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SOL (MSHA) V. OVERLAND SAND & GRAVEL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 91-228-M
A.C. No. 25-00772-05507

v.

Mowitz Mine

OVERLAND SAND & GRAVEL
COMPANY,
RESPONDENT

Docket No. CENT 92-3-M
A.C. No. 25-01057-05504

McCool Portable Mine

DECISION

Appearances: Tambra Leonard, Esq., Office of the Solicitor,
U. S. Department of Labor, Denver Colorado,
for Petitioner; Tobin N. Anderson, Stromsburg,
Nebraska, for Respondent.

Before: Judge Barbour

These cases are before me upon petitions for assessment of a civil penalty filed by the Secretary of Labor ("Secretary") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"). 30 U.S.C. 815 and 820. The petitions allege violations of various mandatory safety standards for surface metal and non-metal mines found in Part 56 of Volume 30 of the Code of Federal Regulations. Overland Sand & Gravel Company ("Overland") timely answered, and the matters were consolidated for hearing. The cases were tried on March 31, 1992, in Lincoln Nebraska.

At the hearing, the parties proposed that I approve the settlement of one of the citations at issue in Docket No. CENT 92-228-M (section 104(a) citation no. 3635911). The citation was issued for a violation of 30 C.F. R. 56.9100(a), a mandatory safety standard requiring establishment and compliance with rules governing speed, right of way, direction of movement and use of headlights at surface metal and non-metal mines. The citation states that there where no uniform traffic rules established for entering and leaving the mine's stockpile and plant area, that two gates were used both for entrance and exit from the mine and that there should have been one entrance and one exit only.

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The inspector indicated the violation was not a significant and substantial contribution to a mine safety hazard (an "S&S" violation), that an injury was unlikely to occur as a result of the violation and that Overland exhibited moderate negligence in allowing the violation to exist. A \$20 penalty was proposed for the violation by the Mine Safety and Health Administration ("MSHA") which Overland has now agreed to pay.

The Secretary's counsel believes the \$20 penalty is appropriate for the violation. In light of the facts as stated, as well as the relevant statutory penalty criteria, I agree. I will incorporate the terms of the settlement into my order at the end of this Decision.

STIPULATIONS AND AGREEMENTS

There remained for trial three alleged violations in Docket No. CENT 91-228-M and two alleged violations in Docket No. CENT 92-3-M. At the hearing the parties entered into the following stipulations:

1. Overland . . . is engaged in the mining and selling of sand and gravel in the United States, and its mining operations affect interstate commerce.
2. Overland . . . is the owner and operator of Mowitz Mine . . . and McCool Portable Mine.
3. Overland . . . is subject to the jurisdiction of the [Mine Act].
4. The Administrative Law Judge has jurisdiction in this matter.
5. The subject citations were properly served by a duly authorized representative of the Secretary upon an agent of [Overland] on the dates and places stated therein, and may be admitted into evidence for the purpose of establishing their issuance, and not for the truthfulness or relevancy of any statements asserted therein.
6. The exhibits . . . offered by [Overland] and the Secretary are stipulated to be authentic but no stipulation is made as to their relevance or the truth of the matters asserted therein.
7. The proposed penalt[ies] will not affect [Overland's] ability to continue business.
8. [Overland] demonstrated good faith in abating the violations.

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9. Overland . . . is a small mine operator with 15,229 tons of production or hours worked per year.

10. The certified copies of the MSHA Assessed Violations History accurately reflect the history of these mines for the two years prior to the date of the citations.

DISCUSSION

The alleged violations in this case arose out of general health and safety inspections conducted at Overland's Mowitz Mine and McCool Portable Mine by MSHA Inspector James Enderby on April 10, 1991, and July 2, 1991, respectively. The Mowitz Mine is an open pit sand and gravel dredging operation and is located in Hamilton County, Nebraska. The McCool Portable Mine is also an open pit sand & gravel dredging operation. The McCool Mine operates intermittently about 9 months of the year. It is located in York County, Nebraska. Enderby was familiar with both operations, having begun inspecting the Mowitz Mine in October 1990 and the McCool Mine in October 1989.

At the hearing, the Secretary called Enderby as her primary witness. Overland's Vice President, Tobin Anderson, presented Overland's case through cross examination of Enderby, as well as through Anderson's own sworn testimony.

DOCKET NO. CENT 92-228-M

Three violations are alleged. Section 104(a) citation no. 3635908 was issued for a violation of 56.14107(a) because a pinch point between the roller screen and the trunnion rollers on the crusher was not guarded. Section 104(a) citation no. 3635910 was issued for a violation of section 56.14107(a) because pinch points on the front of the dredge's main diesel engine were not guarded. Section 104(a) citation no. 5635905 was issued for a violation of section 56.11002 because the wire rail around the outer edge of the dredge was not properly maintained.

Overland argues that it did not violate section 56.14107(a) with regard to guarding the crusher rollers. Overland admits the second guarding violation, and it admits the violation of failing to maintain the wire handrail around the edge of the dredge, but argues that, contrary to the inspector's findings, neither of these admitted violations was S&S.

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|----------------|--------------|---------|-------------|
| Mine Act | | | |
| Section | Citation No. | Date | 30 C.F.R. |
| Section 104(a) | 3635908 | 4/10/92 | 56.14107(a) |

The citation states:

The pinch point between the roll screen and the south trunnion roller was not guarded to prevent a person becoming entangled in the pinch point. The pinch point was located adjacent to the walkway on the south/side of the roll screen. Persons are not permitted on the roll screen walkways when the screen is in operation.

The inspector testified that during his inspection of the plant area of the mine he observed an unguarded pinch point on the south/side of the roll screen mechanism that is used for screening gravel. The roll screen consists of a steel drum, approximately 8 feet in diameter, and 10 to 12 feet in length. There are screens on the roll. The drum turns in a clockwise direction. The inspector described the mechanism that drives the drum and how the roll screen functions. He stated that the roll screen has "four support rollers underneath it, one side being the drive and the other side being the support rollers, just to keep it so it will stay in one position." Tr.23 The trunnion rollers are hard rubber rollers mounted on the lower parts of the framework of the platform. They hold the drum up off the walkways and off the platform so it can turn, allowing the gravel to go through the screens that are on the roll. The roll screen is surrounded on three sides by a deck or platform. The platform is approximately 12 feet above the plant floor. A stairway provides access to the platform.

The inspector explained that an unguarded pinch point existed between the drum and the drive roller and that this pinch point was located approximated 12 inches above the walkway and 12 inches from the side of the walkway. Although, there was no guard immediately adjacent to the pinch point, the inspector further explained that at the bottom of the stairway leading to the platform, a 3/8 inch chain was stretched from one handrail of the stairway to the other side of the stairway. The chain was welded to the handrails and was locked with a padlock.

The inspector feared that a miner who slipped or fell on the walkway would reach out while trying to steady himself or herself and would come in contact with the pinch point. If so, he believed, fingers or hands would be crushed beyond repair and/or arms would be broken. He estimated the drum to weigh 2,000 pounds. Because there was nothing to prevent a person from stepping over or ducking under the chain and proceeding up the stairs to the platform, and because the person might then slip or fall and be caught in the pinch point, the inspector issued to Overland the citation for a violation of section 56.14107(a).

The Violation

Section 56.14107(a) states:

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, taxi, and takeup pulleys, flywheels, coupling, shafts, fan blades, and similar moving parts that can cause injury.

Overland does not dispute the fact that the pinch point was unguarded but rather argues that access to the pinch point was effectively restricted by the padlocked chain across the stairway, that there was no reason for anyone to gain access except for purposes that require the screen roll to be de-energized and rendered inoperable and that were a person nonetheless on the platform the person would be seen prior to re-energizing the roll screen.

The Secretary responds that the chain was not an adequate guard as contemplated by the regulation because it did not prevent anyone from gaining access to the roll screen platform. A person could step over or duck under the chain, and any employee who had a key to the padlock could also gain access to the platform.

I conclude that the Secretary has established the violation. The guarding standard for metal and non-metal mines is not comparable to the guarding standards for coal mines, 30 C.F.R. 75.1722 and 30 C.F.R. 77.400, which state that "Gears, sprockets, chains and similar exposed moving machine parts, which may be contacted by persons and which may cause injury to persons shall be guarded." Rather, section 56.14107(a) states that moving machine part that can cause injury "shall be guarded to protect persons from contact." As Commission Administrative Law Judge George Koutras, has aptly noted, "the . . . language found in [section] 56.14107(a) specifically and unequivocally requires guarding for any of the enumerated moving machine parts, as well as any similar moving parts that can cause injury if contacted. The obvious intent of the standard is to prevent contact with a moving part." Highland County Board of Commissioners, 14 FMSHRC 270,291 (February 1992) (ALJ Koutras).

Overland does not dispute the fact that the cited moving machine parts were unguarded, nor has it asserted that the equipment was not the kind covered by the standard. I therefore find that the cited roll screen and trunnion roller were moving machine parts within the meaning of section 56.14107(a) and that contact by anyone with the pinch point can cause an injury.

The presence of the locked chain across the entrance to the stairs accessing the platform mitigates the gravity of the violation but does not excuse it. I note in this regard MSHA's official published policy that "the use of chains to rail off walkways and travelways over moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard". Department of Labor, the Mine, Safety and Health Administration, Program Policy Manual, Vol.V at 55a (6/18/91).

Gravity and Negligence

In assessing the gravity of the violation, both the potential hazard to the safety of miners and the probability of such hazard occurring must be analyzed. There is no doubt that the potential hazard was grave. Severe injury to fingers, hands, or arms reasonably could be expected should a miner slip and fall into the pinch point or reach into it in order to break a fall.

However, such an accident was decidedly less than likely given the fact that access to the platform was restricted by the locked chain and given the fact that, as the inspector himself testified, a miner would not normally be in the area of the pinch point when the roll screen was operating. The inspector candidly explained that the only time access is required to the platform is when screening material needs to be replaced and that this must be done while the drum is not moving. Further, it is not disputed that a miner in the vicinity of the pinch point would be observed before the roll screen was re-energized and started. In addition, the inspector termed the possibility of a non-miner having access to the platform while the drum was operating as "very remote." Tr. 28,40.

I conclude that although the potential injuries resulting from the violation are grave, the likelihood of them occurring is so remote as to make this a non-serious violation.

Because the lack of a guard was readily apparent Overland knew or should have known of the violation, and I also conclude that Overland negligently violated the standard.

| Mine Act | | | |
|----------------|--------------|---------|-----------|
| Section | Citation No. | Date | 30 C.F.R. |
| Section 104(a) | 3635910 | 4/10/91 | 56.11002 |

After inspecting the roll screen, the inspector proceeded to the dredge area of the mine. The dredge itself is located in the pit on an island-like platform that floats on pontoons. The dredge is reached by rowboat. The water is 30 to 40 feet deep at the dredge.

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The inspector testified that upon climbing onto the dredge platform from the rowboat, he noticed that the wire rope hand rail that completely surrounds the platform was slack. The wire, which the inspector described as being either 5/16 inch or 1/4 inch in size, passes through metal loops at the top of steel posts. There is one post every six to eight feet around the outer perimeter of the dredge deck, and the posts are bolted or screwed to the deck. The wire rope completely circles the outer edge of the dredge platform and is of one piece. It is clamped together at its ends.

The inspector testified that the rope could be pushed out over the water one arm's length, or about 30 inches. The inspector believed that if a person fell against the wire rope, the slackness of the rope would allow the person to go over the rope and into the water. The inspector cited Overland for a violation of section 56.11002. The citation states in part:

The handrail and mid-rail around the outer edges of the dredge walkways and travelways was not being properly maintained in that it was not kept tight.

He further found that the violation was S&S.

The Violation

30 C.F.R. 56.11002, requires that when handrails are provided at specified locations they shall be "maintained in good condition." Overland does not dispute that it violated the cited standard. Rather, it asserts that the violation was not S&S.

S&S

A S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significant and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. 814(d)(1). A violation is properly designated S&S "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 reasonable serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822,825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term significant and substantial as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove:

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(1) the underlying violation of a mandatory safety standard; (2) a discrete safety--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.

In United States Steel Mining Co., 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 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 Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

In United States Steel Mining Co., Inc., 7 FMSHRC 327, (March 1985), the Commission reaffirmed its previous holding in U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) that it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial, and that a determination of the significant and substantial nature of a violation must be made in the context of continued normal mining operations, including the question of whether, if left uncorrected, the cited condition would reasonably likely result in an accident or injury.

The inspector testified that during the course of normal mining operations, one person, the dredge operator, was usually on the dredge and that the dredge operator would leave the dredge control shack up to 3 or 4 times a day to start, to grease, or otherwise to service the dredge engine. The inspector feared that a person on the deck could slip on oil, or, if there were a frost, on ice, or could trip on equipment lying on the deck, such as hydraulic hoses and pipelines, and could fall over the loose wire rope and into the water. Due to the heavy clothing that is usually worn by the dredge operator, such a fall could lead to a drowning or an injury. The inspector also feared that the dredge operator could slip upon getting out of the rowboat and climbing up onto the dredge deck and, because of the slack wire rope, fall into the water.

He believed that such an accident was made more likely by the fact that the dredge operator arrived at the dredge in the morning when frost was more likely to be on the deck. Although, life jackets are required to be worn in the boat and on the dredge deck, they are not worn in the control shack, and the

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inspector believed a mine employee would forget to put on a jacket when coming out of the shack. Also, he feared that employees of Overland who were sent to the dredge for repair and maintenance work would not always wear life jackets. (He testified that repair and maintenance workers usually numbered between one and four people and on the average were sent to the dredge one day a week.) Finally, although the inspector agreed that two or three employees working at the pit could see the dredge from their work stations, he stated that an employee who had fallen into the water could go unnoticed.

In assessing the S&S nature of the violation, it is certain that the first element of the Mathies test has been established. Overland agrees that the cited standard has been violated. The second element of the test, likewise, has been established. The inspector's testimony makes clear that there was a daily need for at least one employee to climb from the rowboat to the deck and that there was a possible slipping or tripping hazard once on the deck. The third element requires a reasonable likelihood that the hazard contributed to will result in an injury. I conclude that the condition of the wire rope contributed to the danger of an employee falling off the deck and into the water and that the evidence establishes it was reasonably likely that such a fall would result in an injury. Even if, as seems probable, the employee was wearing a life jacket, and was ultimately "fished out", the employee could be injured by striking the edge of the deck while going "over board", or could be injured while trying to climb back onto the deck. Obviously, it is reasonably likely that the resulting injury, whether a drowning or bodily injury from the fall, would be of a reasonably serious nature.

The Secretary argues that she is not required to establish that the feared injury causing event is more likely than not to occur, and I agree. Rather, as I understand the Mathies test, the Secretary must prove that the feared event is reasonably likely. Since, in my opinion, she has done so here, the S&S finding is affirmed.

Gravity and Negligence

Given the potential injuries that could have resulted from the violation and the probability of the hazard occurring, I conclude that the violation was serious.

In addition, the slack rope was readily detectable and should have been known to the operator. Hence, Overland was negligent in allowing the violation to exist.

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|----------------|--------------|---------|-------------|
| Mine Act | | | |
| Section | Citation No. | Date | 30 C.F.R. |
| Section 104(a) | 3635910 | 4/10/91 | 56.14107(a) |

Continuing his inspection of the dredge, the inspector found that the pinch point of the V-belt drive and the alternator pulley on the front of the dredge's main diesel engine was accessible and unguarded. He cited Overland for a violation of the guarding standard, section 56.14107(a), and he found that the violation was S&S.

The inspector testified that the unguarded pinch point was on the right front side of the engine, 36 to 40 inches above the dredge floor and twelve to fourteen inches from a stairway providing access to the control shack. The inspector stated the stairway is one of the main stairways to and from the control shack and that it is normally used two or three times a day by the dredge operator during the course of the day. (The inspector stated that he had seen the dredge operator use the stairs two or three times during the inspection.) He further stated that the stairway is part of the most direct route from the control shack both to the main diesel engine and to the place where oil is stored on the dredge. The inspector feared that a person could fall or trip and extend a hand into the pinch point, which accident could result in the full or partial amputation of a finger or fingers. He noted that the walkway past the pinch point could be slippery from spilled oil or frost (work starts on the dredge at 7:00 a.m.) and, in fact, he stated that he had observed some spilled oil when he cited the violation. While the stairway has a handrail and a mid-rail, these are on the side opposite the pinch point. The inspector also stated, and Overland agreed, that the guard on the pinch point had been removed during a recent overhaul of the diesel engine and that it had not been replaced.

Overland's representative testified that the stairs in question are designed to provide access to the main diesel engine for servicing and that under normal circumstances the engine was shut off while it is being serviced. However, he acknowledged that at least once a day the dredge operator walks past the unguarded pinch point while the engine is turning and that it is possible the dredge operator might have to walk by more frequently if other engines on the dredge malfunctioned.

The Violation

Overland concedes the violation.

S&S

As with the prior violation, the first two elements of the Mathies test have been established. Overland admitted the

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required guard was not in place, and the testified offered by both parties is in agreement that the stairway provided access to the pinch point and that the stairway was normally used. The lack of a guard on the pinch point created a safety hazard to anyone using the stairway and passing the unguarded pinch point. The question is whether the third and fourth elements of the Mathies test were also established by the Secretary?

The hazard contributed to by the violation is the danger of a person having fingers or a hand caught in the pinch point. The testimony establishes that at least once a day miners pass close to the pinch point while the engine is running and, indeed, Overland's representative does not dispute the testimony of the inspector that on the day of the inspection the dredge operator used the stairs adjacent to the pinch point 2 or 3 times. The fact that the feared injury was reasonably likely to occur was heightened by the fact that there was an open space between the edge of the stairs and the pinch point. Moreover, Overland did not refute the inspector's belief that oil and early morning frost could make the stairs slippery and that the inspector noted some spilled oil on the day of the inspection. Given the presence of at least one miner adjacent to the pinch point, and given the presence of causes for slipping and falling, I conclude that there was a reasonable likelihood the hazard contributed to would result in a reasonably serious injury in that a miner's fingers or hand could be caught in the pinch point, with the resulting loss or severe damage of such parts, and I find that the violation was S&S.

Gravity and Negligence

Further, given the potential hazard to miners and the probability of the hazard occurring, I conclude that the violation was serious.

In addition, the violation was visually obvious, Overland should have known of its existence and was negligent in allowing the violation to exist.

DOCKET NO. CENT 92-3-M

Two violations are alleged to have occurred at the McCool Portable Mine. One section 104(a) citation was issued when the inspector found that a wooden walkway leading to a floating pump platform lacked handrails in violation of 30 C.F.R. 56.11012, and a second section 104(a) citation was issued for an alleged guarding violation on the main diesel motor of the dredge. The inspector further found that both were S&S violations.

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Overland concedes the violations but challenges the S&S designations.

| Mine Act | | | |
|----------------|--------------|--------|-----------|
| Section | Citation No. | Date | 30 C.F.R. |
| Section 104(a) | 3907149 | 7/2/91 | 56.11012 |

The inspector testified that he observed a wooden walkway that lacked handrails. The walkway was approximately 12 inches wide, 2 inches thick and 14 feet long. It extended from the shore of the pit to a floating platform, on which was located a fresh water pump. The first 2 to 3 feet of the walkway rested on the sand and gravel at the edge of the pit. The rest of the walkway extend over the water to the platform. Although, there was a handrail around the platform, there was no handrail on either side of the walkway. The inspector testified that the water under the walkway gradually increased in depth until it measured 2 to 3 feet at the platform. The inspector described the board as being "slightly warped" and as not being secured to the platform. Tr.
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The inspector testified that during the Spring and Fall one miner uses the walkway daily to access the platform in order to prime and drain the pump. During the summer, daily visits are not required -- there being no chance the water in the pump will freeze -- and the walkway is used approximately one time a week by a miner who checks the pump.

The inspector stated that the board could be slippery from frost or rain and that he feared without handrails a miner trying to cross to the pump platform could slip or loose his or her balance and fall, that the miner could come down on the board and have a resulting injury to his or her back, or a miner could hit his or her head on the board, be knocked unconscious and drown. However, he agreed that drowning was but a very remote possibility. In his opinion a back injury was more likely.

The Violation

Overland agrees that it violated the cited standard.

S&S

Overland argues, I believe correctly in this instance, that the testimony does not establish the S&S nature of the violation. While the first two elements of the Mathies test have been met in that there is a violation of section 56.11012 which resulted in a measure of danger to safety, the evidence falls short of establishing a reasonable likelihood that the hazard contributed to will result in an injury. The inspector's testimony makes clear that if a miner slips or loses his or her balance, the miner will simply step in the water and get his or her feet and

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legs wet; or the miner will fall to one side and the water will cushion the fall -- as the inspector stated, the miner will "just fall in the water and go splash." Tr. 148 Should this happen, the inspector agreed that the miner would most likely have no difficulty standing and walking out of the water. Further, even if the miner hit the board on the way down, which appears unlikely given the relative narrowness of the board (12 inches), the inspector stated that the flexibility of the board would in most cases cause the person to simply bounce back up. In short, I conclude that the chance of actual injury to a miner is so remote as to exclude a reasonable likelihood that the hazard contributed to will result in an injury. Therefore, I find that this is not a S&S violation.

Gravity and Negligence

The lack of any reasonable likelihood of injury in my opinion renders the violation non-serious, and I so find.

The lack of handrails was visually obvious and due to Overland's negligence.

| Mine Act Section | Citation No. | Date | 30 C.F.R. |
|---------------------|--------------|--------|-------------|
| Section 104(a) | 3907149 | 7/2/91 | 56.14107(a) |

Continuing the inspection the inspector found that a guard was missing at the pinch points of the fan belts and pulleys on the portable dredge's main diesel engine. The inspector was most concerned with the belt at the side of the engine that went to the alternator. The pulley and pinch point were adjacent to a walkway and the pinch point was approximately 48 inches above the floor level. The inspector believed that a miner could purposefully reach into the belt and pulley area and become entangled in the pinch point. The inspector also believed that a miner could inadvertently slip or trip, that the miner's clothing could become entangled in the pulley and that the miner could be drawn into the pinch point.

The pinch point was adjacent to a walkway normally traveled one time a day by a person doing visual equipment checks. Further, on the day of the inspection, the inspector observed one person cleaning an hydraulic fluid spill in the immediate vicinity of the pinch point. The inspector, therefore, cited Overland for a violation of the guarding standard, 56.14107(a), and found that the violation was S&S.

The Violation

Overland concedes that the violation existed.

S&S

Overland challenges the inspector's S&S finding. The first two elements of the Mathies test are established in that the violation of section 56.14107(a) is admitted, and it is apparent the violation contributed to the hazard of a miner being injured by becoming entangled in the pinch point. The next question is whether there was a reasonable likelihood the feared injury would actually occur. Obviously, for there to be a reasonable likelihood of injury there must be a miner in the vicinity of the unguarded pinch during normal mining operations. The inspector's testimony that normally a miner would traverse the walkway adjacent to pinch point one time a day was not refuted, nor was his assertion that on the day the violation was cited a person was in the area, at times was within 12 inches of the pinch point, cleaning up an hydraulic oil spill. Further, the inspector's statement that the walkway was uneven due to the presence of hydraulic hoses and water lines was not challenged, and this material, along with the presence of the hydraulic fluid, obviously increased the possibility that a miner would slip or fall and come in contact with the pinch point.

I conclude that in the context of continued normal mining operations the presence of the hydraulic fluid and the presence of the hoses and water lines made it reasonably likely that a miner would slip or fall, would become entangled in the pinch point, and, as a result, would be injured. Further, as the inspector explained, the resulting injuries could include cuts, bruises, scrapes and strained muscles, all injuries that are of a reasonably serious nature. Therefore, I find that the Secretary has established the S&S nature of this violation.

Gravity and Negligence

Because of the nature of the potential injuries resulting from the violation and the possibility that they would occur, I conclude that the violation was serious.

Because the lack of a guard was visually obvious, Overland should have known the guard was missing and I find that Overland was negligent in allowing the violation to exist.

Other Civil Penalty Criteria

The parties stipulated that Overland is a small operator, that assessment of the proposed penalties would not effect Overland's ability to continue in business, and that Overland demonstrated good faith in abating the violations. The parties also stipulated that copies of MSHA's assessed violations history accurately reflect the history of previous violations at Overland's mines for the two years prior to the date of the citations. I accept these stipulations.

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Regarding Overland's history of previous violations, I note that in the two years prior to the subject inspection of the Mowitz Mine, a total of six violations occurring at the mine were assessed, one of which was a violation of section 56.14107(a) and one of which was a violation of section 56.11012. Exh. P2. No violations were assessed at the McCool Portable Mine in the two years prior to July 1, 1991. Id. This is a commendably low history of previous violations.

It is so worth noting that Overland's attitude toward compliance was described by the inspector as reflecting a "very good record." Tr. 184 The inspector stated that Overland effectuated compliance "almost immediately." Id. In my opinion, the company's low history of previous violations and its willingness to abate with expedition those violations for which it was cited, are indicative of a laudable attitude toward compliance, an attitude that warrants encouragement. Effectuation of the goals and purposes of the Mine Act is made possible when violations of the Act and its standards are kept to a minimum and when unsafe conditions are swiftly eliminated. In consideration of these factors the penalties assessed will be reduced by approximately 10%, and I do so with the hope and expectation that Overland will continue its efforts to maximize compliance with the Act.

Civil Penalty Assessment

On the basis of the foregoing, I conclude and find that the following civil penalties are appropriate for the violations that have been affirmed:

Docket No. CENT 91-228-M
Mowitz Mine

| Citation No. | Date | 30 C.F.R. | Amount Assessed |
|--------------|---------|-------------|-----------------|
| 3635908 | 4/10/91 | 56.14107(a) | \$18.00 |
| 3635909 | 4/10/91 | 56.11002 | \$71.00 |
| 3635910 | 4/10/91 | 56.14107(a) | \$57.00 |

Docket No. CENT 92-3-M
McCool Portable Mine

| Citation No. | Date | 30 C.F.R. | Amount Assessed |
|--------------|--------|------------|-----------------|
| 3907148 | 7/2/91 | 56.11012 | \$18.00 |
| 3907149 | 7/2/91 | 56.1407(a) | \$35.00 |

ORDER

ACCORDINGLY, Overland is ordered to pay civil penalties totaling \$199 for the assessed violations. Overland is also ordered to pay a civil penalty of \$20 for section 104(a) citation no. 3635911 (Docket No. CENT 91-228-M) as agreed to in the approved settlement. In addition, section 104(a) citation no. 3907149 (Docket No. CENT 92-3-M) is modified to delete the S&S finding. Overland shall pay the assessed civil penalties and the civil penalty specification of the approved settlement within thirty (30) days of the date of this Decision and, upon receipt of payment, these matters are DISMISSED.

David F. Barbour
Administrative Law Judge
(703) 756-5232