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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

v.

HALLETT CONSTRUCTION COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. CENT 88-17-M
A.C. No. 41-03197-05506

Porter Plant & Pit

DECISION

Appearances: Mary Witherow, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
the Petitioner;
Frank Johnson, Division Manager, Hallett
Materials, Porter, 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). Petitioner seeks civil penalty assessments in the amount of \$595 for six alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed a timely answer contesting the alleged violations, and a hearing was convened in Houston, Texas. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record in the course of the hearing.

Issues

The issues presented in this case are (1) whether the conditions or practices cited by the inspector constitute violations of the cited mandatory safety standards, (2) the appropriate civil penalty to be assessed for the violations, taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether the violations were

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"significant and substantial." Additional issues raised by the parties 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. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

All of the contested citations in this case were issued by MSHA Inspector Melvin R. Jacobson during the course of an inspection of the respondent's sand and gravel dredge operation on August 19, 1987 (Tr. 8). The inspector was accompanied by respondent's mine foreman, Steve Iverson (Tr. 11).

Section 104(a) "S & S" Citation No. 3061118, cites a violation of mandatory safety standard 30 C.F.R. 56.12025, and the condition or practice is described as follows: "The ground lug on the electrical cord for the fan used on the left walkway of the dredge was broke off exposing personnel to a probable shock hazard should a fault occur on the fan motor or controls."

Inspector Jacobson testified that he issued the citation after finding the ground lug of an electrical plug-in cord of a 110-volt, 1/2 horsepower, metal encased cooling fan broken off. The fan was one of two fans located on either side of the dredge, and he believed they were used for cooling the cabin. He observed an electrical outlet nearby, and the cord was long enough to reach it. The fan was portable, had no handles, and the fan blade was 18 to 24 inches in diameter. The cited fan was not plugged in, and neither fan was operating. The dredge was down for maintenance, and no one was at the controls. Mr. Jacobson stated that he pointed out the condition to Mr. Iverson, and he agreed that it was a hazard and stated that he would take care of it "right away" (Tr. 12, 14).

Mr. Jacobson believed that the lack of a ground lug constituted a hazard because under a fault condition, the fan could be energized and someone could be severely shocked. If this occurred, the individual could suffer fatal injuries or burns. Since the dredge operator is sometimes alone on the dredge, if he were to receive a shock, no one would be there

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to help him. No one can predict when a fault will occur, and any deterioration of the insulation on the wiring could result in a fault if it were to contact the metallic fan parts. The lack of a sufficient grounding device would not blow the fuses, and if anyone were to touch the fan with the current still on, they could become part of the circuit and this could result in a fatal shock. Mr. Jacobson believed that it was reasonably likely that an injury would occur "based on the fact that these type accidents have been and are continuing to occur" (Tr. 16). He stated that one of his friends was fatally injured after using an electrical cord without a ground lug on it (Tr. 20).

Mr. Jacobson confirmed that he made a finding of "low negligence" because the dredge operator probably was not cognizant of the potential shock hazard, and the fact that the foreman was new and probably did not recognize the potential for an accident. The violation was abated by installing a proper plug with a connecting ground to provide the proper protection to prevent a fault in the current on the fan frame (Tr. 17).

Mr. Jacobson believed that the fan was not new and had been used for a long period of time, and exposure to the sunlight would contribute to the deterioration of the wiring. He confirmed that he observed no deterioration, but did observe that it had been exposed to a certain amount of grease and oil which would also add to the deterioration of the cord (Tr. 19). He confirmed that he inspected the cord receptacle and found that it would accommodate a three-conductor plug (Tr. 20).

Section 104(a) "S & S" Citation No. 3061120, cites a violation of 30 C.F.R. 56.12025, and the condition or practice is described as follows:

The ground lug on the cord plug-in for the battery charger in the shop was broke off. Additionally, 3 Light extension cords in the gravel plant and 1 in the sand plant had the ground lugs broke off. The foreman cut the plugs off these cords. This citation will only be abated when all of the cords are removed from service or new 3 conductor plug-ins installed.

Inspector Jacobson confirmed that this citation was similar to the previous one in that he found electrical extension cords with the ground lugs cut off in the locations noted.

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The battery charger in question was often used with extension cords to reach the batteries being charged on equipment located at the mine. He observed the battery charger at the shop area near a trailer used as a maintenance area. A grounding lug is necessary because a battery charger is an electrical device that changes AC current to DC current through a rectifier, and a fault on the charger could energize the metal charger case, as well as the vehicle to which it is attached. Anyone coming in contact with the current, or between the two potentials, could be killed. The remaining plugs were not being used and were rolled up and stored in the trailers, but they were available for use by the employees. The battery charger was not being used, and if it were, he would have taken it out of service. Mr. Iverson agreed that the conditions posed a severe hazard and indicated that he "was going to keep better track of his equipment from now on," and was concerned about it (Tr. 23).

Mr. Jacobson stated that a failure of the insulation or any of the component parts of the metal battery charger under a fault condition would cause the metal surface of the battery charger to become charged, and without a ground to blow the fuse, anyone could put their hand on it and become part of the circuit. The same would be true if the frame of a vehicle being charged were touched, and "it don't take much current to take you out" (Tr. 24).

Mr. Jacobson believed that the cited conditions posed a serious hazard, and that an electrical accident would likely result in fatal injuries or burns. He stated that "the battery charger, in particular, is notorious for causing accidents" (Tr. 25). If the battery charger had been plugged in, Mr. Jacobson would have removed it from service by issuing an imminent danger order because fault conditions can occur at any time (Tr. 26). The cords which were stored "weren't in bad shape, except that the plug ends were broke off," and Mr. Jacobson believed that they were relatively new cords (Tr. 27). Mr. Jacobson observed no visible signs of deterioration in any of the cords, including the one used on the battery charger, and if the ground lug were in place, he would have had no other reason for citing it (Tr. 28).

Mr. Jacobson confirmed that he based his "moderate negligence" finding on the fact that the individuals using the equipment are maintenance personnel, and that the supervisor was new and not aware of his responsibility to see to it that the equipment is maintained properly (Tr. 29). Mr. Jacobson stated that during a previous inspection in February, 1987, he found some extension cords with the ground plugs broken off in storage and

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discussed the matter with Mr. Johnson. Mr. Jacobson believed that these cords were either destroyed or replaced by new ones. He did not cite the prior cords because "I would probably have had a problem proving they were being used," and he did not cite the battery charger previously because it had a ground plug on it (Tr. 32). The cited fan had never been a problem in the past, and Mr. Jacobson confirmed that his inspection of August 19, 1987, was the first time he ever noticed any problem with electrical equipment on the dredge (Tr. 32).

Section 104(a) "S & S" Citation No. 3061127, cites a violation of 30 C.F.R. 56.14001, and the condition or practice is described as follows: "The drive coupling on the fresh water pump on the pond supplying water to the plant was not guarded."

Mr. Jacobson confirmed that he issued the citation after finding an unguarded water pump drive coupling on the pump being used to pump water to the plant area. The coupling was a moving metallic machine part, and he identified exhibit PÄ3 as a photograph taken of the pump, coupling, and motor, and confirmed that the coupling is used to connect the pump to the motor (Tr. 34Ä36).

Mr. Jacobson believed that anyone coming in contact with the coupler could be injured, and he investigated one case in which an individual's coattail was caught in a similar coupling, and it resulted in fatal injuries. He believed that anyone contacting the coupler could suffer severe lacerations, bruises or burns, "something that would cause him to lose time." He described the motor as a 100 to 150 horsepower motor, and estimated that the coupler would turn at least at 120 rpm (Tr. 37). He believed that anyone greasing the pump while it was operating, or observing a mechanical problem, could contact the coupler inadvertently or brush against it. If it were cold weather, a jacket tail could wrap around the shaft and access to the pump was by means of a walkway or ramp from the shore to the pump location (Tr. 38).

Mr. Jacobson stated that the coupler has two parts which are coupled together by bolts which leave seams, and that it probably has rough edges. He confirmed that the pump could be turned on and off from shore, and that no one needs to board the barge where the pump was located to start and stop it. The only reason one would have to go on to the barge would be for maintenance of the coupling or to grease the pump. Mr. Jacobson had no knowledge of the respondent's maintenance procedures, but he believed that the pump should be greased once a day and that the ideal method for greasing the pump

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bearings would be while it was running. However, he did not know whether the pump in question was greased while it was running or while it was turned off (Tr. 41).

Mr. Jacobson believed that it was reasonably likely that an accident would occur if someone on the barge came in contact with the drive coupling in question, and that he could brush against it with his leg and tear the tissue. He stated that one cannot predict when someone will walk out to the barge, but the opportunity is there, and the hazard exposure has "accident probability," and the coupler needed to be protected (Tr. 44).

Mr. Jacobson confirmed that he made a finding of "low negligence" because the respondent did not believe the coupling had to be guarded because the pump could be started and stopped without anyone going on the barge. Abatement was achieved by guarding the coupler (Tr. 45).

Section 104(a) "S & S" Citation No. 3061128, cites a violation of 30 C.F.R. 56.14006, and the condition or practice is described as follows: "The sides of the guard on the pea gravel conveyor had been removed, exposing the pinch point."

Inspector Jacobson stated that he had previously observed the conveyor in question during a prior inspection in February, 1987, and it was guarded. He identified exhibit PÄ4 as a photograph of the tail pulley area of the conveyor, and he confirmed that during his inspection of August 19, 1987, the guards had been removed from the side, exposing the pinch points and moving parts of the pulley. The guard on the back side of the self-cleaning tail pulley was intact and not removed, and he described it as the wire mesh guarding shown in the photograph. He also described the location of the unguarded pinch point (Tr. 44Ä48).

Mr. Jacobson confirmed that the conveyor was not in use at the time of his inspection, but that Mr. Iverson admitted that it had been used without the guard in place, and the presence of small particles of material on the frame of the conveyor, as shown in the photograph, would indicate that the conveyor was operated without the guard in place (Tr. 49). Mr. Jacobson believed that anyone working around the open pinch point while greasing the tail pulley or cleaning up around it would be exposed to the moving parts. He was aware of injuries occurring under other similar conditions, and injuries have happened through inadvertence or thoughtless acts while working in such areas. The conveyor was out in the open, and anyone walking by could stick his hand into the

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pinch point if he were to fall or slip. Anyone walking on the outside of the conveyor, however, would have to stick his arm into the pinch point. The conveyor operates at high speed, and the pulley is turning at a rapid rate. If one were to contact the pinch point he could not react fast enough to get away from it, and many individuals have been known to get caught in similar situations (Tr. 51Ä53).

Mr. Jacobson stated that Mr. Iverson offered no explanation as to why the guard was off, and Mr. Jacobson saw no guard in the area. A new guard was made and installed to abate the violation, and the respondent did a good job in designing and installing a guard which was much better than those on the other conveyors in the area. Mr. Jacobson stated that he had no information that the guard had been removed for changing bearings, and was replaced before the plant was started up. Had he been told that the conveyor was out of service and locked out, which he doubted was the case, he would not have issued the citation (Tr. 53Ä55).

Mr. Jacobson believed that it was reasonably likely that an accident would occur as the result of the unguarded conveyor in question because unguarded equipment of this type has caused numerous serious and fatal accidents over the years, and he confirmed that within the past 6 months he investigated an accident where an individual lost an arm in an unguarded pulley pinch point (Tr. 58). Mr. Jacobson believed that all guarding citations are "S & S" because "at some point in time, around a piece of unguarded equipment that is accessible, somebody is going to have to go there," and no one can predict when this will occur (Tr. 59Ä60). Inadvertent accidents and mistakes have caused many injuries of this type in the past (Tr. 61). He made a finding of "moderate negligence" because the supervisor was new, and Mr. Johnson was not able to be present at the mine site for some time (Tr. 61Ä62).

Section 104(a) "S & S" Citation No. 3061129, cites a violation of 30 C.F.R. 56.12032, and the condition or practice is described as follows: "A motor starter box in the gravel plant electrical panel had the cover off exposing the electrical 480Ävolt conductors."

On September 2, 1987, the inspector terminated the citation, modified it to a non-"S & S" citation, and also modified the gravity finding to "unlikely." The reasons for these modifications are stated as follows: "It was determined the box was disconnected lowering the degree of hazard to unlikely, no lost work days, non-S & S. The cover should have

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been on the box to protect the magnetic starter from mechanical damage. The cover was placed on the box."

Mr. Jacobson explained the circumstances which prompted him to issue the citation. He stated that he observed a cover off of a motor starter box, and the motor starter was attached by conduit to a fuse box directly above it. He assumed the unit was either used, or could be used, and if someone "threw the right switch, they could turn the power on," exposing the uncovered electrical parts inside the box and thereby presenting a hazard if someone contacted the parts. Since the area was muddy, a person walking through the area could slip or fall and easily come in contact with the exposed electrical parts. He believed the box needed to be protected or removed if it were not to be used (Tr. 63Å64).

Mr. Jacobson stated that during his follow-up abatement inspection it was brought to his attention that the wiring inside the cited starter box had been removed, and at the time of his spot inspection "there was evidence that this was the case." However, since the starter motor was still there, Mr. Jacobson believed that it was going to be used again, and that it needed to be protected and maintained in an operable condition. He conceded that the starter could only be used only if the box were re-wired, and that under the prevailing conditions, the motor could not have been started. Under the circumstances, the only hazard presented "would be in the abuse of the equipment." He assumed that if the starter box were to be used again, there was an opportunity to use the old box which had been exposed to mud and water. He could not recall observing any wires going into the box during his initial inspection, and during his follow-up, there were no wires in the box, and it was deenergized. He also stated that during his initial inspection, he assumed the box "was dead," but that it could be energized. At that time, the plant was down, and the power to the starters was off (Tr. 66Å68). He assumed that the conduit connecting the fuse box to the starter box would allow current to flow, but that the upper portion of the box had apparently been disconnected (Tr. 69).

Mr. Jacobson confirmed that he made a gravity finding of "reasonable likely" based on the information he had during his initial inspection, but that he would now rate it "unlikely." He believed that the respondent's negligence was "low," and assuming the box had been wired, he would have required the cover to be replaced with a screw to hold it on. Assuming the box were not wired or "live" he would require the box to be covered to protect the components, and in this case abatement was achieved by installing a cover over the box. The box was

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subsequently removed, and he believed this was a good idea (Tr. 69-70).

On cross-examination, Inspector Jacobson confirmed that he was unaware that the cited fan was burned out, and that Mr. Iverson informed him that it was in operable condition. Mr. Jacobson stated further that both he and Mr. Iverson believed that the fan would have worked if it were plugged in, and that the fact that it may have been burned out made no difference. He believed that a burned out fan presented every opportunity for a shock hazard because a fan motor malfunction could energize the frame of the fan if it were plugged in (Tr. 80-81).

With regard to the cited electrical extension cords, Mr. Jacobson confirmed that during his prior inspection he discussed with Mr. Johnson the fact that ground lugs were missing from extension cords which were not in use and stored in a parts trailer. Although Mr. Jacobson did not cite them at that time, he included them in the citation which he issued during the August 18, inspection because they were available for use on the battery charger. The batter charger cord was not long enough to reach a piece of machinery in the shop area, and Mr. Jacobson believed that the cords would have been used to reach the equipment being charged with the battery charger (Tr. 85).

In response to further questions, Mr. Jacobson stated that an extension cord carries current to the circuit, and it is an extension and integral part of the circuit. Without a grounding lug or conductor, there is no grounding continuity. As soon as an extension cord is plugged in, it becomes part of the circuit (Tr. 86-87). Mr. Jacobson confirmed that he has observed battery chargers used with more than one extension cord at other mining operations, but not at the respondent's mine. He cited the cords because he believed they would be used in series with the battery charger, and to bring to the attention of the respondent the fact that the cords had a problem that needed to be corrected (Tr. 89).

Mr. Jacobson stated that there is no MSHA standard specifically requiring an extension cord to have a ground lug, and if he were to cite only an extension cord he would cite section 56.12030 which requires the correction of a potentially dangerous condition before equipment or wiring is energized. He confirmed that the cords were not in use, but in storage, and that he had previously discussed the lack of ground lugs with Mr. Johnson and that "it is quite apparent that conversation wasn't doing the job" (Tr. 92).

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Mr. Jacobson stated that the battery charger was portable and mounted on small wheels, and that it was used to charge batteries on mobile equipment, including trucks and pick-ups. The battery charger cord was not long enough to reach out to the trucks without the use of an extension cord, and the battery charger was on the ground in the shop area. If the charger were taken to the vehicle, an extension cord would be required because the charger would have to be plugged into an electrical source. Although a battery could be removed from a piece of equipment and taken to the charger, he found this highly unlikely because the batteries are large and heavy (Tr. 93-96).

Respondent's Testimony and Evidence

Division Manager Frank Johnson asserted that the cited fan was burned out and was not in use at the time of the inspection. He explained that the fan was not removed from the dredge because it weighed 40 pounds and would require two men to carry it and place it in a boat to take it to shore. He conceded that the fan was not tagged out, and had no knowledge as to whether Inspector Jacobson was aware of the fact that the fan was inoperable (Tr. 82-83; 96-97).

With regard to the cited electrical extension cords, Mr. Johnson stated that they were not in use and that "we threw them in the parts trailer to get them out of service" (Tr. 97). He confirmed that as a result of Mr. Jacobson's prior inspection in February, "we had gotten rid of all the old, ungrounded cords, and bought new ones." Mr. Johnson conceded that the battery charger ground lug was broken off, and he explained that some of his employees who live nearby probably used the charger to charge their personal batteries and broke the lug off because their house had no grounding plug-in device, and "they probably snapped it off" (Tr. 98).

With regard to the cited unguarded coupler, Mr. Johnson stated that it is perfectly round with no protrusions on it, and that it is powered by a 75 horsepower motor, and turned at 1750 rpms. Mr. Johnson explained that the pump is greased in the morning before it is started, and the water valves are opened to bleed off any air. As soon as the flow of water begins, the valve is closed, and the pump is started from shore with a start button, and "we never touch it again until the next morning." No one is on the barge during the course of the day, unless something breaks down. Any breakdown would only involve the pump or motor because they are the only

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moving parts on the barge, and in the event maintenance is required this equipment is shut off (Tr. 99).

Mr. Johnson stated that if anyone contacted the coupler while it was in operation and spinning, he could suffer bruised or broken ribs, but not fatal injuries, and this would also be true if anyone fell against the guard which was installed to abate the violation. He believed that the likelihood of anyone coming in contact with the coupler while it was in operation was remote (Tr. 99-101).

With regard to the unguarded conveyor, Mr. Johnson stated that the rock plant was down at the time of the inspection, and that the conveyor belt speed was approximately 70 feet per minute (Tr. 102). Mr. Johnson could not confirm that Mr. Iverson told Mr. Jacobson that the belt had operated with the guard off, and he stated that Mr. Iverson "was a very shook up man because he got nailed with 19 citations that day," and he has since quit (Tr. 102-103). Mr. Johnson agreed that if Mr. Iverson told the inspector the conveyor was operated without a guard, "he should give him a citation" (Tr. 109).

With respect to the cited starter box with the missing cover, Mr. Johnson stated that the box was not in use and that all of the wires had been torn out of it when several conveyors were dismantled and removed, and the disconnected box simply remained in the panel (Tr. 109). The box in question had been used for a magnetic starter, and the stop-start switch was located on a separate panel and had a cover on it (Tr. 110). Mr. Johnson agreed that in the event the box in question had been hooked up, it would have been dangerous (Tr. 111). Mr. Iverson may not have been aware of the fact that the wires had been removed from the box because he was not working there when the prior dismantling work was done, and Mr. Jacobson may not have known it because he was not the inspector when this work was done (Tr. 112).

Findings and Conclusions

Fact of Violations

Citation No. 306118 - 30 C.F.R. 56.12025

The credible evidence of record reflects that the cited electrical fan cord used to supply power to the fan had its grounding lug broken off, thereby rendering it incapable of providing any ground continuity in the event the fan were plugged into a receptacle which was within ready access of the

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fan. The cited standard section 56.12025, requires that all metal enclosing or encasing electrical circuits be grounded or provided with equivalent protection. While it is true that the fan was not plugged into the receptacle when the inspector observed it, thus completing the circuit between the fan and the electrical source provided by the receptacle, the fact is that the electrical circuitry inside the fan motor, which was enclosed with a metallic frame or covering, was not provided with any workable grounding device since the ground lug to the power cord had been broken off. Under the circumstances, I conclude and find that the cited fan was not provided with any grounding protection, nor was it provided with any equivalent ground protection. Accordingly, I conclude and find that the petitioner has established a violation of the cited standard, and the citation IS AFFIRMED.

Citation No. 3061120 - 30 C.F.R. 56.12025

The respondent has conceded that the ground lug on the electrical plug-in cord which supplied power to the cited battery charger was broken off, and the credible testimony of Inspector Jacobson establishes this fact. Given the fact that the broken grounding lug would not provide a means of maintaining any grounding continuity or protection for the metallic battery charger circuitry, and the fact that no equivalent grounding protection was provided, I conclude and find that the petitioner has established a violation of the cited standard, and the citation concerning the battery charger IS AFFIRMED.

With regard to the extension cords which were found in the equipment trailer and which were not in use or connected to the battery charger, I cannot conclude that the missing ground lugs, standing alone, constituted a violation of section 56.12025. The cords were not an integral part of the battery charger electrical circuitry, and Inspector Jacobson's speculative opinion that they were available and could be use in conjunction with the battery charger's power cord is insufficient to establish a violation. Further, Mr. Jacobson admitted that part of his reason for citing the cords was to alert the respondent to the fact that the broken ground lugs may present a problem, and he conceded that although MSHA has no specific mandatory standard for citing extension cords per se, he could have cited section 56.12030, which requires that potentially dangerous conditions be corrected before equipment or wiring is energized. Under all of these circumstances, that portion of the citation which alleges a violative condition in connection with the extension cords which were in the trailer IS VACATED.

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Citation No. 3061127 - 30 C.F.R. 56.14001

The respondent does not dispute the fact that the drive coupling for the water pump located on the barge was unguarded, and Inspector Jacobson's credible testimony establishes that this was the case. The cited section 56.14001 requires that all exposed moving machine parts, such as a coupler, which may be contacted by persons and which may cause injury to persons, be guarded. Mr. Johnson conceded that the coupler in question was a moving machine part, and although he believed that the chances of someone contacting the unguarded and exposed coupler were remote, he nonetheless confirmed that someone could have come in contact with it while it was spinning, and if they did, they could possibly suffer bruised or broken ribs. Under all of these circumstances, I conclude and find that the petitioner has established a violation of the cited standard, and the citation IS AFFIRMED.

Citation No. 3061138 - 30 C.F.R. 56.14006

The respondent has not rebutted the credible testimony of Inspector Jacobson which establishes that the conveyor side guard in question had been removed and not replaced. Since Mr. Iverson is no longer employed by the respondent, and was not called to testify. Mr. Jacobson's testimony that Mr. Iverson admitted that the conveyor had been in operation without the guard in place, and that the presence of materials on and around the frame of the conveyor led him to believe that the conveyor had been operated without the guard in place, is unrebutted. Further, Mr. Johnson conceded that if Mr. Iverson told the inspector that the conveyor was operated without the guard in place, the citation was justified (Tr. 109).

The cited section 56.14006 requires that guards be securely in place while machinery is being operated. While it is true that the conveyor was not in operation during the inspection, I conclude and find that the evidence presented by the petitioner establishes with some degree of reasonable certainty that the conveyor had in fact been operated with the guard off, and the inspector found no evidence of any guard nearby the cited equipment.

Although the standard provides for an exception for a guard while the equipment is being tested, and the respondent's answer states that bearings were being changed, and that the guard was assembled before the plant was started, the respondent advanced no such credible evidence at the hearing.

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Further, the fact that the conveyor was guarded to the rear of the exposed and moving pulley area, suggests that the respondent was aware of the fact that the area was hazardous and needed guarding.

In view of the foregoing, and on the basis of all of the credible evidence adduced by the petitioner in support of the violation, I conclude and find that a violation of section 56.14006, has been established, and the citation IS AFFIRMED.

Citation No. 3061129, 30 C.F.R. 56.12032

The record reflects that the cited motor starter box which lacked a cover was inoperable and that all of the wiring inside the box had been removed. There was no power to the box, and Inspector Jacobson conceded that the box could only be rendered operable if it were re-wired and again placed in service. Mr. Johnson's un rebutted testimony, which I find credible, establishes that the box had been disconnected and the inside wires removed for a long time prior to the inspection of August 19, 1987, when several conveyors used in conjunction with the box in question were dismantled and removed. Mr. Johnson testified that although the box was in use in 1985, the conveyors were torn out and the box was disconnected and the wires were removed (Tr. 109).

The cited standard, section 56.12032, requires that cover plates on electrical equipment and junction boxes be kept in place at all times except during testing or repairs. I conclude and find that the dismantling and removal of the conveyors and the removal of the wires from inside the box which was used in conjunction with the conveyors when they were operable, constituted repair work. Under the circumstances, I conclude that the removal of the box cover falls within the exception found in the standard, and there is no evidence that the box was ever used or rendered serviceable subsequent to the time this repair work was done. I conclude and find that the petitioner has failed to establish a violation, and the citation IS VACATED.

The respondent has withdrawn its contest of section 104(a) "S & S" Citation No. 3061132, August 19, 1987, citing a violation of mandatory safety standard 30 C.F.R. 56.12032 (Tr. 70-71). Inspector Jacobson issued the citation after finding that a lighting panel at the plant was not provided with an inner cover, thereby exposing a person to a 220-volt single phase hazard when the outer cover was raised to turn on the lights. Under the circumstances, the citation IS AFFIRMED AS ISSUED.

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Significant and Substantial Violation

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3Ä4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574Ä75 (July 1984).

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The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Based on the credible testimony of the inspector, I conclude and find that the violation concerning the missing ground lug on the fan electrical cord (3061118), and the violation concerning the missing ground lug on the battery charger electrical cord (3061120), posed a discrete shock hazard within the Commission's interpretation of "significant and substantial." Even though the fan may have been inoperable, it was not removed or tagged out, and in the event someone inadvertently plugged it in and a fault occurred, the metallic fan frame could have been energized. Had this occurred, the individual plugging it in would likely suffer a shock or burn injury of a reasonable serious nature. This same result would occur in the event a fault occurred while someone using the battery charger plugged in the cord supplying power to the charger. The evidence establishes that employees often used the battery charger to service their personal vehicles, and this would increase the likelihood of an injury by the use of the charger without a proper grounding device. Under these circumstances, I conclude and find that these violations were significant and substantial, and the inspector's findings in this regard are affirmed.

With regard to the unguarded motor drive coupler on the fresh water pump (3061127), I agree with the inspector's significant and substantial finding. While it is true that the motor could be turned on and off from shore, the unguarded coupler was readily accessible to anyone on the barge greasing or performing maintenance work. Although respondent's witness Johnson stated that no one had a need to be on the barge while the pump was in operation, he conceded that someone would necessarily be present in the event of an equipment breakdown, and he confirmed that if anyone inadvertently came in contact with the exposed and unguarded coupler, he would likely suffer broken or bruised ribs. Under the circumstances, I conclude and find that the violation was significant and substantial, and the inspector's finding is affirmed.

With regard to the unguarded pea gravel conveyor violation (3061128), the credible testimony of the inspector supports his significant and substantial finding. Although the conveyor was not in operation at the time of the inspection, the evidence presented by the inspector supports a reasonable un rebutted

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inference that material had been processed with the conveyor running with an exposed unguarded pinch-point which was readily accessible to anyone greasing or cleaning up in the vicinity of the unguarded conveyor pulley. Since the conveyor operates at a relatively high speed, anyone inadvertently contacting the unguarded pinch-point would likely suffer injuries of a reasonably serious nature. I conclude and find that this violation was significant and substantial, and the inspector's finding is affirmed.

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

The parties agreed that the respondent is a medium-sized sand and gravel operator (Tr. 121-122), and absent any evidence to the contrary, I conclude and find that the civil penalty assessments which I have made for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Petitioner's counsel did not have a computer print-out of prior assessed violations available at the hearing. However, based on the information available from MSHA's proposed assessment form, petitioner's counsel stated that the respondent was issued 10 prior citations during the 24-month period prior to the issuance of the contested citations in this case. Counsel had no knowledge as to whether or not any of the prior citations were similar to those issued in this case (Tr. 119-120). Given the available evidence, I cannot conclude that the respondent's history of compliance is such as to warrant any additional increases in the civil penalties which have been made for the contested violations in issue in this case.

Good Faith Compliance

The record establishes, and the parties agreed, that all of the violations were timely abated by the respondent in good faith (Tr. 17, 30, 45, 54-62, 122). I have taken this into account with respect to the civil penalty assessments made in this case.

Negligence

The inspector's negligence findings as to each of the citations in question, ranging from low to medium, are affirmed. I conclude and find that the violations resulted from the respondent's failure to exercise reasonable care.

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Gravity

For the reasons stated in my significant and substantial violations findings, I conclude and find that the violations concerning the missing ground lugs on the fan and battery extension cords, the unguarded motor drive coupler on the barge water pump, and the unguarded pinch point on the pea gravel conveyor were all serious violations.

Civil Penalty Assessments

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

Citation No.	Date	30 C.F.R. Section	Assessment
3061118	08/19/87	56.12025	\$ 112
3061120	08/19/87	56.12025	\$ 100
3061127	08/19/87	56.14001	\$ 68
3061128	08/19/87	56.14006	\$ 126
3061132	08/19/87	56.12032	\$ 112

In view of my findings and conclusions concerning the cited electrical motor box, Citation No. 3061129, 30 C.F.R. 56.12032, the citation IS VACATED, and the petitioner's proposal for assessment of a civil penalty for this violation is REJECTED AND DISMISSED.

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in this proceeding within thirty (30) days of this decision and order. Upon receipt of payment by the petitioner, this case is dismissed.

George A. Koutras
Administrative Law Judge