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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	CIVIL PENALTY PROCEEDING Docket No. WEST 88-184-M A.C. No. 05-04311-05501
v.	Ross Pit
WALSENBURG SAND & GRAVEL COMPANY, RESPONDENT	Docket No. WEST 88-214-M A.C. No. 05-03920-05504
	Vezzani Pit

DECISION

Appearances: Margaret A. Miller, Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
For Petitioner;
Ernest U. Sandoval, Esq., Walsenburg, Colorado,
For Respondent.

Before: Judge Cetti

These cases are before me upon the petition for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq., the "Act," charging Walsenburg Sand & Gravel Company (Walsenburg) with a violation of 13 safety standards found in Title 30 of the Code of Federal Regulations, Part 56, for surface metal and non-metal mines.

Walsenburg filed a timely answer to the Secretary's proposal for penalty. After notice to the parties the matter came on for hearing before me at Pueblo, Colorado. Oral and documentary evidence was introduced, post-hearing briefs filed, and the matter was submitted for decision.

The general issues before me are whether Walsenburg violated the cited regulatory standards, whether or not certain alleged violations were significant and substantial as alleged, and if violations are found, what is the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

Walsenburg, at all relevant times herein, owned or leased and operated three sand and gravel pits in the general vicinity of Walsenburg, Colorado. Two of the pits, the Ross Pit and Vezzani Pit, were inspected by Federal Mine Inspector Lyle K. Marti. The inspector issued two citations for alleged violations of regulatory standards at the Ross Pit and 11 citations for alleged violations of regulatory standards at the Vezzani Pit.

Docket No. WEST 88-214-M

Background Information

Lyle K. Marti, a federal mine inspector, in his inspection of the Vezzani pit, was accompanied by Gary M. Vezzani, Vice-President of Walsenburg. The Vezzani Pit is a small intermittent seasonal operation. Raw material is extracted from the earth and processed. At the pit there is a crusher with screening facilities, a maintenance shop, and a hot plant. The pit is in operation from time to time when the operator has need for the products processed there. On the day of the inspection the plant and crusher were not operating and only one employee was at the site.

As a result of the inspection, Inspector Marti issued 11 citations. Four of the citations involved guards for moving machine parts. Three of the guard-related citations involve alleged violations of 30 C.F.R. 56.14001 for failure to properly guard exposed moving machine parts which may be contacted by persons and which may cause injury to persons. The other guardrelated citation was for the alleged violation of 30 C.F.R. 56.14006 which requires guards to be securely in place while machinery is being operated. The other seven citations involve alleged violations of electrical equipment standards.

Stipulation

The parties stipulated that each of the 11 citations accurately describes what Inspector Marti observed during his inspection of the Vezzani Pit. (Consequently, I quote from each citation the condition or practice observed by Inspector Marti.)

Citation No. 3065798

This citation alleges a 104(a) S&S violation of 30 C.F.R. 56.14001. The citation describes the condition observed by Inspector Marti as follows:

> The chain and gear sprocket to the tail pulley on the feeder belt conveyor of the Cedar Rapids Crusher was not guarded against personal contact.

Inspector Marti testified that the chain and gear sprocket could easily be contacted by persons doing cleaning or maintenance work in the area. Such a contact could result in the loss of a finger, an arm, or a hand.

Mr. Marti testifed that he could tell from the shininess of the teeth of the sprocket, which is created by movement of the chain, that the machinery had been operated during the week or two before the inspection. Gary Vezzani would not tell him when the machinery was last operated.

Inspector Marti discussed this violation with Gary Vezzani who told him, "We don't have men in that area when this machinery is in operation."

Citation No. 3065799

This citation alleges a 104(a) S&S violation of 30 C.F.R. 56.14001. The condition observed by Inspector Marti is stated in the citation as follows:

> The drive shaft and its couplings to the roller drum on the Cedar Rapids Crusher, SN 100861, was not guarded against personal contact that would cause injury to the person.

The cited standard, 30 C.F.R. 56.14001 provides as follows:

> Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons, shall be guarded.

Inspector Marti stated that the revolving drive shaft had couplers and keyways that could catch your clothing and wrap you into it, or you could fall against it. A person making contact could sustain serious bodily injury.

Inspector Marti testified that the rotating drum had a smoothness which reflected a shine that indicated the crusher had operated within the past 48 hours. In addition, he also noticed that along the wheels, along the rims, and on the frame of the crusher, there was a build-up of some very light material.

Citation No. 3065884

This citation charges a Section 104(a) S&S violation of 30 C.F.R. 56.14001. The stipulation of the parties established that Inspector Marti observed the following condition during his inspection which he described in the citation as follows:

> The tail pulley on the Plains Radial Stacker Conveyor with equipment # 72-8430 was not guard [sic] to prevent contact that could cause a serious injury to the person.

Inspector Marti testified that there was no guard to prevent a person reaching in between the roller and the self-cleaning tail pulley and making contact with the pinch point. A guard should have extended below the frame and extended forward so an employee could not reach in behind and get caught in the pinch points. If one got caught in the pinch point, it could cause serious bodily harm or death. The height of the top of the belt around the tail pulley is approximately 48 inches above the ground and the bottom of the belt approximately 30 inches above the ground. The sheen on the bars of the tail pulley indicated that it had been operated recently. If it had not been operated recently, it would have had a dull-looking finish rather than a sheen.

Citation No. 3065800

This citation charges a Section 104(a) S&S violation of 30 C.F.R. 56.14006 as follows:

> The guard for the chain drive and gear sprockets of the tail pulley on the Peerless belt conveyor, SN: 2566 was not kept in place.

30 C.F.R. 56.14006 provides as follows:

> Except when testing the machinery, guards shall be securely in place while machinery is being operated.

Mr. Marti testified that the guard was not in place. The guard was lying beside the frame of the belt conveyor exposing the idle pulley, drive pulley, and the pulley chain of this conveyor. This machinery was not being tested while the inspector was at the site.

The guard was partially buried by loose material that came off the conveyor indicating to the inspector that the machinery had been operated the previous day. There were no tracks in and around the area showing where anyone had made adjustments or had been testing. There was in fact nothing to test in the area. The inspector would expect an employee to be near or around the sprocket and pulley since the area must be kept "cleaned out" in order for the tail pulley and the belt to operate properly. It is quite common not to shut a plant down just to clean up around the tail pulley. Inspector Marti testified it is also common for maintenance people to go ahead and grease the bearing while the machinery is being operated. This is why all moving machinery parts that a person can contact must be guarded.

Electrical Citations

The seven remaining citations charge violations of a number of regulatory standards involving electrical equipment. The parties stipulated that each of these seven citations accurately describes the condition observed by Inspector Marti during his inspection of the Vezzani Pit.

Citation No. 3065795

This citation alleges a Section 104(a) non-S&S violation of 30 C.F.R. 56.12005, as follows:

> The electrical power cable (Triangle PWC Inc. #814 Type SO) to the motor on the radial stacker belt conveyor (Plains equipment number 72-8430) was installed across the top of the roadway whereby vehicles running over it could cause possible internal damage to its conductor. The power cable was not bridged nor protected by other means.

The cited safety standard, 56.12005, provides as follows:

> Mobile equipment shall not run over power conductors, nor shall loads be dragged over power conductors, unless the conductors are properly bridged or protected.

Inspector Marti testified that the power cable was lying across the roadway next to the crusher. The power cable ran from the control panel to the radial stacker. The power cable was not bridged nor protected. This cable was a power conductor with four cables inside of it. Three of the conductors are hot and one is a ground conductor. It was obvious from the mobile equipment tracks he observed that mobile equipment was running over this cable. It appeared to the inspector that the roadway was used every day that the crusher was operating. The power conductor went from the distribution panel over to the radial stacker belt conveyor, a distance of approximately one hundred feet.

Citation No. 3065881

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. 56.12025 which reads as follows:

> The electric motor, (3-phase, 440 VAC, 7 1/2 HP) mounted on the frame of Pearless belt conveyor SN: 2566, was not frame-grounded with a continuous ground conductor to its source of power.

30 C.F.R. 56.12025 provides as follows:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

Inspector Marti testified that the electrical three-phase motor mounted on the frame of the Peerless belt conveyor was not grounded with a continuous ground conductor to its power source. There was no ground conductor whatsoever attached to the motor. Should a fault occur, the frame of this motor would become energized. If someone came in contact with this equipment, one would receive a shock which could be serious and even fatal. The motor was wired for 440 volts. It was a 7 1/2 HP motor that would take 9.2 to 11 amps at normal operation. The equipment is outdoors so that on some days it would be dry and on some days it would be wet. When the ground is wet or damp you could receive a "higher degree" of shock.

Citation No. 3065882

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. 56.12030 as follows:

> The power cable (4/8 type SU) male plug on the end next to the Peerless belt conveyor had a bare conductor exposed at the male plug clamp fitting.

The cited safety standard provides as follows:

> When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

Inspector Marti testified that he observed a bare phase conductor on the power cables's male plug on the end next to the Peerless belt conveyor. He stated that this is a potentially dangerous condition since a person coming in contact with the bare conductor could receive a serious shock. Normally, you would not expect to see the conductor at all if it was installed properly. The wiring on the machinery is a three-phase system that involves 440 volts. The length of the bare exposed area was less than a quarter of an inch. (See photo Ex. 13). Inspector Marti said that the violation was visible to anyone working in that area. However, the small length of the bare segment (1/4 inch) will be taken into consideration in my evaluation of the gravity of the violation and the penalty to be assessed.

Citation No. 3065883

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. 56.12008 and reads as follows:

> The power cable leading out the bottom of the 30 amp, 3-phase safety disconnect box mounted on the generator control panel was not provided with a fitting to prevent strain on the conductor termination and the conductor installation from possible [sic] be cut on the metal edge causing an electrical shock hazard.

The cited safety standard, 30 C.F.R. 56.12008, provides as follows:

> Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

Inspector Marti testified that the citation accurately describes what he observed. A fitting should have been installed in the opening in the center of the box. The purpose of the fitting is to secure and protect the phase conductors from hitting against the metal sides of the opening. The fitting prevents the metal from cutting the insulation and creating an electrical hazard. If the insulation were cut, it would cause a fault creating the hazard of an electrical shock. It would energize not only the box but the entire frame and everything hooked to it.

Citation No. 3065885

This citation alleges a Section 104(a) S&S violation of 30 C.F.R. 56.12013 and reads as follows:

> The electrical power cable (leading to the electric motor mounted on the frame of Peerless belt conveyor and with SN: 2566) was not spliced properly. It was not made mechanically strong, insulated to that of the original, nor was it provided with damage protection on the outer jacket of the original cable.

The cited safety standard, 30 C.F.R. 56.12013 provides as follows:

> Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:
>
> (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
>
> (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and

> (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Inspector Marti testified that the citation accurately describes the condition he observed. The individual conductor had just one or two wraps of electrical tape over the individual conductors. There were 3-phase conductors and one ground conductor. The splice allowed moisture to seep in and did not provide the same damage protection or mechanical strength as near as possible to that of the original. If someone stepped on the splice, he could receive a serious shock that could be fatal depending on the amount of voltage and the condition of the ground at the time.

Citation No. 3065886

This citation charges a Section 104(a) non-S&S violation of 30 C.F.R. 56.12028, and reads as follows:

> A record of continuity and resistance of the plant electrical grounding system was not available for review.

The cited safety standard, 30 C.F.R. 56.12028 provides as follows:

> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

Inspector Marti testified that he asked Gary Vezzani, who accompanied him on his inspection, for the record of the resistance measured during the most recent testing of the continuity and resistance of the grounding system. Mr. Vezzani told him a record of the electrical ground check was not available.

Citation No. 3065887

This citation charges Walsenburg with a Section 104(a) non-S&S violation of 30 C.F.R. 56.12018, and reads as follows:

> The safety fuse disconnect boxes on the generator set control panel board were not labeled to show which unit they control.

The cited safety standard, 30 C.F.R. 56.12018, provides as follows:

> Principal power switches shall be labeled to show which units they control, unless identification can be made readily by location.

Inspector Marti testified that the labeling on the disconnect power switches to motor control and other crushing facilities were not labeled to show which unit they controlled. Identification could not be made readily by location.
Walsenburg's case

Other than the federal Mine Inspector Lyle K. Marti, the only witness to testify at the hearing was Louis Vezzani, owner and operator of Walsenburg, and the Vezzani Pit. Walsenburg's primary defense to all the violations at the Vezzani Pit was as follows:

1. On the day of inspection the plant was not operating.

2. The plant was last in operation approximately two weeks before Mr. Marti's inspection.

3. Even though the cited equipment may have been hooked up (the generator with its panel box, the Peerless conveyor, and the Plains conveyor), it had never been in operation at the pit.

Mr. Vezzani, when asked who hooked the equipment up from the generator to the motors of the conveyors, responded in the following manner:

> A. I don't have any idea. Probably one of the men. One of the crusher men. I don't know.
> I'm not even sure they were hooked up.
>
> Q. Well, Mr. Marti testified that they were hooked up. Do you disagree with that?
>
> A. I can't disagree with that. I don't know that.

Q. So, if they were hooked--wouldn't it make sense that they were hooked up from the generator to the motor because they would want to be used?

A. Yes, if they hooked them up, I'm sure that's the reason for it. They might have just hooked them up to see if the motors would run on them. I don't know. I wasn't there when they did that. If anybody did that.

Q. They have to operate the motors to see if they run, is that correct?

A. Yes. The electric motors, yes.

Mr. Vezzani testified that he closed the Vezzani Pit approximately two weeks before Mr. Marti's inspection. The Secretary points out that 30 C.F.R. 56.1000 requires an operator to notify MSHA of the commencement of operations as well as temporary or permanent closures. The operator must also indicate whether the operation will be continuous or intermittent. Walsenburg's legal identity report indicated that at the time of the inspection the Vezzani pit was an open mine operated on an intermittent basis. There was no closure on file with MSHA. On the date of inspection the pit was an open mine, subject to inspection. The fact that the machinery at the Vezzani Pit was not actually in operation on the day of inspection is legally irrelevant.

It appears from the record that Mr. Marti is an experienced and well-qualified federal mine inspector. Based upon his observation of the appearance and condition of the machinery and the surrounding area at the time of his inspection, he was of the opinion that the plant had been in operation a short time prior to his inspection, and that while it was in operation it was in the same violative condition that he observed at the time of his inspection and noted in the citations and testimony.

I credit the testimony of Inspector Marti and, on the basis of the stipulation of the parties and testimony of Inspector Marti, I find there was a violation of the regulatory standard specified in each of the citations issued for violation at the Vezzani Pit.

The Ross Pit

The Ross Pit is a sand and gravel pit that was leased by Walsenburg to provide the gravel Walsenburg needed for a highway project. Walsenburg subcontracted with the Southway Construction Company of Alamosa to bring one of its portable crushers to the Ross Pit and crush the aggregate at the pit. On January 26,

1988, Mr. Marti, a federal mine inspector, made an inspection of the Ross Pit. As a result of that inspection he issued two citations to Walsenburg.

Citation No. 3065898

This citation charges Walsenburg with a Section 104(a) non-S&S violation of 30 C.F.R. 56.1000. The citation reads as follows:

> The Operator (Walsenburg Sand & Gravel) started mining operations at the Ross Pit during the week of Jan. 25, 1988. This mine site is located in Pueblo County, State of Colorado. The operator failed to give notification of commencement of operation to Rocky Mountain District Manager of Mine Safety and Health Administration.

The cited regulatory standard, 30 C.F.R. 56.1000 provides as follows:

> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.
> When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

Inspector Marti testified that on January 18, 1988, he received notification from Southway Construction Company (Southway) of their intention to move a portable gravel crusher into the Ross Pit and begin crushing operations. Inspector Marti could find no computer listing of the legal identity of the Ross Pit. Consequently, he went to the pit to make an inspection. At the pit he talked to Darrell Yohn, the foreman for Southway, who told him that they had a contract with Walsenburg to crush 130,000 tons of material at the pit. Southway has portable crushers with a portable identification number. Inspector Marti talked to Louis Vezzani, the President of Walsenburg, during his inspection of the Ross Pit and informed him that he was in vio-

lation of 30 C.F.R. 56.1000 for his failure to fill out a legal identity report and notify the MSHA District management of commencement of operation at the Ross Pit. Mr. Vezzani opened his briefcase and gave the inspector the needed legal identification report and notification. The legal identity report was dated January 23, 1989. Since the report was given to MSHA after operations had begun, there was a violation of 30 C.F.R. 56.1000. The minimum penalty of $20 was appropriately assessed for this violation.

Mr. Marti testified that during his January 26, 1988, inspection of the Ross Pit, he observed an Allis-Chalmer dozer owned and operated by Walsenburg. He talked to the dozer operator Carl Pfaffenhauser, who informed him that he was employed by Walsenburg and that Mr. Vazzani would soon be arriving at the Ross Pit.

Mr. Darrell Yohn, the foreman for Southway, informed the inspector that Walsenburg had leased the 20 acres that included the Ross Pit. At the time of his inspection, the subcontractor Southway was operating their portable crusher at that pit. There were two other employees there who informed him they were employed by Walsenburg. They were working with the Allis-Chalmer dozer. They were stripping - taking off and pushing aside the overburden material from the material that was to be crushed. Mr. Yohn told Mr. Marti that they started working at the pit during the week of January 18. Mr. Marti testified that the legal identity report which was handed to him by Mr. Louis Vizzani during his January 26, 1988, inspection of the Ross Pit showed that Walsenburg was the operator of the Ross Pit.

Citation No. 3065900

This citation charges Walsenburg with a 104(a) S&S violation of 30 C.F.R. 56.9022. The citation reads as follows:

> The outer bank of the elevated roadway into the Ross Pit was not provided with a berm or guard. For approximately 175 feet the outer edge of the roadway drop-off 3-18 feet approximately. The hazard is increased by it being only 8-11 feet wide and also the weather condition.

The cited regulatory standard, 30 C.F.R. 56.9022, provides as follows:

> Berms or guards shall be provided on the outer bank of elevated roadways.

Inspector Marti testified the only access to the pit was a narrow dirt road approximately 180 feet long that leads up to the crusher and the excavation site of the Ross Pit. The road's elevated incline to the top was approximately 150 to 160 feet long. In order to maneuver on this narrow road, the inspector used a four-wheel drive. He talked to Darrell Yohn, foreman for Southway Construction Company, who told him that it was the only available road for employees to get in and out of the work site at the Ross Pit. It was also used as a haul road to bring in water and fuel.

Foreman Yohn told him that under Southway's contract with Walsenburg, it was Walsenburg's responsibility to see that the road was bermed. Mr. Yohn told Inspector Marti him that the day before the inspector arrived at the Ross Pit, Walsenburg almost lost the flatbed and the dozer tractor it was hauling over the edge of the elevated road. Southway had to hook on to the flatbed with their front-end loader to assist in pulling the equipment up the grade. Inspector Marti stated that he examined the area and saw tire tracks in the mud that indicated that the vehicle had gone off the edge of the road. There were no berms or guardrails installed on the road. MSHA normally requires that the berm be placed to the axle-height of the largest vehicle that is being used on the mining property. The natural repose dropoff of the elevated road varied in height up to approximately 18 feet. If a vehicle went off the road it could roll over and drop 18 feet.

Inspector Marti testified that since the roadway was used by Southway as well as Walsenburg he informed foreman Yohn that if the citation were not abated by construction of the berm, the citation would be replaced by an order which would close the road and no one could go in or out of the Ross Pit.

The inspector testified that he served the citation on Mr. Vezzani and explained to him the date by which the violation had to be abated. There was a timely abatement of the violation by Southway.

Mr. Marti testified that the violation was significant and substantial in nature. He explained that the hazard created by lack of a berm on the road is that it would allow a vehicle that got too close to the edge, to go over. He stated that if a vehicle dropped off the elevated portion of the road "there was a high degree of bodily injury all the way from a permanent injury to a fatality." In the inspector's opinion there was a reasonable likelihood of an accident.

The inspector testified that this was the only road used during the two days he was at the Ross Pit making the inspection. He observed one of Walsenburg's maintenance vehicles come to the pit when they had a problem with the dozer.

Louis Vezzani, President of Walsenburg, testified that in October 1987 he entered into a contract with the State Highway Department for a highway job near Pueblo. In order to do the job Walsenburg needed a rock pit that could supply the needed gravel. Walsenburg subleased the Ross Pit in October 1987 and proceeded to apply to the Mine Land Reclamation Board for a permit to mine gravel at the Ross Pit. Mr. Vezzani testified that the permit was issued to him on January 25, 1988.

Walsenburg subcontracted the crushing of the gravel at the Ross Pit to Southway Construction Company of Alamosa.

Mr. Vezzani testified that he does not know when Southway moved its equipment into the Ross Pit. He did not know whether Southway built any roads at the Ross Pit.

Mr. Vezzani testified that he had nothing to do with the elevated road that was cited. At the time of the inspection they already had a 36-foot wide road at the west end of the pit that they were going to use to haul gravel out. He admitted that some of the employees on his crew may have driven up the cited road. He himself drove up the elevated road several times in Walsenburg's company pickup and looked at the pit. He had no employees working at the Ross Pit at the time of the inspection. He owned several Allis-Chalmers dozers but did not have a dozer at the pit. When Mr. Vezzani was asked if the person on the grader at the Ross Pit was telling Inspector Marti the truth when he said he worked for Walsenburg, Mr. Vezzani replied, "I don't have any way of knowing that. I don't know." Asked if Foreman Yohn was being honest when he told the inspector that Southway was not responsible for the overburden or the dozer, Mr. Vezzani replied, "I can't answer it. Mr. Yohn will have to answer that. I'm sorry."

Mr. Vezzani testified that he always drove to the Ross Pit in his company pickup. He drove there at least once every day, sometimes using the cited elevated road. However, Walsenburg did not haul any material out of the pit until three months after the inspection. Walsenburg's answer, filed October 27, 1988, states, "Our haul road is 30 feet wide on the west end of the pit built in time for haulage purposes." (Emphasis supplied).

Mr. Vezzani testified that when Walsenburg got its permit from the Mine Land Reclamation to start operations at the Ross Pit on January 25, 1988, Southway had already moved in with its mobile crusher and had been crushing for several days.

On cross-examination, Mr. Vezzani testified that he had an employee by the name of Carl Pfaffenhauser. He was Vezzani's blade operator on the highway project, which commenced in October of 1987. Asked if he had loaned any of his employees to Southway to work at the Ross Pit, Mr. Vezzani replied, "To my knowledge, no." Mr. Vezzani went on to explain that some time in late February or early March of 1988, he "laid some of his employees off for a three-week period and they could have worked for Southway during that time."

Inspector Marti was recalled and testified that at the time of his inspection the cited elevated roadway was the only road into the Ross Pit. However, when he returned to terminate the citation a month later, he observed that after the inspection another road had been constructed along the west side of the pit.

Discussion

Inspector Marti is an experienced, well-qualified inspector. I credit his testimony. Some of the evidence he presented was hearsay, but it was, in my opinion, reliable hearsay. Based upon the testimony of Inspector Marti, I find that Walsenburg violated the provisions of 30 C.F.R. 56.9022 as alleged in the citation issued.

Even assuming arguendo, that Walsenburg made very little use of the cited elevated roadway, the citation was properly issued to Walsenburg. The language employed by Congress in drafting the Mine Act, the legislative history of the Act, and several court of appeals decisions show that the Secretary can cite the operator, the independent contractor, or both, for violations committed by the independent contractor. Mine operators are "absolutely liable for violations by independent contractors." Harman Mining Co. v. FMSHA, 671 F.2d 794 (4th Cir. 1981).

The prime question for consideration in determining a violation of the Mine Act is whether the alleged condition existed at the mine. The Fifth Circuit has held that "if the Act or its regulations are violated, it is irrelevant whose act precipitated the violation or whether or not the violation was found to affect safety; the operator is liable," Allied Products Co. v. FMSHRC, 666 F.2d 890,894 (5th Cir. 1982).

The legislative history of the Mine Act confirms that Congress clearly intended the Secretary to have broad discretion to cite either owners or independent contractors or both for violations involving independent contractors. In the Senate report on the bill that ultimately became the Mine Act, the Committee on Human Resources stated the following:

> In enforcing this Act, the Secretary should be able to issue citations, notices, and orders, and the Commission should be able to assess civil penalties against such independent contractors as well as against the owner, operator, or lessee of the mine. The Committee notes that this concept has been approved by the federal circuit court in Bituminous Coal Operators' Ass'n. v. Secretary of the Interior, 547 F.2d 240 (C.A. 4, 1987).

(S. Rep. No. 95-181, 95th Cong., 1st Sess. 14 (1977).) Thus, Congress intended to enable, but not to require, enforcement against independent contractors. Further, this language makes clear that the Secretary is authorized to cite owner-operators for their independent contractors' violations. The passage also expressly endorses Bituminous Coal Operators' Ass'n (BCOA) v. Secretary of Interior, 547 F.2d 240 (4th Cir. 1977), holding that under the Coal Act, the Mine Act's predecessor statute, the Secretary could cite owners, contractors, or both for the contractors' violation.

The second significant passage from the legislative history appears in the Conference Committee Report on the Mine Act.

That report contains the following explanation:

> The Senate bill modified the definition of "operator" to include independent contractors performing services or construction at a mine. This was intended to permit enforcement of the Act against such independent contractors and to permit the assessment of penalties, the issuance of withdrawal orders, and the imposition of civil and criminal sanctions against such contractors who may have a continuing presence at the mine. [Emphasis added.]

(S. Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 37 (1977).) Again this language shows a congressional intention only to permit enforcement against independent contractors not require it.

A number of court of appeals decisions have uniformly construed the Mine Act as granting the Secretary broad discretionary authority. The Third Circuit considered the Mine Act's legislative history, as well as the BCOA decision, in determining whether under the Mine Act the Secretary has discretion to hold owners responsible for certain independent contractors' activities. In National Industrial Sand Ass'n. v. Marshall, 601 F.2d 689 (1979), a group of operators challenged a regulation requiring them to provide training in mine safety and health to the employees of some of their independent contractors. The owner-operators argued that, because the Mine Act's definition of "operator" includes independent contractors, the Secretary must enforce the regulation against independent contractors, rather than owners, where the contractors control the job being performed. The court held that the inclusion of both owners and independent contractors in the definition endowed the Secretary with discretion to assign responsibility to either. 601 F.2d at 703. In reaching this conclusion, the court referred with approval to the reasoning of the BCOA decision that the Coal Act's definition of operator gave the Secretary discretion to enforce the Act against owners or contractors for the contractors' violations. 601 F.2d at 702. The court also examined the legislative history accompanying the Mine Act and concluded that, when Congress amended the definition of "operator" to include independent contractors, "Congress was clearly concerned with the permissive scope of the Secretary's authority, not with the mandatory imposition of statutory duties on independent contractors." 601 F.2d at 703.

In Harman Mining Co. v. FMSHRC, supra, Harman, an owner-operator, challenged a withdrawal order issued to it for an incident involving Norfolk and Western Railroad, its independent contractor. The Fourth Circuit rejected Harman's argument that the Secretary should have cited the independent contractor, reasoning: "Even assuming, however, that Norfolk and Western had some degree of culpability, the Secretary had discretionary authority to cite Harman for the violation." 671 F.2d at 797. The court ruled that under both the Coal Act and the Mine Act "mine owners are absolutely liable for the violations by independent contractors," and cited with approval the reasoning of BCOA on joint and several liability. In addition, the court decided that the Secretary had exercised his discretionary authority in an "appropriate manner" in issuing the citation against Harman.

Similarly, in Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981), the Ninth Circuit rejected an

operator's claim that the employment of an independent contractor removed the operator from liability under the Mine Act. The court noted that the addition of the term "independent contractors" to section 3(d) of the Mine Act did not require the Secretary to cite only the independent contractor; rather, the addition permitted the Secretary to cite the independent contractor, the operator, or both. 664 F.2d at 1119. The court concluded that the Secretary "did not abuse his discretion" by citing the owner-operator. 664 F.2d at 1120.

Thus, the language employed by Congress in drafting the Mine Act, the legislative history of the Act, and several court of appeals decisions show that the Secretary can cite the owner-operator, the independent contractor, or both, for violations committed by the independent contractor. The decision as to whom to cite is of a discretionary nature. In this case the Secretary exercised her discretion and acted within the scope of that discretion by citing the Walsenburg, even if we assume arguendo that the cited elevated road at the Ross Pit was used primarily by Southway and very little by Walsenburg.

Significant and Substantial

A violation is properly designated "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 815 (April 1981). In Mathis Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> 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 reasonable serious nature.

Accord, Austin Power v. Secretary of Labor, 861 F.2d 99, 103 (5th Cir. 1988).

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," and that the likelihood of injury must be evaluated in terms

of continued normal mining operations. U.S. Steel Mining Co., 6 FMSHRC 1573, 1574 (July 1984). See also Monterey Coal Co., 7 FMSHRC 996, 1001-02 (July 1985). The operative time frame for determining if a reasonable likelihood of injury exists includes both the time that a violative conditon existed prior to the citation and the time that it would have existed if normal mining operations had continued. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC 1125, 1130 (August 1985). 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. Texasgulf, Inc., 10 FMSHRC 498, 500-01 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 1007, 2011-12 (December 1987). Finally, the Commission has emphasized that 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 Co., 6 FMSHRC 1834, 1836 (August 1984).

Under this precedent and based upon my independent review and evaluation of all the evidence, including the photographs that are in evidence and the physical location of each hazard, I find the evidence presented is insufficient to establish that any of Walsenburg's violations were significant and substantial in nature. In particular, with regard to the third element of the Mathies test, I find the evidence presented is insufficient for me to conclude that a reasonable likelihood existed that the hazard contributed to by any one of the violations will result in a serious injury. In support of this finding it should be noted that the undisputed evidence in this case establishes that this pit operated intermittently and that when it was in operation, only two or three employees operated the facility. Exposure to the hazardous violative condition was not high. Louis Vezzani testified that during the 25 years the Vezzani plant was in operation, they never had a lost-time injury. His testimony was undisputed. Upon evaluation of the evidence I find that, while the violations were serious, there is insufficient evidence to conclude that there was a reasonable likelihood that the hazard contributed to by the violation would result in a serious injury.

Motion of Both Parties Denied

The Secretary made a motion for default judgment because Respondent failed to serve her with a copy of respondent's answer. The answer was filed by the operator, Louis Vezzani, not by his counsel. The Secretary's counsel did not know Respondent

was represented by counsel until she received Respondent's reply to my prehearing order. The Secretary was provided with a copy of the answer and the Secretary's motion for default was denied. Respondent moved for sanctions and for dismissal of all citations on grounds that the Secretary did not serve him with a copy of her reply to the prehearing order and again because she filed her post-hearing brief a few days late. I have considered the matter and I deny all motions. There is no meritorious reason why these cases should not be decided on the merits.

Civil Penalty Assessment

Section 110(i) of the Act mandates consideration of six criteria in assessing a civil penalty. In compliance with the mandate, I have considered the following:

The operator's sand and gravel business was of small size. Both the Ross Pit and the Vezzani Pit were small intermittent operations.

In the absence of any evidence to the contrary, I find that proposed penalties would not adversely affect Walsenburg's ability to continue in business.

Exhibit P-7, a computer printout, indicated that, within the two years prior to the inspection of both the Ross and Vezzani pits, Walsenburg was assessed no violations. This is a good history.

I find the operator's negligence to be moderate. The gravity was high. The guard-related violations, the electricity-related violations, and the elevated roadway violation were serious and could have resulted in serious bodily harm or death, even though the evidence is insufficient to conclude that there was a reasonable likelihood that the hazard they contributed to would result in an injury.

The company demonstrated good faith in its abatement of the violations.

Everything considered, I assess civil penalties which I find appropriate for each violation as follows:

Citation No.	30 C.F.R. No.	Penalty Assessed
3065795	56.12005	$20.00
3065798	56.14001	40.00
3065799	56.14001	40.00
3065800	56.14006	40.00
3065881	56.12025	40.00
3065882	56.12030	25.00
3065883	56.12008	30.00
3065884	56.14001	40.00
3065885	56.12013	50.00
3065886	56.12028	20.00
3065887	56.12018	20.00
3065898	56.1000	20.00
3065900	56.9022	50.00
	Total	$435.00

ORDER

1. Citation Nos. 3065798, 3065799, 30657800, 3065881, 3065882, 3065883, 3065884, 3065885, and 3065900 are modified to delete the characterization "significant and substantial" and, as modified, the citations are affirmed.

2. Citation Nos. 3065795, 3065886, 3065887, and 3065898 are affirmed.

Walsenburg Sand & Gravel Company is ordered to pay the sum of $435 within 30 days of the date of this decision as a civil penalty for the violations found herein.

August F. Cetti
Administrative Law Judge