

CCASE:  
SOL (MSHA) V. LEBLANC'S CONCRETE & MORTAR SAND  
DDATE:  
19890424  
TTEXT:

~660

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

CIVIL PENALTY PROCEEDING

Docket No. CENT 88-106-M  
A.C. No. 41-02775-05503

v.

Dudley's Pit Mine

LEBLANC'S CONCRETE & MORTAR  
SAND COMPANY,  
RESPONDENT

DECISION

Appearances: Brian L. Pudenz, Esq., Office of the Solicitor,  
U.S. Department of Labor, Dallas, Texas, for  
the Petitioner;  
Dudley J. LeBlanc, Owner, LeBlanc's Concrete &  
Mortar Sand Company, Rosenberg, Texas, Pro Se,  
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 for 10 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed a timely answer and notice of contest, and a hearing was held in Houston, Texas. The parties waived the filing of posthearing briefs, but I have considered all of their oral arguments made on the record during the hearing in my adjudication of this matter.

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 penalties to be assessed for the violations,

~661

taking into account the statutory civil penalty criteria found in section 110(i) of the Act, and (3) whether several of the violations were in fact "significant and substantial."

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. Part 56, Title 30, Code of Federal Regulations.
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated in pertinent part to the following (Exhibit ALJ-1):

1. The name of the respondent company is LeBlanc's Concrete & Mortar Sand Company with a place of business near Rosenberg, Texas.
2. Jurisdiction is conferred upon the Federal Mine Safety and Health Review Commission under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. The alleged violations took place in or involve a mine that has products which affect commerce.
3. The name of the mine is Dudley's Pit, identification number 41-02775. The mine is located near Richmond, Texas in Fort Bend County. The size of the company and mine is 7,480 production tons or hours worked per year.
4. The imposition of any penalty in this case will not affect the respondent's ability to continue in business.
5. The total number of assessed violations (including single penalties timely paid) in the preceding twenty-four months is zero.
6. On March 1, 1988, an inspection was conducted by James S. Smiser and Joseph P. Watson (also known as Jim Watson) authorized

representatives of the Mine Safety and Health Administration.

7. Ten Section 104(a) citations (numbers 03061705 through 03061714) were issued for violations of 30 C.F.R. 56.14006, 56.14001, 56.15020, 56.14001, 56.4102, 56.4230(a)(1), 56.46001, 56.14001, and 56.4100(b) respectively, on March 1, 1988.

8. All of the citations were abated within twenty-four (24) hours by the respondent.

#### Discussion

When the hearing convened, the parties advised me that the respondent wished to withdraw its contests with respect to Citation Nos. 3061705 and 3061708 (photographic exhibits P-4 and P-1). The respondent agreed to pay the full amount of the proposed civil penalty assessments for the violations, and after considering the request to withdraw the contests as a proposed settlement pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the request was granted and the settlement was approved from the bench. My decision in this regard is herein reaffirmed, and the citations are affirmed as issued.

The remaining citations in issue in this proceeding are as follows:

Section 104(a) "S&S" Citation No. 3061706, cites a violation of 30 C.F.R. 56.14001, and the condition or practice states as follows:

The guard covering main drive shaft and couplers on dredge was broken, parts removed, and loose, exposing employee to moving machine parts, a fall into dredge sump, and a potential of being drown (sic) in water/oil being held in bottom of dredge.

Section 104(a) "S&S" Citation No. 3061707, cites a violation of 30 C.F.R. 56.15020, and the condition or practice states as follows:

The dredge operator did not wear a life jacket on dredge while on deck and where there is a danger from falling into water, the dredge deck is not protected by handrails.

~663

Section 104(a) "S&S" Citation No. 3061709, cites a violation of 30 C.F.R. 56.4102, and the condition or practice states as follows:

The flammable or combustible liquid spillage and leakage was not removed in a timely manner or controlled to prevent a fire hazard on the dredge. The sump of dredge contained a large amount of oil, diesel fuel, and water floating under engine, pump, and other equipment which could be ignited to produce a flash fire and expose operator to fire hazard.

Section 104(a) "S&S" Citation No. 3061710, cites a violation of 30 C.F.R. 56.4230(a)(1), and the cited condition or practice states as follows:

A fire extinguisher was not provided on the dredge where a fire or its effects could impede escape from self-propelled equipment. Operator is exposed to fire hazard from diesel fuel, oils, and grease used on dredge motor.

Section 104(a) "S&S" Citation No. 3061711, cites a violation of 30 C.F.R. 56.4600(a)(1), and the cited condition or practice states as follows:

A fire extinguisher was not provided in the welding area of shop where electric arc and cutting torch were in use. Electrical circuits are also in area which could produce a hazard by the use of a electrical conductive extinguishing agent. A multi-purpose dry chemical fire extinguisher or other type with at least a 2-A; 10 B:C rating shall be used. Combustibles are stored in area of shop which could be ignited by welding activity.

Section 104(a) non-"S&S" Citation No. 3061713, cites a violation of 30 C.F.R. 56.14001, and the cited condition or practice states as follows:

The V-belt drive of floating fresh water pump was not provided with a guard to protect ingoing pinch points. Gravity reduced due to location of pump.

~664

Section 104(a) non-"S&S" Citation No. 3061712, cites a violation of 30 C.F.R. 56.14001, and the cited condition or practice states as follows:

The V-belt drive on shop air compressor was not provided with a guard to protect employees from ingoing pinch points. Gravity is reduced due to location of drive.

Section 104(a) "S&S" Citation No. 3061714, cites a violation of 30 C.F.R. 56.4100(b), and the cited condition or practice states as follows:

Welding, which produces open flame and sparks, was in area of shop which also had bulk oils stored with open caps and hand pumps. Employee was exposed to fire hazard. Gravity is increased due to lack of a fire extinguisher being available at area.

#### Petitioner's Testimony and Evidence

MSHA Inspector James R. Smiser, testified as to his experience and training, and he confirmed that he conducted an inspection at the respondent's mining operation on March 1, 1988, and issued the citations which are in issue in this proceeding.

Citation No. 3061706

Inspector Smiser stated that he issued this citation after observing that the mesh grating guard used to guard the main drive shaft and coupler on the dredge was loose and unsecured. If one were to step on the grating, it would give and go down under the weight of anyone walking on it. Mr. Smiser identified exhibit P-2 as a photograph of the mesh guard in question.

Mr. Smiser confirmed that he made a gravity finding of "highly likely," and he did so because the dredge deck was wet and coated with oil, making it slippery, and he believed that if anyone stepped on the grating it would give way and expose the individual to the hazard of falling into the exposed moving drive shaft and coupler.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because the dredge operator was required to be on the dredge, and he should have been aware of the readily observable condition of the loose grating.

~665

On cross-examination, Mr. Smiser confirmed that when he stepped on the loose grating guard, it gave some, but did not touch the coupler. He also confirmed that he had no knowledge that the grating had been in that condition for 2 years, and that his inspection was the first time he had observed the condition. He stated that he discussed the condition with superintendent Jim Davis, and agreed that the loose grating was probably caused by fatigue resulting from a broken angle iron which helped support the grating.

Citation No. 3061707

Inspector Smiser confirmed that he issued the citation after observing that the dredge operator was not wearing a life jacket while the dredge was in operation. He stated that the dredge operator walked around the dredge while inspecting the equipment, and at the time of the inspection the dredge deck was wet and slippery due to the presence of water and oil, and the dredge perimeter was not equipped with handrails. Under these circumstances, he concluded that the violation was "significant and substantial" because it was reasonable likely that the dredge operator could drown if he slipped and fell off the barge without a life jacket.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because the respondent had been in the dredging business for years and should have been aware of the requirement for the wearing of a life jacket.

Mr. Smiser stated that he spoke with superintendent Jim Davis who advised him that life jackets are made available to the dredge operator and that the operator apparently chose not to take one with him or to wear it at the time of the inspection.

On cross-examination, Mr. Smiser stated that he did not know the dimensions of the dredge and made no measurements. He described the pilot house where the dredge operator is stationed when he operates the dredge, and estimated that it was 5 feet wide. He confirmed that he observed no life jacket on the dredge, and that Mr. Davis obtained one after the inspection and provided it to the dredge operator. Mr. Smiser identified photographic exhibit P-3(a) as the dredge in question, and he estimated that it was anchored approximately 100 to 150 yards off shore, but he did not know the depth of the water at that location. He also identified photographic exhibit P-3(b) as a photograph of a portion of the edge of the dredge deck where no handrails were installed.

~666

Mr. Smiser stated that if the water was "knee deep," he would still require the dredge operator to wear a life jacket because if he slipped or fell overboard and struck his head, he would still be exposed to a drowning hazard if he was not wearing a life jacket.

Mr. Smiser stated that in accordance with MSHA's policy, if the dredge were equipped with protective hand-rails, a life jacket would not be required. He confirmed that there is no mandatory standard requiring hand-rails on a dredge, and that in the absence of hand-rails, there is a presumption that a dredge operator without a life jacket would be exposed to the hazard of falling overboard at any given time while walking around the dredge performing his duties.

Mr. Smiser confirmed that he spoke with the dredge operator and asked him why he was not wearing a life jacket, but received no response or explanation.

Citation No. 3061709

Mr. Smiser stated that he issued the citation after observing an accumulation of combustible and flammable oil and diesel fuel below the dredge engine and sump pump. The liquid had spilled or leaked from the engine or sump and it was mixed with water and was floating on the surface beneath the engine. He identified the material as the "shiny" material shown behind the batteries and below the engine in photographic exhibit P-5.

Mr. Smiser confirmed that he made a gravity finding of "reasonably likely," and considered the violation as significant and substantial because the combustible materials could have been ignited and caused a "flash fire" from the heat of the engine. Although the operator's compartment was located 15 to 20 feet from the sump and engine area, the absence of a life jacket and a fire extinguisher on the dredge, and the fact that diesel fuel was stored on the dredge, added to the hazard in that in the event of a fire, the dredge operator would be unable to safely remove himself from the dredge and could suffer fatal injuries.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because the leakage or spillage was readily observable and the respondent should have been aware of the requirement to timely remove the accumulated materials.



~667

On cross-examination, Mr. Smiser stated that he did not measure the accumulations, but estimated they were 6 to 8 inches deep. He confirmed that he had no knowledge of the "flash point" of the accumulated oil or fuel, and did not know how much heat was generated by the engine, or how hot it had to be in order to ignite the materials or cause a flash fire. He assumed that oil and fuel, by their-nature, are combustibile and flammable.

Mr. Smiser stated that the sump is located approximately 12 to 15 inches below the deck level of the dredge, and he had no knowledge of the size and type of the dredge engine.

Citation No. 3061710

Mr. Smiser confirmed that he issued the citation after finding that no fire extinguisher was provided for the dredge which was the subject of the previous citations. Given the potential fire hazard presented by the accumulation of combustibile fuel and oil at the dredge engine and sump area, as described with respect to Citation No. 3061709, and the fuel stored on board, he believed that it was reasonable likely that a fire would occur, and if it did, the absence of a fire extinguisher would not provide a means for extinguishing the fire, and the lack of a life jacket for use by the dredge operator would have impeded his escape from the hazard. Mr. Smiser confirmed that he considered the dredge to be self-propelled equipment for which a fire extinguisher was required. Under these circumstances, he concluded that the violation was significant and substantial.

Mr. Smiser confirmed that he made a negligence finding of "moderate" and that he did so because superintendent Davis advised him that a fire extinguisher had previously been provided for the dredge, and that one was obtained and provided by Mr. Davis after the inspection. Under these circumstances, Mr. Smiser concluded that the respondent was aware of the requirement for a fire extinguisher and that it knew or should have known about the requirement.

On cross-examination, Mr. Smiser confirmed that he and Mr. Davis were transported to the dredge by a small boat, but he had no knowledge as to whether another boat or barge used to transport fuel and the dredge operator to the dredge was also tied up and available for the dredge operator at the time of the inspection. Mr. Smiser stated further that the pilot house containing the dredge controls had one door.

Mr. Smiser confirmed that he issued the citation after he found that a multipurpose dry chemical fire extinguisher was not provided at the shop area where electrical welding work was being performed on a dredging bucket. He stated that fluids and oils were being used and stored in the shop, and he observed three or four 55-gallon drums of oil stored in one corner of the shop, and one of the drums was equipped with a hand pump. He estimated that these drums were located approximately 8 to 10 feet from where the welding or cutting was taken place.

Mr. Smiser confirmed that he made a gravity finding of "moderate" and considered the violation to be significant and substantial because it was reasonably likely that an "air arc" generated by the type of work going on could spray small pieces of hot metal in the shop and ignite the oil and other fluids which were present in the shop. However, he believed that in the event of a fire, the workers in the shop area could quickly exit the shop.

Mr. Smiser confirmed that he made a negligence finding of "moderate" because he believed that the respondent knew or should have known about the requirement for a fire extinguisher in the shop.

On cross-examination, Mr. Smiser stated that he had no knowledge of the size of the shop, but estimated that it was approximately 100 x 200 feet, and he characterized it as "pretty good size," with an open entrance.

Mr. Smiser confirmed that the welding truck was parked inside the shop, and the actual welding work was taking place outside the shop entrance immediately below the shop roof-line and approximately 4 to 5 feet outside of the shop.

Mr. Smiser stated that he could not recall the precise cutting or welding process which was taking place, but believed that it was an "air-arc" cutting apparatus which used compressed air. He did not believe that an open flame process which utilizes acetylene gas or oxygen, or electric welding, was being used, but confirmed that both of these processes were available for use. He confirmed that the bucket in question was on the ground.

Mr. Smiser confirmed that the cited standard, section 56.4600(a)(1), requires that a multipurpose dry chemical fire extinguisher be available when electrical arc or open flame

~669

welding or cutting work is being performed, and that the intent of the standard is to insure that an appropriate fire extinguisher be available in the event the kind of welding taking place creates an electrical hazard.

Citation No. 3061712

Mr. Smiser confirmed that he issued the citation after finding that the V-belt drive on a compressor located in the shop was not guarded. He stated that employees had access to the area where the compressor was located, and that tools and other materials were located and stored in the area. Mr. Smiser described the compressor as a "large tank" located in the corner of the shop, and he stated that the unguarded belt was mounted on top of the compressor approximately 5 to 5-1/2 feet above the shop floor, and that it was to the rear of the compressor facing the outside shop wall.

Mr. Smiser stated that he made a gravity finding of "unlikely" and did not consider the violation to be significant and substantial because he believed it was unlikely that an injury would occur due to the location of the unguarded belt. He did not believe it was likely that an employee would get caught in the unguarded belt and suffer an injury. He confirmed that the respondent's negligence was low because it was probably not aware that the belt was required to be guarded.

On cross-examination, Mr. Smiser stated that if someone deliberately wanted to get into the unguarded belt, they could do so by reaching behind the compressor. He also believed that someone could contact the unguarded belt through inattention, but conceded that there was a "slim chance" of anyone contacting the belt.

Mr. Smiser stated that he did not believe that the cited belt in question was guarded "by location," and that MSHA's informal policy recognizes "guarding by violation" only in instances where unguarded pinch points are located 7 feet off the ground.

Citation No. 3061713

Inspector Smiser confirmed that he issued the citation after finding that the V-belt drive on the fresh water floating pump motor was not provided with a guard to protect the exposed pinch points. He identified photographic exhibit P-9 as a photograph of the pump in question. He confirmed that he made a gravity finding of "unlikely" and did not consider the violation to be significant and substantial because it was

~670

unlikely that an employee would be at the pump location when it was started up or in operation. Due to the location of the pump, and the fact that the motor was activated from the plant, he did not believe that it was likely that an employee would be exposed to a hazard.

On cross-examination, Mr. Smiser stated that the cited mandatory standard, section 56.14001, requires that a belt drive "which may be contacted" be guarded. He confirmed that Mr. Davis advised him that under normal operating circumstances, no one would be on the pump barge.

Citation No. 3061714

Mr. Smiser confirmed that he issued the citation because the welding taking place in the shop area as previously described with respect to Citation No. 3061711 was taking place at the shop area where flammable or combustible oils and fluids were stored or handled. Mr. Smiser confirmed that while both citations were issued for the same welding or cutting work which was being performed on the bucket outside the shop, Citation No. 3061714, was issued for performing welding work in an area where open flame welding was taking place in an area where combustible or flammable oils and fluids were stored. Performing such work in such an area is prohibited by the standard.

Mr. Smiser stated that the coil welding which was taking place produces open flame sparks, and he determined that an injury was reasonably likely in that in the event of a fire someone would probably suffer minor burns. For these reasons, he determined that the violation was significant and substantial.

Mr. Smiser confirmed that he made a finding of "low" negligence, and that he did so because Mr. Davis advised him that he was in the process of moving the stored materials to another location.

#### Respondent's Testimony and Evidence

Dudley J. LeBlanc, respondent's owner, testified that his concrete and sand dredging operation is a very small business, and that he employs four individuals at his operation. One person operates the dredge, one operates the plant, one operates the loaders which load the trucks, and one person works in the office. He further stated that he is open for business 5 days a week, from 7:00 a.m. to 5:00 p.m.

~671

Citation No. 3061706

Mr. LeBlanc conceded that the metal grating provided to guard the dredge drive shaft and couplers was loose and in need of repair because of a broken angle iron support. However, he pointed out that most of the drive shaft was located under the grating which was firmly in place as shown by photographic exhibit P-2. He also stated that the machine gear box which is shown in the photograph is normally in that raised position. Although the guarding was loose, Mr. LeBlanc stated that one could walk on it and it would not give or contact the drive shaft or coupler.

Citation No. 3061707

Mr. LeBlanc stated that he has instructed the dredge operator to wear a life jacket while working on the dredge, and that he is provided with a jacket. Although he was not present during the inspection, Mr. LeBlanc believed that a life jacket was provided and located in the pilot house located at the end of the dredge. After viewing photographic exhibit P-3(a), Mr. LeBlanc estimated that the dredge was located 10 to 15 feet from the bank, and was in 4 or 5 feet deep water on the day of the inspection. However, he confirmed that during any given day, the dredge moves from one location to another during the dredging and pumping operation, and that it does operate in water which is 30 feet deep.

Mr. LeBlanc stated that the dredge was 16 feet wide and 24 feet long, with two 4 x 20 foot floats. The dredge contains a pilot house, an 8 x 10 foot pump, four winches, and a Detroit engine and hydraulic pump. Diesel fuel is used to drive the dredge, and there is a 900 gallon fuel tank at the rear of the dredge.

Citation No. 3061709

Mr. LeBlanc stated that the engine and sump leakage in question was not unusual in that the packing around the sump drive shaft causes leakage. He confirmed that the spillage and leakage cannot be emptied into the water, and that it is periodically removed and taken ashore. He has now devised a method to automatically pump out the spillage and remove it from the dredge.

Mr. LeBlanc stated that while diesel fuel is combustible, its ignition point is so high that one could throw a lighted match on the materials and it will not ignite. He confirmed that the dredge operator is permitted to smoke while in the

~672

pilot house, and that a water can is available in the house for cigarette butts. The operator is not permitted to smoke while working on the dredge outside of the pilot house.

Citation No. 3061710

Mr. LeBlanc confirmed that since he was not on the dredge during the inspection, he did not know whether a fire extinguisher was aboard. He stated that an 8 x 20 foot small barge used for transporting fuel is always tied up at the dredge, and it can be used by the dredge operator in an emergency. He stated that the pilot house has two doors, and it contains the dredge controls and radio and communications equipment.

Citation No. 3061711

Mr. LeBlanc confirmed that he was not present during the inspection and has no knowledge as to whether a fire extinguisher was provided for the shop area. However, he did observe a C.O. five extinguisher in the shop in the evening after the inspection. He confirmed that the welding operation was taking place outside of the shop and that the bucket which was being serviced was on the ground. Since it was on the ground, he did not believe that any sparks or arcs would reach the oil stored inside the shop. In the event welding was taking place above the stored oil drums, he would concede that arcs and sparks could fall below and onto the oil drums, but since this was not the case, he did not believe that any hazard was present.

Citation No. 3061712

Mr. LeBlanc stated that the cited unguarded compressor belt was at approximate "eye-level" and that the compressor was mounted on 4 x 4 blocks in the corner of the shop. He stated that in order to change out the belt located at the rear of the compressor, one would have to physically move the compressor in order to gain access to the belt. He stated that he abated the citation by installing a bar across the compressor to provide a physical barrier, and that the V-belt itself was not required to be guarded.

Citation No. 3061713

Mr. LeBlanc stated that under normal operating procedures, no one is required to be on the barge on which the fresh water pump was located. The pump motor is activated from shore in the plant by means of a switch located 200 to 300 feet from the barge, and that any engine priming is done from the shore some

~673

20 to 30 feet away. He stated that the pump is located on a 6 x 6 foot barge which rests on floats, and that no one is permitted to be on the barge while the pump is in operation. He confirmed that someone is on the barge only once a week for service before dredging is started, but that all of the electricity is deenergized and the pump is shut down. When major repairs are required, the pump is physically lifted ashore by means of a cherry picker.

Citation No. 3061714

Mr. LeBlanc confirmed that the welding work in question was taking place outside of the shop at the same location and on the same piece of equipment where Citation No. 3061711 was issued. He conceded that the work was being performed with an acetylene oxygen cutting torch which produced an open flame, and although he had available a "plasma cutter that you cut with electricity," it was inoperative.

#### Findings and Conclusions

##### Fact of Violations

Citation No. 3061706, 30 C.F.R. 56.14001

The inspector issued the citation after finding that the wire mesh grating guard used to guard the dredge drive shaft and coupler was loose and unsecured. The inspector confirmed that the respondent's superintendent agreed that the grating was loose because of fatigue resulting from a broken angle iron used to support the guard, and Mr. LeBlanc conceded that this was the case and that the guard was in need of repair. Although Mr. LeBlanc believed that most of the drive shaft was protected and disagreed with the inspector's belief that the grating would give and move down if someone were to walk on it, the fact remains that the guard was not securely in place, and I believe one can reasonably conclude that through fatigue and wear, it would have come completely loose over time and exposed one to a hazard of falling into the moving drive shaft and coupler. I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061707, 30 C.F.R. 56.15020

The evidence establishes that the dredge operator was not wearing a life jacket while the dredge was in operation and while he was walking around a slippery deck performing his duties. The dredge was not provided with any protective handrails around its perimeter, and in the event the operator

~674

fell into the water, which I believe was reasonably likely given the slippery deck conditions, he could possibly drown. Although Mr. LeBlanc stated that the dredge was located in 4 or 5 feet of water, he confirmed that on any given day the dredge moves around and sometimes operates in water 30 feet deep. Although the respondent's evidence indicates that a life jacket may have been provided for the dredge operator's use, the fact remains that he was not wearing it. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061709, 30 C.F.R. 56.4102

The inspector issued the citation after observing a combination of oil, diesel fuel, and water floating under the dredge sump pump and engine located approximately 12 to 15 inches below the deck level of the dredge. The inspector did not measure the accumulated materials, but estimated they were 6 to 8 inches deep. The cited section 56.4102, provides that "flammable or combustible liquid spillage shall be removed in a timely manner or controlled to prevent a fire hazard."

30 C.F.R. 56.2 defines the term "combustible" as "capable of being ignited and consumed by fire." The term "flammable" is defined as "capable of being easily ignited and of burning rapidly." The term "Flash Point" is defined as "the minimum temperature at which sufficient vapor is released by a liquid or solid to form a flammable vapor-air mixture at atmospheric pressure."

Mr. LeBlanc testified that due to the packing around the shell of the water pump, it is impossible to prevent water from leaking and mixing with oil and hydraulic fluid which may be present when the hoses break. He confirmed that any such spillage is periodically cleaned up and contained within the dredge, and then taken to shore and disposed of. Although he conceded that the material may be considered combustible, he stated that the ignition point is so high that it would not burn even if one were to throw a lighted match on it. Mr. LeBlanc's testimony in this regard is un rebutted.

The evidence here establishes that the accumulated materials were a mixture of water, which one may reasonably assume was leaking from the water pump, and oil and diesel fuel. Section 56.4102, requires the removal or control of "flammable or combustible spillage. In my view, in order to establish a violation, a determination must be made by the inspector as to whether the accumulations he observed were in fact combustible or flammable. Given the mixture of water



~675

which was present, and Mr. LeBlanc's un rebutted testimony with respect to the absence of an ignition point high enough to ignite the materials in question, I cannot conclude that the petitioner has presented any credible probative evidence to establish the combustibility or flammability of the materials cited by the inspector. Although the inspector was of the opinion that a "flash fire" could have resulted from the heat generated by the engine, he conceded that he had no knowledge as to the flash point of the accumulated oil and fuel, how much heat was generated by the engine, or whether the engine was hot enough to generate a flash fire. Under the circumstances, I conclude and find that the petitioner has failed to establish that the accumulated materials were in fact combustible or flammable. Accordingly, I conclude and find that a violation has not been established, and the citation IS VACATED.

Citation No. 3061710, 30 C.F.R. 56.4230(a)(1)

The inspector issued the citation after finding that a fire extinguisher was not provided for the self-propelled dredge. The cited section 56.4230(a)(1), provides that "whenever a fire or its effects could impede escape from self-propelled equipment, a fire extinguisher shall be on the equipment."

The inspector believed that an accumulation of fuel and oil at the sump pump area presented a potential fire hazard, and that in the event of a fire, and in the absence of a fire extinguisher, there would be no available means to fight the fire. The accumulations noted by the inspector were the same accumulations previously cited in Citation No. 3061709. That citation was vacated for a lack of any credible evidence to establish that the accumulations were combustible or flammable.

I find no problem with a safety standard which directly and clearly requires that a fire extinguisher be available on a dredge in the event of a fire. However, I do have a problem with the language of the particular standard cited in this instance. The standard requires a fire extinguisher only if it can be shown that "a fire or its effects" could impede an escape from self-propelled equipment. I find no evidence in this case to establish that any fire or its effects could have impeded the escape of the dredge operator from the dredge. Although the absence of a life jacket may have effectively impeded his escape, the respondent here has already been charged with a violation for the failure of the dredge operator to wear a life jacket. The intent of the standard is fire protection, and it is not a life jacket requirement.

On the facts of this case, the dredge was located 10 to 15 feet from shore in water 4 to 5 feet deep, and Mr. LeBlanc's un rebutted credible testimony reflects that a small barge is always tied up to the dredge for use in any emergency. In the event of any fire, the dredge operator could readily jump overboard, or use the barge as a means of leaving the dredge. Under all of these circumstances, including the lack of any evidence to establish that a fire, or its effects, would have impeded the escape of the dredge operator, I conclude and find a violation has not been established. Accordingly, the citation IS VACATED.

Citation No. 3061711, 30 C.F.R. 56.4600(a)(1)

In this instance, the respondent is charged with an alleged violation of mandatory standard 30 C.F.R. 56.4600(a)(1), which provides as follows:

Extinguishing Equipment.

(a) When welding, cutting, soldering, thawing, or bending--

(1) With an electric arc or with an open flame where an electrically conductive extinguishing agent could create an electrical hazard, a multipurpose dry-chemical extinguisher or other extinguisher with at least a 2-A:10-B:C rating shall be at the worksite.

The inspector confirmed that he issued the citation because a multi-purpose dry chemical fire extinguisher was not provided at the location where welding work was being performed on a dredging bucket outside of the shop. The citation states that an electric arc and cutting torch were in use during the welding process, that electrical circuits were present, and that these circuits could produce a hazard by the use of an electrically conductive extinguishing agent.

The inspector testified that electrical welding work was being performed on the bucket in question, and that he was concerned that an "air arc" generated by the type of welding work taking place could have sprayed small pieces of hot metal into the shop and ignited some oil and other fluids which were stored in drums inside the shop. In short, the testimony of the inspector reflects that he was concerned about a fire hazard, rather than an electrical hazard. Although the citation alluded to the presence of certain electrical circuits,

~677

the inspector's testimony is devoid of any reference to any such electrical circuits or electrical hazards.

In my view, the intent of the standard is to preclude the use of an extinguishing agent or apparatus capable of conducting electricity, thereby introducing an electrical hazard if the proper type of extinguisher is not available when work is being performed with an electric arc or open flame. As an example, the inspector stated that if a water fire extinguisher were being used, it could create an electrical hazard (Tr. 60).

The inspector testified that electrical welding was taking place, and that the work included the use of an "air arc process" which is a cutting method that uses compressed air to remove molten metal. He confirmed that he could not recall whether an electric or gas process was being used, nor could he recall whether an electrical welding device or a torch open flame device using oxygen acetylene or propane was being used. In any event, he confirmed that the term "air arc" could apply to either a torch welding system or an electric system, and that the respondent was using one or the other, and no other type of system (Tr. 59).

Mr. LeBlanc confirmed that he was not present during the inspection and he had no knowledge as to whether or not any fire extinguisher was provided at the location where the welding work in question was being performed. He conceded that the work was being performed with an acetylene cutting torch which produced an open flame.

On the facts presented here, although the inspector could not recall which of the two welding systems were being used (electric arc or open flame), Mr. LeBlanc confirmed that it was the latter. The inspector's credible testimony establishes that no fire extinguishing agent or device was available at the location where the work was being performed. Although one may argue that in the absence of any fire extinguisher, an electrically conductive extinguishing agent was not present to create an electrical hazard, my construction of the intent of the standard leads me to conclude and find that a multipurpose dry-chemical extinguisher was required to be available at the work location in question. Since it was not, I further conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061712, 30 C.F.R. 56.14001

The evidence establishes that the compressor drive unit was not guarded to prevent contact with an exposed moving

~678

machine part. Although the evidence establishes that the unguarded unit was facing the wall, and that it had to be moved in order for one to gain access to it, I cannot conclude that it was "guarded by location." The inspector stated that the unguarded drive was approximately 5 to 5-1/2 feet above ground level, and Mr. LeBlanc confirmed that it was at "eye level." The inspector also testified that the compressor was located in a shop area where tools and other materials were located and stored, and that employees had ready access to the area. Although the inspector agreed that it was unlikely that anyone would get caught in the unguarded drive unit and suffer an injury, the intent of the guarding standard is to preclude the possibility of anyone contacting an exposed and unguarded pinch-point through inattention, inadvertence, or ordinary human carelessness. See: Secretary of Labor v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094 (September 1984). I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 3061713, 30 C.F.R. 56.14001

The inspector issued the citation after finding that a belt drive unit on a floating fresh water pump was not guarded over its "ingoing pinch points." The pump was installed on a 6 x 6 foot barge which is supported by floats, and it was located on the water 20 x 30 feet off shore (photographic exhibit P-9). The inspector believed that it would be unlikely that anyone would be on the barge when the pump was started from the plant, and due to the location of the pump, he did not believe that it was likely that anyone would be exposed to a hazard. Mr. LeBlanc's un rebutted credible testimony reflects that the pump motor is activated by means of a switch located in the plant which was located some 200 to 300 feet from the barge, and that any priming of the pump is done from shore. Mr. LeBlanc confirmed that no one is required to be on the barge during the normal operation of the pump, and that although someone may be on the barge once a week for service before any dredging is begun, the pump is deenergized and shut down, and if any major repairs to the pump are required, the pump is lifted out of the water with a cherry picker and taken ashore for repairs.

I find no evidence to support any reasonable conclusion that there existed a reasonable possibility of anyone contacting the unguarded pump belt drive unit in question, and the petitioner has presented no evidence to establish that anyone would ever be near the belt drive while the pump was in operation. Under the circumstances, I conclude and find that a

violation has not been established, and the citation IS VACATED.

Citation No. 3061714, 30 C.F.R. 56.4100(b)

The inspector issued the citation because of the presence of oils and fluids in the shop area where welding was taking place. Section 56.4100(b), prohibits the use of an open flame where flammable combustible liquids, including greases, are stored or handled. The inspector testified that he observed several 55 gallon drums of oil, one of which had a hand pump for dispensing the oil, and three or four drums of petroleum fuel. The inspector confirmed that the superintendent advised him that a new storage area was being prepared to store the drums of oil and fluids in question.

The evidence establishes that the oil and fluid drums in question were stored inside the shop area in one corner, and that the welding work in progress was taking place outside of the shop. The inspector had no knowledge as to the types of fluids or oils which were in the drums, and he presented no credible testimony or evidence to establish that the oils and fluids were in fact combustible or flammable. He confirmed that section 56.4100 does not establish any particular distance parameters requiring the separation of stored flammable and combustible materials from open flames, and assumed that the use of an open flame in the same building where such materials are stored would be prohibited, unless there was an appropriate distance between the two or a partition isolating the materials from an open flame. He conceded that in this case, he simply concluded that the materials and open flame welding were in "close enough proximity" to present a hazard (Tr. 79-80).

In this case, the evidence establishes that the oil and fuel drums were stored inside the shop approximately 8 to 10 feet away from where the welding was taking place (Tr. 52). The shop was approximately 100 x 200 feet, with an opening in the front of approximately 50 to 75 feet. The dredge bucket which was being worked on was located outside of the shop on the ground some 4 to 5 feet beyond the roofline of the shop (Tr. 56). Thus, the drums in question were stored inside the shop approximately 12 to 15 feet from where the dredge bucket was located outside of the shop. Under these circumstances, I conclude and find that there was an adequate physical separation between the outside shop area where the work was being done and the area inside the shop where the drums which were not proven to contain combustible or flammable materials were stored, and that the work location was not, by any reasonable interpretation, a location where flammable or combustible

~680

liquids were stored. Accordingly, I further conclude and find that a violation has not been established, and the citation IS VACATED.

#### Significant and Substantial Violations

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, 3-4 (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, 1574-75 (July 1984).

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).

Citation No. 3061706

I conclude and find that the loose and broken wire mesh guard over the engine drive shaft and couplers constituted a significant and substantial violation. The location of the engine was such that it was readily available to anyone stepping across from one side of the dredge to the other, and given the fact that the angle iron guard support had broken through fatigue, I believe that over time, as more strain was placed on the mesh guarding by anyone stepping or walking on it, it would be reasonably likely that the guarding would have given way. If this had occurred while someone was stepping over it or walking on it, he could have fallen into the moving drive shaft and couplers and suffered injuries of a reasonably serious nature. Under the circumstances, the inspector's "S&S" finding IS AFFIRMED.

I take note of the fact that although the citation issued by Inspector Smiser makes reference to a potential drowning if someone were to fall into the water and oil held in the bottom of the dredge, no testimony was forthcoming from the inspector with regard to this alleged hazardous condition, and my findings and conclusions are limited to the question of possible contact with moving machine parts because of the loose and unsecured wire mesh guarding in question.

Citation No. 3061707

I conclude and find that the failure of the dredge operator to wear a life jacket while performing his work duties on the slippery deck of the dredge which was not protected by handrails constituted a significant and substantial violation. Given the fact that the dredge operator works alone in water which is sometimes as much as 30 feet deep, if he were to slip and fall off the dredge without a life jacket, and possibly strike his head on the metal deck, I believe that one could conclude that he would likely drown. The inspector's "S&S" finding IS AFFIRMED.

With regard to Citation No. 3061711, concerning the lack of a fire extinguisher in the shop area where welding was taking place with an electrical arc and cutting torch, the evidence establishes that the welding work was not being performed inside the shop where the 55-gallon drums of oil were stored in one corner. The work was being done outside the shop some 12 to 15 feet from where the drums were located. Inspector Smiser conceded that it was possible that the respondent was performing the welding outside of the shop as a precautionary measure to insure some distance between the welding work area and the area where the drums were stored. The inspector also confirmed that in the event of a fire, the employees in the shop area would have no difficulty in exiting the shop. Mr. LeBlanc confirmed that the welding work was taking place at ground level, and he did not believe that any sparks generated by the welding activity could reach the drums which were stored in the corner of the shop.

Based on the facts presented here, I cannot conclude that the violation was significant and substantial. Given the fact that the welding was taking place at ground level outside the shop, and some distance from the stored oil drums, I find it unlikely that any sparks generated by the welding activity would reach the drums and ignite the oil and cause a fire. Further, I find no evidence that the lack of a fire extinguisher presented any electrical hazard. Under the circumstances, the inspector's "S&S" finding IS REJECTED, and the citation is modified to a non-"S&S" citation.

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

Based on the stipulations by the parties and Mr. LeBlanc's un rebutted testimony concerning the size and scope of his operation, I conclude and find the respondent is a very small mine operator.

The parties have stipulated that payment of any civil penalty assessments in this case will not adversely affect the respondent's ability to continue in business. I adopt this stipulation as my finding and conclusion on this issue.

#### History of Prior Violations

Mr. LeBlanc stated that he has operated his present business since 1984. Although the petitioner's proposed stipulations, Exhibit ALJ-1, and the information which appears on MSHA's proposed assessment Form 100-179, reflects that the



~683

respondent had no prior assessed violations for the 24-month period prior to the issuance of the citations in issue in this case, Mr. LeBlanc believed that he had three prior citations. However, he could provide no further information, and the petitioner could not elaborate further.

Since the burden of establishing any prior violations lies with the petitioner, and since the petitioner did not present any computer print-out or other evidence with regard to any prior assessed violations, I conclude and find that for purposes of the civil penalty assessments made by me for the violations which have been affirmed, the respondent has no history of prior assessed violations.

#### Good Faith Compliance

Mr. LeBlanc testified that his operation has never experienced an accident or injury, and that he has a concern for the safety of his employees and has always taken prompt corrective action to abate any violative conditions brought to his attention. He confirmed that he always welcomes any MSHA inspection in order to maintain a safe working environment for his employees, and that all of the citations in this case were promptly abated within 24 hours.

Inspector Smiser agreed with Mr. LeBlanc's testimony, and the parties have stipulated that all of the citations were abated in good faith by the respondent within 24 hours. Accordingly, I conclude and find that the respondent exhibited rapid good faith compliance in correcting the cited conditions, and this is reflected in the civil penalties which I have assessed for the violations which have been affirmed.

#### Negligence

For the reasons stated by the inspector, I agree with his moderate negligence findings with respect to Citation Nos. 3061706, 3061707, and 3061711, and these findings are all affirmed. I also agree with his low negligence findings with respect to Citation No. 3061712, and his finding in this regard is affirmed.

#### Gravity

In view of my "S&S" findings with respect to Citation Nos. 3061706 and 3061707, I conclude and find that these violations were serious. I further conclude and find that the violation cited in Citation No. 3061711, was non-serious.

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
3061705	03/01/88	56.14006	\$ 30
3061706	03/01/8	856.14001	\$ 70
3061707	03/01/88	56.15020	\$ 65
3061708	03/01/88	56.14001	\$ 20
3061711	03/01/88	56.4606(a)(1)	\$ 20
3061712	03/01/88	56.14001	\$ 20

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.

Citation Nos. 3061709, 3061710, 3061713, and 3061714 ARE VACATED, and the proposed civil penalty assessments ARE denied and dismissed.

George A. Koutras  
Administrative Law Judge