CCASE:
SOL (MSHA) V. PETERS TRUCKING
DDATE:
19901018
TTEXT:

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 90-36-M A.C. No. 04-04684-05505
v.	Peters Trucking Plant
PETERS TRUCKING COMPANY, RESPONDENT	

DECISION

Appearances: George B. O'Haver, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for the Petitioner;
Leo M. Cook, Esq., Ukiah, California, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments in the amount of $1,834 for ten (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 a hearing was held in Ukiah, California. The parties waived the filing of posthearing briefs, but I have considered their oral arguments made on the record during the course of 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 in the contested citations constitute violations of the cited mandatory safety standards, and (2) the appropriate civil penalties to be assessed

for the violations, taking into account the statutory civil penalty assessment criteria found in section 110(i) of the Act, and any mitigating circumstances connected with the violations. Additional issues raised by the parties are disposed of in the course of this decision.

Applicable Statutory and Regulatory Provisions

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

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

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

Petitioner's Testimony and Evidence

MSHA Inspector Michael E. Turner testified that he conducted his initial inspection of the respondent's mine site on September 13, 1988, and he confirmed that the crusher plant was shutdown at this time and that "several employees were in the process of building guards" (Tr. 8). He confirmed that he considered the citations to be "non-S&S" because he observed no exposures to any hazards because the plant was down and he observed no employees walking about the plant while it was in operation.

With regard to Citation No. 3285843, concerning the lack of guarding for the jaw crusher tail pulley and mechanical belt, Mr. Turner stated that he fixed the abatement time of September 20, 1988, after discussing it with Mr. Peters, and that Mr. Peters gave him that date as the time within which he could make the changes and corrections required. Mr. Turner further stated that when he returned for a follow-up compliance inspection on May 31, 1989, he found that "no apparent effort had been made to correct the condition that was previously cited" on September 13, 1988, and the crusher appeared to be in the same condition. When asked whether he spoke to Mr. Peters on May 31, Mr. Turner replied as follows:

> A. I am sure I did. The thing of it is, Mr. Peters quite often is not there and I spoke with Mr. Bagley so I can't really say that I talked to Mr. Peters that day. If I issued a 104-B order I would think that I talked to Mr. Peters. I would assume that I did.
>
> Q. All right.
>
> THE COURT: Did you take any notes or anything that day that would refresh your recollection?

~1976

> THE WITNESS: I did. But the conference sheet that we fill out states that I did talk to Mr. Peters about all the changes to orders, 104-B orders.

Mr. Turner stated that he next returned to the site on June 9, 1989, when he terminated the citation and order, and he indicated that the original citation abatement date had been extended and that he would have discussed the abatement dates with Mr. Peters during his subsequent two visits (Tr. 11).

Notwithstanding his belief that "no apparent effort had been made" to secure the guard for the crusher tail pulley and belt on May 31, 1989, he agreed that a guard had been provided for the crusher flywheel on that day, but it simply lacked a bottom piece which was missing, and that some work had been performed to abate this condition (Tr. 15).

With regard to Citation No. 3285844, concerning the jaw crusher drive motor, Mr. Turner stated that although three violative conditions are noted on the citation form, he only issued one violation in accordance with MSHA's policy. He believed that there was a problem with the motor feed box because it was an old motor and a box had to be fabricated (Tr. 13).

With regard to Citation No. 3285845, concerning the lack of a protective railing or barrier to "prevent the fall of person" at the walkway adjacent to the jaw crusher control station, he believed that no barriers were present when he returned on May 31. With regard to the notation on his order issued that day that "no apparent effort had been made to correct the condition of a chain used to prevent contact with moving machine parts at the jaw crusher control station," Mr. Turner stated that the chain was at a different location than the missing barrier or railing and that the chain was simply hanging down from a support post. The missing barriers concerned the other side of the control station (Tr. 18).

With respect to Citation No. 3285846, concerning the lack of guards on the tail pulley pinch points on a conveyor under and below the crusher, and his notation on May 31, that "no apparent effort had been made to secure" the guards, Mr. Turner believed that there may have been a change in the condition as it was initially cited on September 13, but that he could not specifically recall this condition and had no independent memory of the cited guard condition (Tr. 21).

With regard to Citation Nos. 3285848, 3285849, and 3285850, Mr. Turner stated that he recalled these cited guarding conditions, and that no changes had been made during the intervening

period of September 13, 1988, and May 31, 1989, when he issued the orders, and that the conditions were the same (Tr. 21-24). He confirmed that the upper conveyor tail pulley (Citation No. 3285850) was guarded, but that the guard was inadequate, and abatement was achieved by pulling the guard screen together and either bolting it or wiring it to eliminate the possibility of someone reaching in and contacting the pinch point (Tr. 24).

On cross-examination, Mr. Turner confirmed that when he initially visited the site on September 13, there were two crushers at the site, and that all of the citations were issued on the new crusher that Mr. Peters was working on in order to make it operational. Mr. Turner stated that the crusher had been operating when he arrived at the site, but that it was shutdown during the inspection. The other crusher was not wired up and was down (Tr. 25-26). He confirmed that Mr. Peters informed him that the crusher which was cited was newly purchased and that he was attempting to set it up (Tr. 27). When asked to confirm whether he informed Mr. Peters that the cited conditions had to be corrected before the crusher was placed in production, Mr. Turner responded as follows (Tr. 28-29):

> A. If we have a problem with semantics, I believe what I told Mr. Peters, which I tell many of the operators, almost all of the operators, is if there is a violation present that the plant should not be operating until that violation is taken care of.
>
> Q. Right, Now did you also tell him that as long as he had these items covered by your citations repaired or installed that he could then place the plant into operation?
>
> A. If they are non S and S citations he can repair them and go from there.
>
> Q. Would it be fair to state that Mr. Peters could very well have understood that there was no particular time limit on making these repairs or installations, provided that he wasn't using the plant?
>
> A. I find it difficult after all of the conversation that we have had, discussions that he could not be aware of the termination dates.
>
> Q. Okay. Now your second visit was on February 23, 1989, and from looking at the various documents it appears that you arrived there at 12 minutes after 12:00 -- 14:07. That would be 2:07 in the afternoon?

~1978

> Q. (BY MR. COOK) Now as I read from your citation of that date, it is the second page under 3285841. You state in the last paragraph, "the plant has been down for some time and Mr. Peters had assured the inspector that the violations shall be remedied prior to start up in the future." That is exactly what he said?
>
> A. Yes, sir.

Mr. Turner stated that all of the cited conditions were ultimately corrected to achieve compliance, and although he had no evidence to establish that the plant was operated without the corrections being made, he confirmed that when he first drove up to the site on September 13, he observed that the plant was running. However, he took "a break" waiting for Mr. Peters to arrive to accompany him on his inspection, and when he returned the plant was shutdown. Mr. Turner described the equipment which comprised the crushing "plant," and he confirmed that all of the guarding citations involved the Eagle jaw crusher operation. He stated that material was being processed through the crusher when he initially observed it in operation, and he confirmed that he did not inspect the second crusher which was not wired up (Tr. 31-33).

With regard to his subsequent visit to the site on February 23, 1989, Mr. Turner confirmed that it was a follow-up visit to abate the citations which he issued on September 13, 1988. Although the extension notice issued that day for Citation Nos. 3285841 and 3285855, were the only ones included with the pleadings filed by MSHA, and were the only ones of record at this point in the hearing, Mr. Turner believed that he issued other extensions that day. When asked if he had any independent recollection that he in fact extended the other citations, he replied "the procedure would be to extend them. . . . I would have to look it up and try to find records in regard to that" (Tr. 38). When asked for an explanation as to why he would issue a section 104(b) order 5 months after he extended the abatement time for a citation, Mr. Turner responded as follows (Tr. 38-39):

> THE WITNESS: Well, first of all, I would like to talk to the operator to find out whatever mitigating circumstances he may have had for not operating the plant.
>
> THE COURT: Do you recall any in this case? What may have happened?
>
> THE WITNESS: I remember going out there, but I cannot remember the conversation on February 23rd, and I cannot remember whether I spoke to Mr. Bagley or Mr. Peters or both of them.

THE COURT: You don't recall whether you issued any extension on all of these other citations that we just went through regarding this?

THE WITNESS: I can't recall. The correct procedure would be for me to do that, but I can't recall whether I did or not.

MR. O'HAVER: I think had he done that they would have been part of the record. They are not.

THE COURT: Doesn't it strike you kind of strange that he would go out there and issue them on the 13th and go back on the 23rd and only address two and not the others?

MR. O'HAVER: It could very well be that time of the year everything was down and he may have only met with Mr. -- Mr. Peters may not have been there, maybe only one person there, and they only talked about the record keeping portions. That time of the year the plant wouldn't ordinarily be operating.

THE COURT: So then he goes back on the 31st?

MR. O'HAVER: Yes, because the weather's getting better and they are going to start operation. That's just speculation on my part.

With regard to Citation No. 3461132, which he issued on June 1, 1989, Mr. Turner testified that he observed a truck driver driving a "cat" front-end loader without a hard hat on. He confirmed that the loader was equipped with rollover protection (ROPS), but that the canopy was not completely enclosed and was open at the top, and had no windshield or side protection. Except for the rollover bars, the loader operator was completely exposed. Mr. Turner stated that the driver was an employee of the respondent, and he identified him as "Mr. Morgan." He stated that the driver was loading the truck with rocks from the side with the bucket of the loader in a raised position, and that he was exposed to a hazard of a "spill of rocks coming back and hitting him in the head." He further believed that the failure by the driver to wear a hard hat could have resulted in a serious injury if he were struck by a rock and he would have incurred "lost days or restricted duty." Mr. Turner confirmed that he observed that rocks were spilling off the raised bucket, and he found that an injury was reasonably likely to occur (Tr. 42). Mr. Turner described the loader as "pretty small," and he stated that the loading bucket would be approximately 8 to 10 feet ahead of the operator's compartment, and if the load were lifted and tilted into the bed of the truck which was being loaded, the load

would be 8 to 10 feet high and over the position of the operator at the controls of the loader (Tr. 45).

Mr. Turner stated that he based his "high negligence" finding on the fact that he and Mr. Peters had discussed the matter of wearing hard hats on the property, and although he believed that the respondent's employees had hard hats available, he did not know whether Mr. Peters furnished them. He could not recall where the hard hat used to abate the citation came from, or whether it was in the loader, in the truck, or obtained from the shop (Tr. 43). He confirmed that he has previously observed loader operators loading materials on a truck and that they wore their hard hats while in the loader (Tr. 44). He further confirmed that the violation was abated in 3 minutes by providing a hard hat, but he could not recall where Mr. Peters obtained it (Tr. 45).

Respondent's Testimony and Evidence

Mr. Robert Peters, a partner in the operation, testified on behalf of the respondent. Mr. Peters testified that the loader which was being operated, as well as his other loaders, are equipped with ROPS protection, and although the front and sides of the machine were open, the top was enclosed with a quarterinch steel plate. He stated that the driver was furnished with a hard hat but that he had it in the truck and he had not bothered to put it on. He confirmed that drivers may load the trucks themselves, or a loader operator will load them (Tr. 46-47; 53).

Mr. Peters testified that he purchased the Eagle crusher in question at an auction in Oregon, and brought it to his operation in Willits, California. Since he had not previously observed it in operation, the crusher was in a "set-up mode" at the time of the initial inspection by the inspector on September 13, 1988. He confirmed that the crusher was not in production at that time, and that "we were trying to see if it worked and what needed to be done to put it into production" (Tr. 48). He further confirmed that a second crusher unit, which had previously been in operation at another location, had been moved "from the North plant in town" and was located next to the Eagle crusher in the vicinity of the power source.

Mr. Peters testified that on September 13, 1988, he and the inspector went to the Eagle crusher plant, and he advised the inspector that he had just purchased the crusher. Although the inspector understood this, he inspected the crusher and issued several citations and explained what needed to be done to bring it into compliance. At the completion of the inspection, the inspector "stated to me that, you now, as long as we didn't run the plant until we had all these corrections made there was no problem" (Tr. 48). Mr. Peters explained that the crushers are not used during the winter because no crushing is done, and it

was his understanding that the inspector was giving him "all winter to get everything put on it and get it up to par" (Tr. 49).

Mr. Peters stated that the inspector next returned on February 23, 1989, to follow up on a citation issued on September 13, 1988, for failing to conduct an annual test for continuity and resistance of the grounding system. Mr. Peters stated that during this visit several equipment guards which he had made were laying by the machine, and that the inspector informed him that "there was no problem with the guards," and that as long as all of the guarding citations were corrected before he went into production, "that there was no problem" (Tr. 49).

Mr. Peters confirmed that the inspector next returned to the site on May 31, 1989. Mr. Peters stated that he informed the inspector that he could not accompany him on his inspection because he was occupied with a mechanical problem on one of his trucks and asked him to come back in an hour. The inspector replied "no" and proceeded to write up the section 104(b) orders. Mr. Peters stated that although he was unhappy with the inspector issuing these orders because he previously told him that there would be no problem as long as he had made the repairs before the crusher was put in operation, he nevertheless continued to complete the repairs and install the guards. He indicated that most of the guards had been constructed and some were installed. He alluded to one particular guard to cover the crusher flywheel, and confirmed that when the inspector returned a week or 9 days later, "we had everything completed and he signed them off" (Tr. 51).

Mr. Peters further stated that if he had not been occupied repairing the truck on May 31, 1989, and had been able to accompany the inspector on his inspection, he would have tried to convince him that he did in fact make an effort to comply and would have reminded him of his understanding in February that the violations had to be abated before he placed the crusher into production. Mr. Peters stated further that he had made "lots of effort to correct the problem," that most of the guards were there, but not on the crusher, and that the inspector saw them (Tr. 51). Mr. Peters stated that he had no opportunity to explain to the inspector because "I was busy repairing my truck while he was writing the 104-b's" (Tr. 52).

On cross-examination, Mr. Peters stated that he often talks to his employees about safety hazards, emphasizes hard hats, and that he has a good insurance company safety record rating. He explained that in connection with the crusher "set up" on September 13, 1988, it had been run two or three times prior to that day with "a little material" in order to check the system to

determine if any repairs were needed (Tr. 55). When the inspector returned on February 23, they discussed the fact that the crusher could not be operated until all of the needed corrections previously cited on September 13, were made, and the inspector did not speak to him about any specific dates. Mr. Peters stated that he did not look at the "paperwork" or the extension dates left with him on February 23, and did not discuss this with the inspector, but did assure the inspector that before he put the crusher into production, the corrections would be made (Tr. 56).

Mr. Peters stated that he usually reopens his operation in June after the winter season because he cannot have access to any streams to obtain his materials until after May 15, when his state fish and game permit is issued. The state usually permits him access to the streams in June. He confirmed that when the inspector returned on May 31, the crusher plant was still dormant and not in production and had not been running (Tr. 56).

With regard to the initial inspection citations issued on September 13, Mr. Peters testified that he did not discuss the September 20, abatement dates recorded on the citations with the inspector, and that these dates do not mean anything to him. He explained that he "glanced over" the citations and read what the inspector wrote and knew that he was writing because "we went over each item specifically and he told me what needed to be done to comply" (Tr. 57).

Inspector Turner was called in rebuttal by the petitioner, and he produced and reviewed copies of several extension notices he issued on February 23, 1989, extending the abatement times of the citations he issued on September 13, 1988, to February 27, 1989 (exhibit P-2, Tr. 58). Mr. Turner stated that he had no independent recollection of discussing the termination dates with Mr. Peters, but that his extensions would indicate to him that they were discussed (Tr. 59).

As noted earlier, the violation extension notices issued by Inspector Turner on February 23, 1989, were not included as part of the initial civil penalty assessment proposal pleadings filed by the petitioner in this case, and petitioner's counsel could offer no explanation as to why they were not previously filed with the pleadings (Tr. 59). The inspector retrieved his file copies during a break in the hearing prior to being called in rebuttal, and the respondent's counsel confirmed that he had not previously seen them. Although the copies reflect that they were served on him, Mr. Peters stated that he had not previously seen them (Tr. 60).

I take note of the fact that copies of the extension notices produced by Inspector Turner at the hearing are stapled to an Inspection Information Sheet filled out by Mr. Turner. In the

"Remarks" portion of that document, Mr. Turner notes that "Copies of terminations and extensions given to office personnel" (Exhibit P-2, pg. 1). Mr. Peters testified that they may have been left with a Mr. Dan Bagley (Tr. 60). Inspector Turner confirmed that he has been instructed not to leave mine property "until we issue the paperwork to someone, or that a copy stays on the property" (Tr. 61). Although the extensions reflect that they were served on Mr. Peters, Mr. Turner could not recall giving them to him, and he testified that "I may have addressed that to Mr. Peters and gave the copies to Mr. Bagley, the weigh master" or left them in the office. Mr. Turner could not recall any conversations with Mr. Peters on February 23, and stated that he made no inspection notes that day and could not find any (Tr. 62).

In response to further questions, Mr. Turner confirmed that Mr. Peters was having a problem with one of his trucks while he was at the site on May 31, 1989, and could not accompany him on his inspection that day. Mr. Turner stated that when he found that the original citations had not been abated or terminated, he made some notes and advised Mr. Peters that he would have to reissue them pursuant to section 104(b). He then wrote them up and discussed them with Mr. Peters. When asked about the nature of the conversation, Mr. Turner stated "we discussed them (sic) about the plant will not operate until all the violations are secured or remedied, and I left the property" (Tr. 64). Mr. Turner confirmed that he was not sure at that time whether or not the crusher had been in operation (Tr. 64).

Mr. Turner assumed that the plant was not in operation from September 13, 1988, through February 23, 1989, and he had no reason to dispute Mr. Peters' testimony that the plant is not normally put into production until after May 31 or early June. He also had no reason to dispute Mr. Peters' testimony that the cited crusher was being "set-up" and tested prior to any production, and that when he conducted the inspection the plant was not running and he did see anyone there (Tr. 65).

Although Mr. Turner claimed that he asked Mr. Peters on September 13, if a week was sufficient time to correct the violations, he agreed that it was possible that Mr. Peters was under the impression that he may have had a week to fabricate the equipment guards, but could wait until the plant was in production before installing them, notwithstanding the termination dates shown on the face of the citations (Tr. 67). Mr. Turner confirmed that the September 13, 1988, inspection was his first inspection of the crusher plant in question (Tr. 68). However, he believed that the plant has had other crushers which had been previously operated, and that other MSHA regular and follow-up inspections have been conducted at the site (Tr. 72). Since Mr. Peters advised him on September 13, that some material had been run through the crusher during the set-up, Mr. Turner

believed that it should have been in compliance with the guarding requirements because accidents may occur when the equipment is running and he found no excuse for not guarding it (Tr. 71).

Mr. Peters testified that during the initial set-up period, the crusher was not operated continuously for 3 days, and that it was operated for 10 minutes while adjusting a belt or changing a bearing, and the guard is off because it covers the tail pulley adjustment device and the guard must be off to make any adjustment. He stated that "we were not continually running for 3 days straight. We would fire up, run it, see a problem and then we would shutdown and work on that," and he reconfirmed that the crusher was not in a production mode from September 13, 1988, until the time the citations were ultimately abated (Tr. 76).

Findings and Conclusions

Jurisdiction

Although the respondent has not raised any jurisdictional question, the evidence establishes that the cited crusher was purchased out of state, and that the respondent has an MSHA ID number, and its crushed stone operation has been inspected and regulated by MSHA. I conclude and find that the respondent is a mine operator within the meaning of the Act, and is subject to MSHA's enforcement jurisdiction. See: Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982); Southway Construction Co., 6 FMSHRC 174 (January 1984); Rockite Gravel Co., 2 FMSHRC 2543 (December 1980), Commission Review Denied, January 13, 1981; Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

Fact of Violations

The respondent was cited for 10 violations of several mandatory safety standard found in Part 56, Title 30, Code of Federal Regulations. One violation was issued because of the failure to conduct a grounding system continuity and resistance test as required by section 56.12028; three were issued for failure to comply with the equipment guarding requirements of section 56.14001; two were issued for failure to guard a conveyor pursuant to section 56.14003; one was issued for the lack of equipment bushings or fittings as required by section 56.12008; one was issued for failure to provide a railing or barrier at the crusher travelway location pursuant to section 56.11012; one was issued for failing to conduct monthly inspections of fire extinguishers or to have the inspection records available at the work site as required by section 56.4201(b); and one was issued for a violation of section 56.115002, because of the failure of a truck driver to wear a hard hat while loading a truck with a front-end loader.

The respondent agreed and stipulated that the cited conditions and practices which are described by the inspector on the face of each of the contested section 104(a) citation notices which were issued on September 13, 1988, and June 1, 1989, were true, and that these cited conditions constituted violations of the cited mandatory safety standards (Tr. 5). Respondent further stipulated and agreed that it does not contest the two "single penalty" citations which resulted in proposed penalty assessments of $20 (Citation Nos. 3285841 and 3285855) (Tr. 39-40).

The respondent further stipulated and agreed that its dispute in this case lies in its disagreement with the inspector's assertion that it made "no apparent effort" to remedy some of the cited conditions and abate the violations. These findings by the inspector formed the basis for his issuance of seven section 104(b) orders which resulted in proposed civil penalty assessments which the respondent believes are "high" and unwarranted for the conditions which were initially cited by the inspector on September 13, 1988.

In view of the foregoing, I conclude and find that all of the conditions and practices cited by the inspector in support of the citations which he issued on September 13, 1988, and June 1, 1989, constitute violations of each of the cited mandatory safety standards relied on by the inspector, and the violations ARE AFFIRMED.

History of Prior Violations

The respondent's history of prior violations is reflected in a "Proposed Assessment Data Sheet" submitted by the petitioner (exhibit P-1). The information presented reflects that with the exception of timely paid "single penalty" assessments, the respondent was assessed for six violations issued during the years 1986-1989. I cannot conclude that the respondent's compliance record is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations in question in this case.

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

The record reflects that the respondent operates a portable stone aggregate crushing operation employing approximately six individuals at any given time. Its annual production is approximately 30,000 tons of crushed stone materials (Tr. 5). Mr. Peters testified that two of his employees operate the crusher, and four employees serve as truck drivers or mechanics (Tr. 51). He also indicated that he is in production approximately 6 months out of the year (Tr. 80). Except for periodic equipment set-ups and testing periods, the record reflects that the crushing operation is essentially a seasonal business which

is not in production during the "winter season" from approximately mid-September through May or early June. I conclude and find that the respondent is a small operator and I have taken this into consideration in making the civil penalty assessments for the violations in question.

Mr. Peters testified that although payment of the full amount of MSHA's proposed civil penalty assessments for the violations may "hurt a lot. Particularly this year," he confirmed that payment of those penalties, in the amounts proposed by MSHA, will not put him out of business (Tr. 79). Under the circumstances, and in the absence of any evidence to the contrary, I conclude and find that payment of the civil penalty assessments which I have made for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

Gravity

With the exception of the "hard hat" citation issued on June 1, 1989, all of the citations issued by the inspector on September 13, 1988, were issued as section 104(a) non-S&S citations. I take note of the fact that in each instance, the inspector noted "zero" as the number of persons affected by the cited violative conditions (Gravity Item 10-D). He also found that there was either "no likelihood" of any injury, or that an injury was "unlikely," but nonetheless found that the injury would be "fatal," "permanently disabling," or would result in "lost workdays or restricted duty." In connection with the six guarding citations, he noted on the face of the citation that the hazard "exposure could not be determined." Mr. Peters testified that if a hazard were presented, the only person exposed would be the crusher operator (Tr. 51).

When asked to reconcile his apparent inconsistent gravity findings, Mr. Turner explained that his findings of "unlikely" were based on the fact that the crusher plant was not in operation at the time of the inspection. However, if someone were to contact an unguarded pinch point, particularly a tail pulley, "it would be fatal" and "a person could get his hand in there or something and it could tear his hand or arm off and he could bleed to death" (Tr. 35). His findings of "fatal" would be relevant if the crusher were to be put into production (Tr. 36). With regard to his findings that "zero" persons would be exposed to any injury, Mr. Turner stated that "I believe this is the way OSHA" would consider any hazard exposure. He conceded that he may have been in error in making these findings, and that MSHA's current policy is to consider the total number of people working at the plant. He also conceded that any determination as to the actual number of persons exposed to any hazard "would have to be determined by asking Mr. Peters some questions. Who lubricated the plant and cleaned it out," and that these determinations

would have to be made before he checked the appropriate item boxes on the citation form (Tr. 36). In the instant case, Mr. Turner confirmed that all of the cited equipment which lacked guards was guarded before the crusher plant was placed in production (Tr. 37).

I conclude and find that Citation Nos. 3285841 and 3285855, for the failure to conduct the annual continuity and resistance grounding system tests, and the failure to inspect the fire extinguishers on a monthly basis were not non-serious violations. I find no evidence to support any conclusions to the contrary. Likewise, in the absence of any evidence or testimony to the contrary, I also find that Citation No. 3285844, for a lack of fittings and bushings on the cited components of the crusher was a non-serious violation. Under the circumstances, the inspector's non-S&S findings regarding these violations are affirmed.

With regard to Citation No. 3285845, for failing to provide a railing or a barrier at the travelway location adjacent to the jaw crusher operator's control station, I conclude and find that this was a serious violation. Although the crusher was not in operation at the time of the inspection, and the respondent had a chain available at one of the locations near the crusher, it was not hooked up to prevent anyone from walking through and into the crusher. Further, the inspector's unrebutted testimony establishes that the lack of a barrier or a railing at the cited travelway location presented a falling hazard and that a barrier or railing would prevent someone from falling off the control station area. The inspector also testified that when he and Mr. Peters walked up a stairway in the proximity of this unprotected area, the crusher jaw was open "where a person could step off into the jaw" (Tr. 17-19).

With regard to the five guarding citations (Nos. 3285843, 3285846, 3285848, 3285849, and 3285850), I conclude and find that they were all serious violations. Although the crusher was not in operation at the time of the inspection, the inspector's unrebutted testimony reflects that it was running when he initially drove up to the site, and Mr. Peters admitted that it had been in operation while it was being setup and tested. Further, the guards were not in place, and there is no evidence that they may have been installed while the crusher was being setup and tested. Under the circumstances, I conclude and find that there was some degree of hazard presented, and that a potential for an accident was present while materials were being run through the crusher while it was in a setup mode and being tested. The fact that the inspector found the violative conditions to be non-S&S is immaterial to any gravity finding or the seriousness of the potential hazards presented.

Neither the inspector or the petitioner suggested that the inspector's non-S&S findings with respect to the guarding citations should be modified. Although I am troubled somewhat by the inspector's inconsistent and contradictory findings with respect to the likelihood of any injuries, and his admission that he "may have been in error," I find no evidentiary basis for disturbing his non-S&S findings. In my view, a serious violation is not ipso facto a significant and substantial violation. The Commission's standards and criteria for determining a significant and substantial violation have been addressed in Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Mathies Coal Company, 6 FMSHRC 1, 3-4 (January 1984); United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129 (August 1985), and the cases cited therein.

The inspector's rationale for his non-S&S findings was based on the fact that an injury was unlikely because the plant was not operating at the time of the inspection, and there is no evidence that it was in production when the guards were not in place. More to the point, however, is the inspector's candid admission that the degree of hazard exposure can only be determined by asking relevant questions during an inspection with respect to the actual work which may have been performed in the proximity of the unguarded locations while the crusher was being operated. Although the inspector conceded that the actual hazard exposure could not be determined because the crusher was not in operation at the time he observed the violative conditions, it seems obvious to me from the lack of any evidence or testimony on his part to the contrary, that he made no inquiries so as to establish any factual basis in support of any conclusion that the guarding violations were in fact significant and substantial, and no evidence or testimony was advanced by the petitioner to establish that this was in fact the case.

Significant and Substantial Violation (Citation No. 3461132, 30 C.F.R. 56.15002)

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:

~1989

> 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, (August 1985), 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 inspector's unrebutted testimony, which I find credible and probative, establishes that when he observed the truck driver operating the loader and loading the truck without wearing a hard hat, the loader bucket was raised 8 to 10 feet above the loader, and the inspector observed rocks spilling out of the bucket. He concluded that it was reasonably likely that the driver operating the loader would incur serious injuries if he were struck by a falling rock. Although Mr. Peters claimed that the loader had a steel plate covering over the canopy, the evidence establishes that it had no windshield and that it was open on both sides of the operator's compartment. The fact that the loader had a steel plate over the canopy, would not in my view, preclude any falling rocks from the raised bucket from entering the otherwise unprotected operator's compartment and striking the driver in the head. Under the circumstances, I agree with the inspector's S&S finding, and it is affirmed.

Negligence

Inspector Turner made findings of "high negligence" for five of the citations he issued on September 13, 1988, (Nos. 3285841, 3285843, 3285845, 3285846, 3285849), and "moderate negligence" for four citations (Nos. 3285844, 3285848, 3285850, 3285855). He made a finding of "high negligence" for the citation he issued on June 1, 1989 (No. 3461132).

Mr. Turner stated that his negligence findings were based on whether or not the cited conditions were readily observable to the respondent, and if the violations occurred in any "hidden" area where the respondent could not see them, he would consider this to be a lesser degree of negligence. As an example, he explained that his "high negligence" finding with respect to Citation No. 3285843, for failing to guard the crusher tail pulley, mechanical belt, and V-belt drive pulley located at the approach ramp to the crusher would be readily observable because mobile equipment used to feed the crusher used the ramp (Tr. 35). No further testimony was forthcoming from the inspector with regard to his negligence findings made on September 13, 1988, other than the fact that Mr. Peters acknowledged that he knew that the cited equipment needed to be guarded (Tr. 35).

I conclude and find that the respondent knew or should have known about the conditions which prompted the inspector to issue the citations on September 13, 1988, and that its failure to exercise reasonable care to insure compliance with the cited mandatory standards constitutes ordinary negligence.

With regard to the citation issued on June 1, 1989, for the failure of a truck driver to wear a hard hat, the inspector stated that he based his "high negligence" finding on the fact that he and Mr. Peters had previously discussed the need for employees to wear hard hats while on the property. Although the inspector confirmed that he spoke with the employee in question, he could not recall whether the employee gave him any explanation for not wearing a hard hat, nor could he recall where the hard hat was located or from where the one supplied to abate the citation was obtained.

Mr. Peters testified that he often spoke with his employees about wearing their hard hats, and he confirmed that he furnished a hard hat to the cited employee, but that he had it in his truck and had not bothered to put it on. This testimony is unrebutted, and I find it credible. Although the respondent is liable for the violation without regard to fault, I find that the negligence of the employee in failing to wear the hard hat furnished to him by the respondent mitigates the respondent's negligence and any civil penalty which may be assessed for the violation. Under the circumstances, I conclude and find that the violation resulted from a low degree of negligence by the respondent.

Good Faith Compliance

I conclude and find that Citation Nos. 3285841, 3285855 (continuity and resistance tests and fire extinguishers) were abated in good faith by the respondent within the extended abatement time. The hard hat citation (3461132) was abated within 3 minutes.

With regard to the remaining citations, the record reflects that when the inspector returned to the site on May 31, 1989, after previously extending the abatement time, he found that the respondent had made "no apparent effort" to secure the guards at some locations, install guards at other locations, or to remedy or correct the other cited conditions. As a result of these findings, he issued seven section 104(b) orders. MSHA's proposed civil penalty assessment amounts for the violations obviously reflect the fact that orders were issued, and I believe that it is reasonable to conclude that the inspector's belief that no effort had been made to correct the cited conditions resulted in the maximum number of penalty points for a lack of good faith compliance by the respondent.

As noted earlier, although the respondent does not dispute the fact that the cited conditions constitute violations of the cited standards, the crux of its contest lies in its dispute with the inspector's belief that it made no apparent effort to correct the cited conditions. Mr. Peters maintained that at the completion of the inspection on September 13, 1988, the inspector informed him that as long as the crusher plant was not in production and was not running, there would be no problem. Mr. Peters testified that he paid no particularly attention to the 1-week abatement period fixed by the inspector, and that it was his understanding that he could make the necessary corrections during the winter season when the crusher was not in production. Mr. Peters further testified that the crusher was not in production from September 13, 1988, until the violations were ultimately abated. The inspector confirmed that all of the cited conditions were ultimately corrected, and he had no reason to dispute Mr. Peters' testimony that the plant was not operated before the corrections were corrected and abated.

The inspector testified that his normal procedure is to inform an operator that if there is a violation, the plant should not be operated until the violation is corrected, and he believed that this is what he told Mr. Peters during his initial inspection on September 13, 1988. The inspector also agreed that it was possible that Mr. Peters was under the impression that he may have had a week to fabricate the guards, but could wait until the crusher was placed in production before installing them.

Mr. Peters testified credibly that when the inspector next returned to the site on February 23, 1989, for a follow-up inspection, several guards which he had constructed were available and were laying by the machine, and the inspector again informed him that there was no problem as long as the citations were corrected before he went into production. Mr. Peters stated that he and the inspector again discussed the fact that the crusher could not be operated until the cited conditions were corrected, but that the inspector said nothing about any specific

dates for abatement, and that he (Peters) did not look at the extension "paperwork" left by the inspector. Mr. Peters confirmed that he told the inspector the violations would be remedied prior to any future start-up of the crusher plant, and the inspector confirmed that this is what Mr. Peters told him and that he wrote this on one of the extension forms which he issued on February 23.

The inspector testified on direct-examination that he could not recall whether he spoke with Mr. Peters, Mr. Bagley, or both of them on February 23, when he extended the abatement times. His inspection report, with the attached copies of the extension notices, reflects that they were given to "office personnel," and the inspector could not recall giving them to Mr. Peters. He confirmed that he made no inspection notes on February 23, and acknowledged that he may have given the extensions to Mr. Bagley or left them in the office. The inspector's asserted lack of any recollection of speaking with Mr. Peters contradicts his earlier testimony that Mr. Peters assured him on February 23, that the violations would be remedied prior to any start-up of the crusher. Further, his notation that he left the extensions with office personnel, and may have given them to Mr. Bagley, or left them in the office, corroborates Mr. Peters' assertion that they were not given to him and he did not see them. Although the inspector indicated that the fact that the extensions were issued suggests that he discussed the termination dates with Mr. Peters, he made no notes to confirm this, and he acknowledged that he had no independent recollection of discussing the extended termination dates with Mr. Peters. Under the circumstances, and in light of the inspector's lack of recollection and contradictory testimony, I give greater weight to Mr. Peters' testimony which I find credible.

With regard to the inspector's return visit on May 31, 1989, when he issued the section 104(b) orders, after concluding that "no apparent effort had been made" to correct the cited conditions, the inspector testified that "I can't really say that I talked to Mr. Peters that day" (Tr. 10). His "assumption" that he spoke with Mr. Peters was based on the fact that he issued the orders. Although the inspector confirmed that he took notes which would refresh his recollection, and that a "conference sheet" which he filled out reflected that he did speak with Mr. Peters about "all the changes to orders, 104-B orders," the notes and conference sheet were not produced and they are not a matter of record.

Mr. Peters testified that he was occupied with certain truck repairs on May 31, and did not accompany the inspector during his inspection. He relied on the inspector's prior statements that there would be "no problem" as long as the crusher was not operated before the abatement of the violations. Mr. Peters maintained that he had in fact made efforts to comply by fabricating

most of the required guards which were there and which the inspector saw. Mr. Peters maintained that he had no opportunity to explain his abatement efforts to the inspector because he was busy repairing the truck while the inspector was writing up the orders.

The inspector confirmed that Mr. Peters did not accompany him on his inspection because he was busy repairing a truck and told him "go on, do what you have to do" (Tr. 63). He testified that he made some notes during his inspection, and when he finished, he told Mr. Peters that he would have to issue the orders, and gave them to him. He stated that he discussed the orders with Mr. Peters, and when asked about what was discussed, the inspector stated that he told Mr. Peters that the plant will not operate until the violations were remedied, and he then left the property.

Although the section 104(b) orders are not directly in issue in these proceedings and there is no indication that the respondent filed any separate contests within the required time period challenging the propriety of the orders, they are relevant to the civil penalty assessments proposed by the petitioner, and the mitigating arguments advanced by the respondent in support of its assertion that it had made some effort at compliance. In this regard, I take note of the fact that one of the orders makes reference to a lack of a guard bottom on the crusher flywheel. The underlying citation noted that the flywheel had not been guarded at all. The inspector agreed that in this instance, the flywheel was guarded on the top and sides on May 31, and that some work had been performed and an effort was made to at least guard the flywheel (Tr. 15). That same order makes reference to the fact that no effort was made to secure a tail pulley guard which was not on the equipment when it was initially cited. This leads me to conclude that prior to May 31, an effort had been made to fabricate the guard, and it was simply not secured at that time. I also take note of the inspector's testimony that the respondent was constructing guards when he inspected the site on September 13.

With regard to another order issued for failing to guard a conveyor tail pulley under the crusher, although the order states that no effort was made to secure the guard, the inspector believed that there may have been a change in the condition as originally cited, and I believe it is reasonable to conclude that a guard had been fabricated but was not in place or secured to the tail pulley pinch point on May 31. These instances of what I construe to be partial abatement efforts, corroborate Mr. Peter's assertions that he had made an effort to fabricate the guards, and had in fact done so, but had not secured or installed them.

On the facts of this case, while it is true that the respondent had not completely abated the most of the violations during

the extended abatement periods, I conclude and find that it had made some effort at compliance by fabricating the guards which were available when the inspector returned on May 31, 1989. Having viewed Mr. Peters during the course of the hearing, I find him to be a credible witness, and I conclude that notwithstanding the abatement extension dates which were on the citations and extension notices, that it was not unreasonable for Mr. Peters to believe that complete abatement was not required until such time as the crusher plant went into full production after the winter season. I further conclude that it was not unreasonable for Mr. Peters to believe that he could wait until after he had completed the installation of the crusher and placed it into full production before completely abating the cited conditions. Accordingly, I have taken this into consideration in mitigation of the civil penalty assessments which I have made for the violations.

Civil Penalty Assessments

Although MSHA has in the past routinely assessed "single penalty" non-S&S violations at $20, its procedures for making such assessments (Part 100, Title 30, Code of Federal Regulations) have been revised on an interim basis pending a permanent revision of its assessment regulations. These interim revisions are the result of a November 21, 1989, court decision in Coal Employment Project, et al. v. Secretary of Labor, (Court of Appeals for the D.C. Cir. No. 88-1708). However, it is clear that I am not bound by MSHA's proposed civil penalty assessments, and that once a penalty is contested and Commission jurisdiction attaches, a judge's determination of the amount of the penalty is de novo, based upon the statutory penalty criteria and the record developed in the adjudication of the case. See: Sellersburg Stone Company, 5 FMSHRC 287 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); United States Steel Mining Co., Inc., 6 FMSHRC 1148 (May 1984).

On the basis of the foregoing findings and conclusions, and taking into account the six statutory civil penalty assessment criteria found in section 110(i) of the Act, I conclude and find that the following civil penalty assessments are reasonable and appropriate in the circumstances of this case.

Citation No.	Date	30 C.F.R. Section	Assessment
3285841	09/13/88	56.12028	$ 20
3285843	09/13/88	56.14001	$125
3285844	09/13/88	56.12008	$ 95
3285845	09/13/88	56.11012	$125
3284846	09/13/88	56.14001	$ 95
3285848	09/13/88	56.14003	$ 90

~1995

3285849	09/13/88	56.14001	$125
3285850	09/13/88	56.14003	$ 85
3285855	09/13/88	56.4201(b)	$ 20
3461132	06/01/89	56.15002	$ 50
			$830

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of this decision and order. Payment is to be made to MSHA, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge