miners are in these areas during their normal working shifts. As noted by the Commission in the Thompson Brothers case, an inspector must take into consideration all relevant exposure and injury variables, including accessibility, ingress and egress, and work duties. Absent any inquiries by the inspector at the time he observes the conditions during his inspection, I fail to understand how he can make an informed judgment as to a violation of the guarding requirements of the cited standard. Under all of these circumstances, the citation IS VACATED.

Citation No. 2237046--No. 90 Conveyor Head and Tail Pulley

Although he cited both the head and tail pulley, Mr. McGregor did not take a picture of the head pulley, and all of his testimony is in regard to the tail pulley. He conceded that he did not know whether the conveyor belt was in operation at the time of his inspection, and he did not ascertain whether it was locked out. He confirmed that the tail pulley pinch point was some 18 inches from the walkway and that there was a physical barrier or handrail adjacent to the belt structure. He conceded that someone would have to reach over the barrier and under the belt to reach the pinch point, and he agreed that someone casually walking by would not be in any danger. Although he expressed some concern over maintenance personnel being exposed to the pinch point while greasing the belt bearings, he conceded that the belt was equipped with grease fittings and if the belt was shut down and the grease fittings used, there would be no hazard.

Mr. McGregor confirmed that he had no knowledge of the respondent's procedures for performing maintenance on the conveyor belt in question, and that he did not ask. Notwithstanding all of his testimony concerning the conveyor, he insisted that he would still issue a violation because "people go by there when its operating," and even though a belt shoveler is shoveling from the walkway he could "get into moving parts."

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Superintendent Bradford testified that at the time of the inspection, the belt had been locked out and the guard had been removed to perform maintenance. He stated that it had not been replaced because Mr. McGregor did not believe that it conformed with MSHA's recommended guards as depicted in the booklet identified as exhibit ALJ-1. After the guard was reconstructed to suit the inspector, it was replaced.

I find Mr. Bradford to be a credible witness and I believe his version of the circumstances surrounding this violation. I find Inspector McGregor's testimony in support of this citation to be contradictory. In addition, I cannot conclude that his testimony establishes a reasonable possibility that anyone would contact the asserted pinch points. Most of the ingredients cited in Thompson Brothers for supporting a conclusion of reasonable contact are totally lacking. Accordingly, I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

Citation No. 2237047--No. 91 Conveyor Belt Tail Pulley

Inspector McGregor testified that the cited flange type unguarded tail pulley is more hazardous than a regular drum type pulley, and he identified the pulley as the one depicted in photographic exhibits P-4 and P-10. He was concerned that a person cleaning up or greasing the pulley could accidentally contact the exposed flange. Although the respondent pointed out that a grease hose was present to facilitate greasing, the inspector believed that a person in the area for greasing, clean-up, or inspection would be exposed to the flange hazard.

Although the respondent argued that the pulley was not readily accessible because someone had to cross-over a belt and go down some stairs, I believe it is reasonable to assume that the cross-over and stairs were constructed to facilitate ready access to the flange pulley area for clean-up and maintenance. As a matter of fact, the location of the flange as shown in photograph P-10 is adjacent to the area where there were three holes in the floor, and the testimony reflects that workers would be at this location while shoveling or cleaning materials which spilled off the belt. Someone stepping in those holes could lose their balance and accidentally fall into or against the exposed flange. Superintendent Bradford conceded that the exposed flange was hazardous because someone could simply reach in and contact the exposed pinch point.

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In view of the foregoing, I conclude and find that the exposed and unguarded flange pulley was readily accessible to those persons required to be in the area for clean-up. Given the existence of the floor holes, there was a real possibility that someone could inadvertently or accidentally trip or fall and come in contact with the flange. Accordingly, I find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

In this instance, the respondent conceded that the unguarded flange type tail pulley was hazardous and anyone could simply reach in and contact the pinch point. Given the proximity of the exposed flange to the adjacent work platform or travelway, which had three holes in it, and the reasonable access to the flange, I conclude and find that it was reasonably likely that a person could trip or stumble, and upon contacting the unguarded flange could suffer serious injuries. Accordingly, Inspector McGregor's "S & S" finding IS AFFIRMED.

Citation Nos. 2237050 and 2337051--Nos. 2 and 3 Dust Collector Drive Shafts

The cited drive shafts in question are shown in respondent's photographic exhibits R-7 through R-11. Inspector McGregor described the shafts as smooth and approximately 1 1/2 to 2 inches in diameter. He confirmed that no "pinch points" are involved in these citations, but that he was concerned that the mill operator, maintenance personnel, or the designated examiner would be exposed to a hazard if they contacted the rotating shafts. He also confirmed that an identical moving shaft on another collector was unguarded but not cited, but he could not explain why he did not cite that one.

Inspector McGregor testified that the two shafts in question were located approximately 3 to 4 feet off the floor or base plate and some 2 feet from the adjacent travelways or walkways in front of the dust collector blowers. He did not consider the area to the rear of the dust collectors to be a travelway or walkway. He conceded that someone casually walking by in front of the dust collector blowers would not contact the shafts, and that in order to do so they would have to stoop or bend down to avoid an overhead ceiling duct, and then fall or reach in some 2 feet over the blower boxes located in front of the shafts.

~1993

Superintendent Bradford believed that the two dust collector shafts were guarded by location, and he stated that they are not subjected to any regular or routine maintenance and are not required to be guarded by OSHA standards. He also stated that the collectors would be shut down and locked out before any maintenance was performed.

I take note of the fact that MSHA's Guide to Equipment Guarding, exhibit ALJ-1, at pages 19 and 20, figures 17 and 19, provides that drive shafts with protruding set screws, keys and keys ways, and power take-off shafts with universal joints (such as those used for portable crushing equipment) shall be guarded. Although the Guide is not incorporated as part of MSHA's mandatory guarding standards, Inspector McGregor relied on it in issuing the citations. However, the evidence establishes that the cited shafts in question were smooth, and had no protrusions. Inspector McGregor testified that the shafts in question were "slick shafts" and had no joints, bolts, or other protrusions, and that in his 20 years of mining experience he has never personally heard of any injuries resulting from contacts with such smooth shafts (Tr. 140-141).

Having viewed the photographs of the two shaft locations in question, and after consideration of the testimony adduced by the parties with respect to these two citations, I conclude and find that the petitioner has not established that the unguarded smooth shafts were required to be guarded. The inspector's assumptions that maintenance personnel would be exposed to any hazard are unsupported by any credible evidence. With regard to his concern for the safety of the mill operator or an examiner, absent any evidence to the contrary, I consider these individuals to be casual passerbys and the inspector conceded that such persons would not be exposed to any hazard. Further, given the rather isolated location of these shafts, and the fact that they are recessed some 2 feet behind the physical parameters of the dust collector blowers, I cannot conclude that they were reasonably accessible. Under the circumstances, the citations ARE VACATED.

Citation No. 2237053--No. 10 Conveyor Belt Head Pulley

The location of this citation is shown in photogaphic exhibits P-7 and R-12. Inspector McGregor conceded that one had to climb up a ladder or catwalk and unfasten several protective chains before reaching the unguarded location. He was concerned that a maintenance man greasing the pulley or someone cleaning rock would be exposed to the hazardous pinch point between the pulley drum and belt.

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Superintendent Bradford confirmed that the head pulley was not guarded and that Inspector McGregor would not accept the conveyor framework or metal strip structure as adequate guarding (Tr. 273-274). Mr. Bradford did not dispute the inspector's estimate that someone would be in the area at least once a week while greasing the pulley bearings, and respondent's counsel agreed that Mr. McGregor's assumption that someone would be in the area doing this work at least once a week was a reasonable assumption (Tr. 153-154).

Respondent's counsel pointed out that since the conveyor stop cord was on the side of the platform depicted in exhibit R-12, that one could reasonably conclude that this was the side of the conveyor from which one could reasonably expect access to the pulley, and not the opposite side shown in the inspector's photograph, exhibit P-7. Inspector McGregor believed that access to the pulley was from both sides, and he conceded that had the pulley been locked out there would not be an existing pinch point (Tr. 154).

Having viewed the photographs of the unguarded pulley in question, I conclude that the side of the conveyor pulley depicted in photographic exhibit R-12, was protected by the conveyor structure itself and was not readily accessible. However, the opposite side of the pulley, as depicted in photograph P-7, depicts an open exposed pulley with rocks and other materials which appear to have accumulated under the belt. Further, photograph R-12 shows a walkway or catwalk adjacent to the pulley area in question, and I believe it is reasonable to conclude that this is used as a means of access to the pulley. The evidence here establishes that a workman is in the area at least once a week while performing maintenance or cleanup around the pulley area, and I find that there was ready access to the pulley even though one had to climb a ladder or catwalk and remove several chains to get to it. Once there, I believe that the inspector's fear of exposure to the pinch point hazard while maintenance or cleanup were being performed was reasonable. Accordingly, I conclude that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

In this instance, the respondent did not dispute the inspector's contention that someone had to be in the area of the unguarded pulley at least once a week to perform cleanup work around the unguarded head pulley. I have concluded that the unguarded pulley was readily accessible, and given the

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fact that a cleanup man would be cleaning material from under the belt in close proximity to the unguarded pulley, he would be readily exposed to the pinch point between the pulley drum and the belt. I believe that someone cleaning up around this area could become entangled in the unguarded pulley, and if he did, it is reasonably likely that he would suffer serious injuries. Accordingly, the inspector's "S & S" finding IS AFFIRMED.

Citation No. 2237055--No. 47 Electric Screw Feed Motor Shaft

With regard to the unguarded shaft in question, Inspector McGregor believed that the condition was a violation of the guarding standard, but he conceded that "it was not reasonably likely to cause an accident" (Tr. 159), and he knew of no past instances where anyone has been injured by contacting such a shaft (Tr. 161). He was concerned that someone walking by during the course of an inspection, or a maintenance man who may be in the area once a shift, once a week, or possibly once a month, could contact the shaft (Tr. 161).

Superintendent Bradford testified that the shaft was located in an isolated area at the end of a catwalk, the motor is started by a remote control panel, and no one is routinely in the area on a day-to-day basis. He also confirmed that the shaft was smooth and had no protrusions (Tr. 253).

I have previously noted MSHA's "guides" concerning the guarding of drive shafts which have protrusions or universal joints. I also note page 8, figure 5, of those "guides," which states as follows: "Remote areas protected by location need not be guarded. However, if work is performed at such location as shown in figure 5, the equipment must be deenergized and locked out and a temporary safe means of access (ladder) provided before any work is started."

In the case of a smooth drive shaft which is guarded by location and where it is established that the equipment is energized and locked out before any work is started in that area, I believe one may reasonably conclude that there is no violation of the guarding requirements of the standard, particularly in a case where an inspector relies on the "guides" to interpret the standard.

In this case, while I cannot conclude that the shaft was guarded by location, Inspector McGregor made no determination whether or not the motor was locked out while any maintenance was being performed. Further, it seems clear to me that the

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shaft was smooth and was not the type covered by the "guides" relied on by the inspector. Under the circumstances, I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

Citation No. 2237056--Silo Dust Collector Motor Drive Shaft

Mr. McGregor confirmed that this shaft was similar to the ones testified to in the previous shaft citations. In this instance, he was concerned that someone greasing the shaft would get their clothing or hair caught in the moving shaft, and he believed that it was reasonably likely that an accident would occur. He conceded that he knew of no prior accidents concerning shafts of this kind, and he believed that someone would be in the area once a day, once a week, or once a month for greasing or cleanup (Tr. 163-167).

Superintendent Bradford testified that the motor in question was located on top of a 50 foot high silo and that one would have to climb up two ladders and over a hand rail to reach the location. He believed the motor was guarded by location, and he confirmed that the motor is started by remote control and is shut down when maintenance is performed. He also stated that personnel "have no business up in there" and that any silo measurements or valve actuations are accomplished by remote control (Tr. 255).

I conclude and find that the shaft in question was located and operated in such a manner (remote control) as to render it guarded by location. Since the shaft was similar to the previously cited one, I assume that it was smooth and had no protrusions, and petitioner has not established otherwise. Further, Mr. Bradford's testimony that the motor is remotely operated and is shut down when maintenance is performed is un rebutted. Under all of these circumstances, I conclude that the petitioner has failed to establish a violation, and the citation IS VACATED.

Citation No. 2237048--30 C.F.R. 55.11-12

Respondent does not dispute the existence of the holes which were cut into the top of the storage bin, and it conceded that the holes were cut to facilitate the removal of material which spills from the belt to the storage bin below. During the hearing, respondent's representative argued that the area adjacent to the belt where the holes were discovered was not a regularly used travelway, and plant superintendent Bradford testified that workers were never in the area routinely. However, Mr. Bradford conceded that the holes were a

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hazard and that persons were working at the location, but were secured by ropes or harnesses.

Inspector McGregor testified that persons would be in the area adjacent to the belt where the holes were discovered during clean-up or while greasing the belt pulley. He considered the adjacent area to be a travelway because people had to go there to work. Although Mr. McGregor could not document how frequently a person had to go to the area, respondent's representative conceded that someone would be in the area at least once a month. Given the fact that the holes were cut to facilitate the shovelling of the spilled materials into the holes, and the un rebutted testimony of the inspector that someone had to go to the area to grease the belt pulley, I conclude and find that the area was a regularly used "travelway" within the definition found in section 55.2.

Section 55.11-12, requires that openings above, below, or near travelways through which men or materials may fall shall be protected by barriers or covers. Mr. McGregor believed that someone could have inadvertently stepped through one of the holes. The respondent does not dispute this, but contends that the men who were working there were tied off or secured. While this may mitigate the gravity of the violation, it is no defense. With all of the spilled material from the belt in such a confined area, it is altogether conceivable that someone walking by the belt to grease it or to begin shovelling may not see the holes, and if he is not tied off, he could inadvertently step through one of the holes. In the case of Secretary of Labor v. Hanna Mining Company, 9 FMSHRC 2045 (1981), the Commission interpreted the language "through" an opening as stated in section 55.11-12, to encompass falling into, as well as completely through, a floor opening. The Commission stated as follows at 9 FMSHRC 2048: "30 C.F.R. 55.11-12 is concerned with the hazard presented to miners by the presence of unprotected opening on travelways. In this regard, a worker is exposed to the risk of injury whether he falls completely through or only into unprotected openings."

In view of the foregoing, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

Although the respondent's representative stated that the men who were working around the area where the three holes in

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the floor were discovered were tied off, the fact remains that someone falling through those holes, even though they are tied off, would be exposed to a hazard. The respondent conceded that the holes constituted a hazard, and the record here establishes that they were located adjacent to the unguarded flange tail pulley which was the subject of Citation No. 2237047. Even though someone was tied off, if they stepped in the hole, they could fall toward the unguarded flange pulley, or they could suffer leg or other bodily harm simply by falling into the hole. Given all of these circumstances, I believe it was reasonably likely that someone stepping into one of the exposed holes could suffer serious injuries. Accordingly, the inspector's "S & S" finding IS AFFIRMED.

Citation No. 2237057--30 C.F.R. 55.20-3

The respondent does not dispute the existence of the clutter described by Inspector McGregor. Superintendent Bradford conceded that the conditions existed as described by the inspector, and that tools and hoses were apparently left in place when the work shift ended. Respondent's defense is that heavy rains contributed to the housekeeping problems, and that the decline pits were difficult to clean up. While I can understand a rainfall contributing to belt clogging and the like, I fail to understand how a rainfall can contribute to an accumulation of rocks, trash, tools, and hoses on walkways. I conclude and find that petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Significant and Substantial Violation

Although Mr. McGregor stated on the citation form that one employee would be exposed to a hazard, he was asked to explain why he did not indicate that all 38 employees were so exposed, particularly since he concluded that the cited conditions constituted a plant wide trip and fall hazard. Mr. McGregor explained that in each instance, he considered only the person likely to be injured as the one exposed to any hazard.

While I find Inspector McGregor's description of the cited condition on the face of the citation, as well as his supporting testimony, to be rather brief in terms of detailing the specific locations where the hazards existed, the fact remains that the respondent did not rebut the existence of the accumulations or clutter on the walkways in question. Although I am not convinced that the inspector established a

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plant wide hazard, I conclude and find that the cited accumulations constituted a tripping or falling hazard, particularly on the wet walkways and inclines. Should someone trip or fall over these materials, I believe it is reasonably likely that they would suffer some disabling injuries. Accordingly, the inspector's "S & S" finding IS AFFIRMED.

Citation No. 2237058--30 C.F.R. 55.9-61

Section 55.9-61, requires that all stockpile faces be trimmed to prevent hazards to personnel. Inspector McGregor issued the citation because he believed that the cited barite stockpile had not been trimmed to prevent the material from caving in or sliding on the bulldozer operator working near the pile or on anyone else working near the pile. Mr. McGregor described the pile as 30 to 40 feet high, and he stated that the angle of repose was 80 to 85 degrees and that it would be hazardous to anyone cutting into the pile. He also stated that he had never seen the material stacked as high or undercut as much as the pile in question.

The respondent's defense is that the consistency of the barite material is such as to prevent it from sliding like sand or gravel, the bulldozer operators were experienced men and would not jeopardize their safety by working under a hazardous angle of repose, the employees were instructed not to walk or work near the stockpiles, and they are trained to avoid such hazards. Although these matters may mitigate the gravity of the violation, I am not convinced that the respondent has rebutted the inspector's testimony that the stockpile in question was not trimmed to preclude a cave-in at that point where the bulldozer digs into the pile.

Superintendent Bradford conceded that the material does slide down when it is cut into and removed by the dozer, and he admitted that it was not unusual to have "sheer faces" at the stockpile. It seems to me that a sheer face of material piled 30 to 40 feet high at an 80 to 85 degree angle presents a potential cave hazard to the equipment operator who may dig into it at its base while removing the material. The fact that the material may not slide as readily as sand or gravel in such a cave situation is not particularly important. Should the material cave-in from a height of 30 or 40 feet, I believe one may reasonably conclude that it will inundate the equipment and the operator working below it. Under the circumstances, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and the citation IS AFFIRMED.

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Significant and Substantial Violation

There is no evidence in this case to support a conclusion that anyone other than the dozer operator would be exposed to any hazard resulting from a cave-in of the material. With regard to the dozer operator, I assume that when he is operating his equipment while digging into the pile he is in the machine and is protected by an overhead canopy. Under normal operating circumstances, one can reasonably conclude that a simple slide of material will not adversely affect the operator. However, on the facts of this case, the respondent has not rebutted Mr. McGregor's observation that the 30 to 40 feet high pile was the highest one he has ever seen. Coupled with Superintendent's Bradford's admission that "sheer faces" are common at this operation, and that the material will move if cut into by the dozer, I cannot conclude that Inspector McGregor's fears of an accident were unreasonable. I conclude and find that a cave-in of materials from a height of 30 to 40 feet, with a dozer operator directly beneath it while he is cutting into the pile, presents a hazard to that operator. In the event of a cave-in, I believe that it is reasonably likely that the operator could be pinned in the cab of his equipment, or if the dozer were completely covered, he could suffocate. Under the circumstances, the inspector's "S & S" finding IS AFFIRMED.

History of Prior Violations

Petitioner's exhibit P-1, with an addendum, reflects the respondent's history of prior violations for the mine in question. The information contained in the print-outs reflects that for the 2-year period immediately preceding the issuance of the citations in this case (8/22/82 to 8/21/84), the respondent had 20 paid violation assessments for the facility in question. For a 5-year period, January, 1978 through July, 1985, a total of 23 citations were issued at the facility, five of which were citations for violations of section 55.14-1. The eight citations issued by Inspector McGregor, although included on the list, are not considered prior citations. Under the circumstances, I cannot conclude that the respondent's history of compliance is such as to warrant any additional increases in the civil penalty assessments made for the violations which I have affirmed. On the contrary, respondent appears to have a fairly good compliance record.

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

Based on the stipulations concerning the respondent's mining operations, I conclude that the respondent is a large operator, but that the subject Raymond Mill operation is small-to-medium. I also conclude that the civil penalties assessed by me for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

Negligence

I conclude and find that all of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and that this constitutes ordinary negligence.

Gravity

For the reasons discussed in my "S & S" findings, I conclude and find that all of the violations which have been affirmed were serious.

Good Faith Compliance

Inspector McGregor stated that all of the violations which he issued in this case were timely abated by the respondent and that it exhibited good faith compliance in this regard (Tr. 230). I adopt this statement by the inspector as my finding on this issue.

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 that the following civil penalty assessments are appropriate and reasonable for the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
2237047	8/22/84	55.14-1	\$ 100
2237053	8/22/84	55.14-1	75
2237048	8/22/84	55.11-12	100
2237057	8/22/84	55.20-3	85
2237058	8/23/84	55.9-61	85

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ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of this decision. Payment is to be made to MSHA, and upon receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge