

CCASE:
SOL (MASH) V. UNITED STEELWORKERS OF AMERICA
DDATE:
19931117
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND	:	
HEALTH ADMINISTRATION (MSHA),	:	Docket No. LAKE 92-279-M
Petitioner	:	A.C. No. 21-00282-05574
and	:	
	:	Minntac Mine
UNITED STEELWORKERS OF	:	
AMERICA, LOCAL 1938,	:	
Miners	:	
v.	:	
	:	
USX CORPORATION, MINNESOTA	:	
ORE OPERATIONS,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 92-306-M
Petitioner	:	A.C. No. 21-00820-05676
v.	:	
	:	Docket No. LAKE 92-457-M
USX CORPORATION, MINNESOTA	:	A.C. No. 21-00820-05706
ORE OPERATIONS,	:	
Respondent	:	Minntac Plant
	:	
	:	Docket No. LAKE 93-5-M
	:	A.C. No. 21-00282-05587
	:	
	:	Minntac Mine

DECISION

Appearances: Miquel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois,
for Petitioner;
James Ranta, Representative, United Steelworkers
of America, Local 1938, for Miners;
William M. Tennant, General Attorney, U.S.S.,
Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Barbour

STATEMENT OF THE CASE

These consolidated civil penalty proceedings are brought by the Secretary on behalf of the Mining Enforcement and Safety Administration (MESA) against USX Corporation, Minnesota Ore Operations (USX), pursuant to Sections 105(a) and 110(a) of the

Federal Mine Safety and Health Act of 1977 (Mine Act or Act).

~2334

30 U.S.C. 815(a) and 820(a). The Secretary charges USX with five violations of certain mandatory safety standards for surface metal and nonmetal mines found in Part 56, Title 30 Code of Federal Regulations (C.F.R.). In addition, the Secretary asserts the alleged violations were significant and substantial contributions to mine safety hazards ("S&S" violations).

The alleged violations were cited by MSHA inspectors at USX's Minntac Mine and its Minntac Plant, both of which are parts of a large taconite operation located in St. Louis County, Minnesota. Following citation of the alleged violations the Secretary proposed the assessment of civil penalties. USX answered the Secretary's proposal by denying the violations, and by asserting in the alternative that if they had occurred they were not S&S.

Pursuant to notice the matters were heard in Duluth, Minnesota. Miguel J. Carmona represented the Secretary. William M. Tennant represented USX. In Docket No. LAKE 92-279-M, James Ranta represented the United Steelworkers of America (Steelworkers), who upon motion and without objection, were permitted party status.

During the hearing counsels stated they had agreed to settle the single violation alleged in Docket No. LAKE 92-457-M and one of the violations alleged in Docket No. LAKE 92-306-M.

THE SETTLEMENTS

DOCKET NO. LAKE 92-457-M

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
4097355	6/10/92	56.11001	\$309.00	\$309.00

The citation alleges a S&S violation of section 56.11001 in that the floor area alongside a first floor belt conveyor was wet, muddy and slippery for a distance of 30 to 35 feet. The inspector who issued the citation found the condition was due to USX's negligence and that one person was exposed to a slipping or falling hazard as a result of the violation. The violation was abated within the time set by the inspector.

USX agreed to accept the citation and in doing so agreed that a violation of section 56.11001, which requires a safe means of access be provided and maintained in all workings places, occurred. Further, USX accepted the inspector's S&S and negligence findings, as well as the inspector's finding that it was reasonably likely one person would suffer an injury resulting in "lost workdays" or "restricted duty" due to the violation. USX further agreed to pay the proposed assessment.

DOCKET NO. LAKE 92-306-M

Citation No.	Date	30 C.F.R.	Proposed Penalty	Settlement
4097197	3/17/92	56.12034	\$288.00	\$50.00

The citation alleges a S&S violation of section 56.12034, in that two lights located 71 inches above the walkway to the pan feeder furnace disconnects were not guarded. The inspector who issued the citation found the condition was due to USX's low negligence and that one person was exposed to a burn or shock hazard should he or she hit the lights. The violation was abated within the time set by the inspector.

USX agreed to accept the violation and the inspector's finding of negligence, and the Secretary agreed to vacate the inspector's S&S finding because, in counsel's opinion, the Secretary could not prove that allegation. Counsel stated that without the S&S finding and given USX's "low negligence," a \$50 civil penalty was appropriate. USX agreed to pay that amount.

APPROVAL OF SETTLEMENTS

There is no indication payment of the agreed upon penalties will adversely affect USX's ability to continue in business. USX is large in size. The mine and plant have a large history of previous assessed violations. Pet. Exh's. 9 and 10. Based upon the representations of counsel and the civil penalty criteria, I conclude the penalties agreed to for the settled violations are appropriate and that the settlements are reasonable and in the public interest. Therefore, they are APPROVED. I will order payment of the civil penalties and vacation of the S&S finding at the close of this decision.

CONTESTED VIOLATIONS

STIPULATIONS

Prior to taking evidence on the contested violations the parties stipulated as follows:

1. That USX's Minntac operation is subject to the jurisdiction of the Mine Act and that the administrative law judge has jurisdiction to hear and decide the proceedings;
2. That civil penalties assess for any of the alleged violations will not affect the ability of USX to continue in business;
3. That USX exhibited good faith in abating all of the alleged violations in a timely fashion. Tr. 10.

DOCKET NO. LAKE 92-279

Citation No.	Date	30 C.F.R.	Proposed Penalty
3893134	1/14/92	56.14214(b)	\$350.00

Citation No. 3893134 alleges a violation of mandatory safety standard section 56.14214(b) and charges:

At the East Pit, the [No.] 968 Locomotive train went thru the RR crossing at the [No.] 81 Dock, without sounding the horn. The RR Xing was a double track in which a train had just cleared the Xing heading West on the front track and the inspection van was waiting to cross the tracks. The No. 968 Locomotive train was heading East on the second track in which it was coming from the blind side because the view was blocked by the other train.

Pet. Exh. 1. The standard states that "[a] warning sound that is audible above the surrounding noise level shall be sounded -- [w]hen trains approach persons, crossings, other trains on adjacent tracks[.]" The parties agree that the train did not sound its horn at the crossing and thus that a violation of the cited standard occurred. They are at odds over whether the violation was S&S.

As is by now well recognized, the Commission has established four elements that must be proved by the Secretary in order to establish the S&S nature of a violation. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981); Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Here, as is usually the case, the question is whether the third element has been satisfied; that is, whether the Secretary has proved that the failure of the locomotive to sound its horn at No. 81 Dock railroad crossing was reasonably likely to have resulted in an injury producing accident.

The inspector who cited the violation, Leon Mertesdorf, testified there are two tracks at the crossing and that a westbound train had just cleared the crossing when an eastbound train approached at a speed of 30 to 40 miles per hour and failed to sound its horn. According to Mertesdorf, the westbound train obscured the view of those in the van and they could not see the eastbound train coming. In addition, Mertesdorf believed the train operator's vision of the van equally was obscured. (Mertesdorf also stated he had seen the eastbound train earlier in the inspection party's travels and he warned the van driver, Randy Pond, that another train was on the tracks. Tr. 40.)

~2337

The tracks were used by trains that carried ore. The train that was headed east was empty, the train headed west was loaded. Tr. 21. The tracks formed the main haulage route for trains coming into and out of the west pit. Tr. 39. Mertesdorf believed approximately 15 trains went into and out of the pit during the course of a shift. Id. The road crossing the tracks was the main route from the east pit into the west pit. Tr. 38. Mertesdorf was of the opinion that "a lot of service vehicles" used the road each shift. Tr. 39.

Mertesdorf explained that because the eastbound train was not immediately visible, the normal reaction of a driver who had stopped at the crossing would be to proceed over the tracks and through the crossing once the westbound train had cleared the crossing. Tr. 24, 25. (There were stop signs on both sides of the crossing and railroad crossing signs at the crossing. The crossing did not have an audible signal. Tr. 37.)

Given the speed with which the westbound train approached the crossing, Mertesdorf believed an accident was reasonably likely. Tr. 29, 32. Mertesdorf stated that he had issued approximately three other citations at the mine for the failure of train operators to sound their horns. Tr. 35.

Randy Pond, a USX safety engineer at the mine, accompanied Mertesdorf during the inspection. He drove the van in which the inspection party was riding. He noted that Mertesdorf failed to mention the presence of a third track south of the two tracks on which the trains were located. The van had already crossed this track and had stopped between the third track and the double track when the eastbound train passed the crossing. Tr. 43-45; Exh. R-1. Pond maintained that even though he knew a train other than the westbound train was somewhere on the tracks and might be approaching, his vision was not totally obscured and he could see the eastbound train prior to it clearing the crossing.

Pond was of the opinion that it was not reasonably likely that the failure to sound the train's horn would have contributed to an accident because:

I wasn't going to cross the tracks until I could see if anything was coming. I never do. I would never be flying across there in the blind.

Tr. 46.

Ranta, who not only represented the Steelworkers, but who also testified on their behalf, stated that pursuant to company rules, trains are supposed to make two long and two short horn blasts when they approach a crossing. Tr. 49; USX Exh. 1.

~2338

In arguing that the violation was not S&S, USX points out that Pond had stopped the van 20 to 25 feet away from the train track and waited for the train to clear the track before proceeding across and that Pond was aware of the presence of the train despite the fact the locomotive operator failed to sound the horn. Thus, at most, the evidence established "only that, on a single occasion, the operator failed to sound a horn as the train approached a crossing where a vehicle was waiting to cross when it was safe to do so [and that] [u]nder th[e]se circumstances, it was not reasonably likely that an event resulting in an injury would occur." USX Br. 11.

The problem with USX's argument is that it is focused upon the factual situation at the time of the violation. The concept of "reasonable likelihood" encompasses not only what happened at the time the violation occurred but also what reasonably could have been expected to happen if the violation continued to exist during the course of continuing normal mining operations. See Halfway, Inc., 8 FMSHRC 8, 12 (January 1986). Thus, I must consider not only what happened on January 14, but also what reasonably could have been expected to happen had the conditions been repeated during continued normal mining operations.

In this latter regard, it is important to note that the railroad crossing where the violation occurred was not an isolated, seldom used crossing. Rather, I accept Mertesdorf's testimony that the road crossing the tracks was the main road between the east and west pits and that it was used by many service trucks during the course of a shift. In addition, I accept his statement that during the same period of time the tracks were traveled by approximately 15 trains into and out of the pit.

I also credit Mertesdorf's testimony that the westbound train blocked his view of the eastbound train. Although Pond testified that he saw the oncoming train (Tr.43) and while this may well have been so, I believe, along with Mertesdorf, that he most likely had seen it earlier when Mertesdorf pointed it out and was aware therefore it might be approaching. Thus, Pond was alerted to be "on the lookout" at the crossing. I cannot assume other drivers always would have Pond's heightened awareness.

Given the train traffic at the crossing, it seems clear that during the course of continued normal mining operations eastbound and westbound trains would have met there again. It also seems clear that not every driver of a vehicle would have been as careful as Pond, who after all was driving a federal inspector and who, as I have found, was alerted to the possibility of an approaching train. Pond may always have stopped at the crossing when his vision was in any way obscured and not proceeded until he had good visibility but Pond was not everyman, and I cannot leave common knowledge of everyday behavior outside the S&S

~2339

evaluation. Drivers do not always stop at railroad crossings, which I assume is the reason USX implemented the standard by requiring the sounding of two long and two short whistles when a train approached the crossing.

As Mertesdorf testified, other train operators had failed to sound their horns at crossings. It has happened previously, there is no reason to think it would not happen again. Given the reasonable likelihood that during continued normal mining operations the vision of drivers at the crossing would have been obscured by passing trains, given the fact that drivers do not always check for safe clearance before proceeding to cross the tracks, given the speed of westbound trains passing the crossing and given the amount of rail and road traffic at the crossing, I conclude that it was reasonably likely that during continued mining the conditions cited by Mertesdorf would have recurred and would have been reasonably likely to result in a potentially fatal accident. I therefore find the violation was S&S.

USX does not contest Mertesdorf's other finds regarding the violation. Tr. 54. On the basis of those findings, I conclude the violation was serious and was due to negligence on the part of USX. The mine has a large history of previous violations. Pet. Exh. 10. In the 24 months prior to June 10, 1992, there were five citations of section 56.14214(b) that were assessed and paid. Id. I will assess an appropriate civil penalty for the violation at the close of this decision.

DOCKET NO. LAKE 93-5-M

Citation No.	Date	30 C.F.R.	Proposed Penalty
4097474	7/7/92	56.15005	\$204.00

The citation charges as follows:

At the West Pit, on the [No.] 32 stripping shovel, an employee was outside the operator's cab climbing a ladder to the top catwalk/platform above the operator's station while the shovel was operated by another shovel operator, swinging to load a truck. The employee was not in a secure position while the shovel was in swinging operation. There was a danger of him losing his grip and falling to the shovel roof, 5 to 6 feet below.

Pet. Exh. 3. In pertinent part the standard requires that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling."

Mertesdorf testified that during the course of an inspection of the mine on July 7, 1992, the inspection party had parked the vehicle in which it was riding in order to observe the Bucyrus-Erie electric mining shovel in operation. While the shovel was digging, a person emerged from the operator's compartment and climbed the ladder at the rear of the compartment to the top of the compartment. Tr. 546-57; see Pet. Exh. 4. The person walked to the front of the compartment roof, turned and walked back and then climbed down the ladder. Tr. 57-58; Pet. Exh. 4. There was another person sitting on the roof taking pictures with a video camera. Mertesdorf believed both persons were involved in making a training video. Tr. 62, 66.

Originally, Mertesdorf cited USX for a violation of section 56.9200(d), which prohibits transportation of persons outside the cab of mobile equipment. However, one week prior to the hearing, counsel for Secretary moved, without objection, to amend the citation to a violation of section 56.15005. Mertesdorf understood the change was made "[b]ecause our attorneys said that the man wasn't being transported." Tr. 64, see also Tr. 65.

The ladder the person climbed was approximately 5 to 6 feet high. In Mertesdorf's opinion the hazard was that the person could have fallen off the ladder or off the roof of the operator's compartment due to the "jerking and swinging" of the shovel. Tr. 58. Mertesdorf believed the shovel should have been stopped while the person climbed the ladder. Short of that, the person should have tied off while climbing the ladder. In addition, the person should have had a safety belt and have secured it to the handrailing that ran around the compartment roof once he had reached the roof. Tr. 60. Mertesdorf, however, admitted he had never seen anyone tie off when climbing such a ladder and he did not know what purpose would have been served by using a safety belt on the roof. Tr. 65-66. (As Pet. Exh. 5 clearly shows, there was a two-rail railing around the roof.)

Because of the movement of the shovel, Mertesdorf believed it was reasonably likely the person would have lost his grip and fallen and have suffered a lost time injury. Tr. 61. In his opinion, such a fall could have resulted in a sprained ankle or wrist or a strained foot. Tr. 62.

To prove a violation of section 56.15005, the Secretary must establish the person climbing the ladder and walking on the roof was in danger of falling. Moreover, the danger must be that of an injury produced by the fall and prevented by the wearing of a safety belt or line. The record does not support finding that falling from the 5 to 6 foot ladder would have produced an injury. Moreover, as Mertesdorf ultimately seems to have recognized, it was utterly impractical to expect the person to tie off while climbing the ladder. Further, once the person was on the top of the operator's compartment, the railing made it

~2341

unreasonable to expect that he would fall from the roof, even though the shovel was jerking and swinging, and the record does not support finding that falling to the roof would have produced an injury preventable by wearing a safety belt or line.

Mertesdorf probably was right in stating that the person should not have been on the ladder or been walking on the roof while the shovel was in motion, but that concern is not addressed by the standard the Secretary ultimately chose to allege was violated. Thus, I agree with USX that the Secretary has failed to sustain his burden of proving that a violation of section 56.15005 existed and that the citation should be vacated. USX Br. 11-12.

Citation	Date	30 C.F.R.	Proposed Penalty
4097478	7/13/92	56.17001	\$288.00

The citation charges as follows:

At the far-west pit, the [No.] 28 P&H 2100 BL shovel had inadequate lighting at the boarding ladder and walkway. The light at the shovel house entrance was broken and the light bulb at the top of the stairs, and operator cab entrance, was burned out, plus the top of the shovel roof A-frame had both lites [sic] burned out. The whole boarding area of the shovel was dark after daylight hours.

Pet. Exh. 5. The standard states that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways ... and work areas."

Mertesdorf issued the citation at 1:30 p.m., during daylight hours. He stated, however, that as a general rule, when he inspected a shovel he not only looked at the conditions in existence when he conducted the inspection, he anticipated the kind of conditions that would be present during later shifts that day. Tr. 70.

The shovel was used by USX to dig ore and load railroad cars. Tr. 72. Mertesdorf maintained that upon inspecting it he observed that all lights used to illuminate the boarding area were out. (By "out" he meant that a few were missing but most were burned out. Tr. 73.) In describing the lack of lighting in the boarding area, Mertesdorf stated that the lights under the shovel's carriage (approximately nine to twelve lights) used to illuminate the ground were out, as was the light above the ladder that a person had to climb to board the shovel and the light used to illuminate the stairway to the operator's compartment.

~2342

Additionally, lights were out on the A-frame, lights that illuminated the area in back of the shovel and the work cages and platform at the top of the shovel. Tr. 72-73, 75-76, 81. (The A-frame is part of the structure of the shovel and it rises above the operator's compartment and the compartment housing the shovel's engine. Tr. 73; See Pet. Exh. 4.) Except for the lights on the A-frame, most of the missing and burned out lights were "regular household lamps," that is, 75-watt to 100-watt bulbs. Tr. 76, 84.

Although there were large "beacon lights" on the front of the shovel, they directed most of their light forward. Mertesdorf also recalled seeing a large light at the back of the shovel. He agreed that it would "pretty well light up the back of the shovel." Tr. 85. Mertesdorf believed the illumination at the shovel was insufficient to assure safety because "if there [are] no lights burning at all, it's going to be dark" and "because of the rugged terrain and the access to the shovel, being it was so rough and so hard ... it was reasonably likely that a person could fall and the injury ... would be at least a sprain or a strain ... from the fall. Tr. 78. The fact that a person entering the shovel would have had to use a flashlight while climbing the ladder to board the shovel added to the likelihood of injury. Tr. 79. (Pond, who accompanied Mertesdorf, believed an employee would have put the flashlight in a tool bag and used both hands to climb the ladder. Tr. 106.) Mertesdorf found the alleged violation was S&S, and he stated it was reasonably likely a lost time injury would have occurred because of the insufficient illumination. Tr. 78. He also believed the condition of the lights was due to USX' negligence. Tr. 80.

Mertesdorf did not know when the cited shovel last had worked at night. Tr. 76, 83. Because he never saw the shovel at night he did not know how much illumination the lights that were operating actually provided. Tr. 83. While he stated that it was not unusual for a shovel to have some lights burned out, he "drew the line" and found illumination was insufficient when he saw "the lights were burned out to the extend where I [did not] see a safe entrance for the man to get on board." Tr. 87. In general, he would not issue a citation for a violation of section 56.17001 unless there was an area that was so dark he could not see or unless there was an area totally lacking in lights. Id.

Pond, identified shovel lights that were working when the violation was cited. (These lights are depicted on photographs of the cited shovel. Resp. Exh's. 1 and 2 (LAKE 93-5-M.)) According to Pond, four lights faced forward: a 150-watt high pressure sodium light, a 400-watt mercury vapor light, a 300-watt flood light and a 300-watt quartz light. (Pond stated that the average street light is 150 to 200-watts.) The top two lights

~2343

were placed at a 45p angle and gave some light to the side, as well as to the front. Tr. 94. Pond also confirmed that a 300-watt floodlight is on the back of the shovel. Tr. 95. Pond was uncertain, however, whether lights other than these were operating on the shovel and although he disagreed "strongly" with Mertesdorf about the number of lights that were out, he did not know the number. Tr. 96, 102-103.

Pond identified a USX document purporting to specify the work history of the shovel. Resp. Exh. 3 (LAKE 93-5-M). The document indicated that from July 5, until the shift on which the citation was issued on July 13, the shovel was operated a total of 3 hours while it was dark. Tr. 97-98. Pond also identified shift reports for those shifts the shovel was running between July 5 and when the citation was issued. Resp. Exh. 4 (LAKE 93-5-M). The reports, which were completed by the shovel operators and on which the operators were asked to indicate any repairs needed, contained no reference to any problems with illumination. Id.; Tr. 99. Pond stated that during the hours when it was dark and the shovel was operating the only person who worked on the shovel was its operator. Tr. 100. Finally, Pond was of the opinion that there would have been sufficient illumination to board the shovel at night because "We didn't get anybody to say anything different." Tr. 101.

The question of whether a violation occurred is dependent upon the amount of lighting provided in the areas where work was being performed (or would be preformed during continued normal mining operations), taking into account any hazards presented by the lack of adequate lighting. Whether illumination was sufficient to provide safe working conditions presents a question of fact, and, given the general nature of the standard, which covers a multitude of locations and work activities, the question usually will involve a subjective judgement on the inspector's part. However, there is a point at which an inspector's determination may be so subjective it does not provide a basis for a factual finding regarding whether the illumination was sufficient to provide safe working conditions, and I conclude that point has been reached here.

First, Mertesdorf cited the violation during daylight hours and did not observe the shovel working at night. Tr. 83. Second, he cited several different areas as lacking in sufficient illumination, but what really concerned Mertesdorf was the lack of light at the ladder and undercarriage (although he did not include nonfunctioning undercarriage lights in the body of the citation), which, in his opinion, made it unsafe for a person to board the shovel at night. Tr. 87. He would not have found a violation had there been illumination sufficient to allow safe boarding. Id.

~2344

I accept Mertesdorf's testimony that no lights were working in the boarding area. However, Mertesdorf agreed that there were other working lights on the shovel, and Pond credibly described the five floodlight-type lights that were operating on July 13, 1992. Tr. 84, 94. Mertesdorf further agreed these other lights would have provided "a little diffused" lighting. Tr. 84. Obviously, he could not say how much because he had not seen the shovel after sundown. Thus, even if I fully credit the inspector's testimony, which I do, this is not a situation where the work area in question -- the shovel boarding area -- would have been without light entirely. See Kaiser Steel Corp., 2 FMSHRC 703, 721-722 (March 1980) (ALJ Koutras). That being the case, without more objective testimony regarding the actual illumination at night, I cannot find the Secretary has established the illumination was insufficient to allow a person to safely board the shovel, and I must therefore vacate the citation.

DOCKET NO. LAKE 92-306-M

Citation No.	Date	30 C.F.R.	Proposed Penalty
4097196	3/17/92	56.14112(b)	\$1,019.00

The citation charges as follows:

The guard on the west side of the 001-03 main conveyor, protecting the undercarriage snubber pulley near the head pulley, was not kept in place. The conveyor was in operation, and a clean-up hose was observed extending approximately 3-feet under the belt. A person extending his arms or upper torso through the unguarded opening would be exposed to the pinch point approximately 18 inches above and to the right.

Pet. Exh. 6. The standard states that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

The citation was issued by Arthur J. Toscano at the plant. Toscano was accompanied during the inspection by USX supervisor of safety Robert Tomassoni and miners' representative Tim Kangas. The inspection party went first to the building housing the crusher and there waked the 00103 conveyor belt, which was operating. (Toscano estimated the conveyor runs at 400 to 500 feet per minute. Tr. 133.) The conveyor belt is approximately 4 feet wide. On the west side of the belt, just past the head area, Toscano noticed a conveyor belt guard in a raised position. The guard was hinged at the top and had been

~2345

raised and wired open to create a opening approximately 3 feet square in size. Inside the opening was the moving snub pulley and the moving bottom portion of the conveyor belt. Tr. 112, 117. (A "snub pulley" is defined as "[a]n idler pulley so mounted as to increase the arc of contact between a belt and a drive pulley." U.S. Department of the Interior, A Dictionary of Mining, Mineral and Related Terms (1968) at 1036.) A hose ran into the opening and the hose was spraying water under the snub pulley. The floor beside the opening was wet and slippery. Tr. 112-113.

Toscano believed the running hose was used to clean a troublesome spot under the belt -- a spot where "a buildup of mud and material would cause the belt ... to start slipping and clogging up" unless the spot frequently was cleaned. Tr. 114. He explained that wet, muddy spillage clings to the belt and drops off of the belt at the pulley. Tr. 117. The pulley and the conveyor belt created a pinch point, that according to Toscano was located approximately 1 1/2 foot above the mine floor and a few inches to the right of where the guard ended. Tr. 115. Thus, the frame of the guard offered 2 or 3 inches of protection from the pinch point. Tr. 131.

Although Toscano did not see anyone working in the vicinity of the open guard on July 17, and there were no footprints next to the cited opening, he believed the area was cleaned several times each shift, and he stated that a person cleaning under the belt and pulley with a hose while the guard was raised could slip into the pinch point. Tr. 116-117, 122, 124.

Further, although it was a practice at the plant to leave hoses running unattended under belts to wash away spillage, Toscano believed the amount of spillage disposed of in this way was limited and that to clear the entire area under the belt a miner would have had to direct the hose. Tr. 122-123. The miner would have to crouch to see under the belt and the pressure on the hose would cause the miner to lean toward the pinch point to control the hose. Tr. 116-117. If a pressure failure occurred, Toscano believed the miner could lose his or her balance and slip or fall through the opening created by the raised guard into the pinch point. Tr. 116. (Normally, the hose was under high pressure, although on July 17 the pressure appeared to be reduced by the partial shut off of a valve. Tr. 123.)

The position of the hose indicated to Toscano that when a person cleaned with it, the person would have been very close to the opening -- just a matter of inches from it. Tr. 118. He agreed if the hose had sufficient pressure the person cleaning with it could have remained outside the unguarded area and cleaned, but he explained the temptation would be to get as close to the spillage as possible to ensure that all of it was cleaned. Tr. 126-127. Moreover, any person reaching into the opening to

~2346

pull the hose out would have his or her arm inches from the pinch point. Tr. 125.

Toscano feared that any person walking by the raised opening could lose his or her balance and fall into the opening, reach an arm out to catch himself or herself and be pulled into the pinch point. Tr. 119. Not only was the floor slippery, but the hose itself created a tripping hazard. However, he did not think it "highly likely" this would happen. Tr. 119.

Toscano found the alleged violation was due to USX's negligence. Pet. Exh. 6; Tr. 120-121. To abate the violation, the inspector required the guard to be welded to the frame of the conveyor "so that an employee unbeknownst to supervisor people couldn't be able to just lift up the flap and poke around or work around near that opening." Tr. 121.

Tomassoni was USX's sole witness. He described the raised guard as being approximately 2 by 3 feet in size. He agreed with Toscano the hose was under the belt. He described water as "trickling out" of the hose.

According to Tomassoni, hosing spillage from under the belt is a very common practice at the mine. Also, according to Tomassoni, USX employees are instructed not to work within 18 inches of a belt and not to reach under the belt to hose down spillage. Tr. 137. In addition, there is no need for an employee to go under the belt to recover a hose. Id. Normal water pressure at the mine is 90 PSI, and Tomassoni believed that pressure to be sufficient to wash down spillage and to do so from 10 to 25 feet away from the spillage. Tr. 138-139.

Tomassoni described the conveyor belt as running above the snub pulley. Because of this, the pinch point was positioned approximately 18 inches above the metal frame of the belt structure. Tr. 141; Resp. Exh. 1 (LAKE 72-306-M). In order to reach the pinch point an employee would have to "take his arm and actually extend it up behind the side frame of the conveyor." Tr. 142. Thus, Tomassoni maintained that because of the position of the pinch point there was no way a person could become entangled in the pinch point without intentionally reaching into it. Moreover, the conveyor belt frame prevented a person from falling into the pinch point. Tr. 143. Further, the snub pulley bearing housing, which Tomassoni described as a "massive piece of steel" also provided protection against a person coming into contact with the pinch point. Tr. 145.

Toscano was recalled as a witness following Tomassoni's testimony and stated he agreed that the position of the snub pulley provided partial protection from the pinch point. However, he believed that a person could contact the pulley "very

~2347

easily" by reaching in to grab the hose and having a sleeve caught on the moving belt. Tr. 149.

USX does not contest the violation. Rather, it argues Toscano incorrectly found the violation was S&S. Tr. 113. Here again, the critical question is whether the Secretary has proven that the failure to keep the guard securely in place was reasonably likely to have resulted in an injury producing accident. On balance, it seems to me the answer is "yes."

While I find Tomassoni accurately described the position of the pinch point as being above and behind the side frame of the conveyor belt and while I conclude that this position made it impossible for a miner to inadvertently come in contact with the pinch point per se, I also am persuaded that Toscano was right in noting that a miner's clothing could snag on the belt as it rounded the pulley and that if this happened the miner easily could be dragged up into the pinch point. Tr. 148. Obviously, if such an accident happened, the miner would be subjected to the possibility of serious injury -- or perhaps of death.

Obviously, as well, for such an accident to have been reasonably likely, miners must regularly have been adjacent to the unguarded snub pulley. I conclude they were. I note especially Tomassoni's testimony that the hosing of spillage was "very common" at the plant, and I conclude that miners frequently were in an area of the open guard. Tr. 137. I am persuaded also that it was likely for a miner to slip or fall in the area. With "very common" hosing under the belt, I conclude the floor area adjacent to the opening was frequently wet and slippery. Even a person crouching next to the raised guard could have slipped and reached in to steady himself or herself, and once within the confined and unguarded area adjacent to and under the belt, contact with the moving belt was reasonably likely.

I do not accept Tomassoni's opinion there was no need for miners to reach into the opening. Tr. 137. Rather, I accept Toscano's testimony that there would be times when the nozzle of the hose would snag under the belt (Tr. 125) and that in those instances a miner would be required to reach under the belt adjacent to the snub pulley to un snag it. Further, and more important, the guard had been raised for some reason and, certainly, the most likely reason suggested by the record was to allow miners closer access to spillage under the belt in order to better hose it. (USX, who controlled the area involved, offered no alternative explanation for why the guard was raised.) In addition, I fully agree with Toscano that with the guard raised "the temptation would be [for miners] to get up as close as they could to clean [the spillage] and I infer that there would in fact be times when miners would reach within the open area to do so. Tr. 126-127. While Tomassoni may have been right that spillage could be washed away from a distance of 20 to 25 feet,

~2348

it is unrealistic to assume such always was the case. Spillage varies in size and content. Water pressure also can vary.

For all of these reasons, I conclude the failure of USX to keep the guard securely in place was reasonably likely to have resulted in an accident resulting in injuries of a reasonably serious nature and that Toscano correctly found the violation to be S&S.

USX does not contest Toscano's other findings regarding the violation and I find therefore that the violation was serious and was due to negligence on USX's part. The plant has a large history of previous violations, including 13 assessed violations of section 56.14112(b) in the 24 months prior to March 17, 1992. Pet. Exh. 9. I will take these factors into consideration when I assess a civil penalty for this violation.

ASSESSMENT OF CIVIL PENALTIES

DOCKET NO. LAKE 92-457-M

Citation No.	Date	30 C.F.R.	Civil Penalty
4097355	6/10/92	56.11001	\$309.00

The parties have settled this violation for \$309, and I have approved the settlement. I therefore assess a civil penalty of \$309.

DOCKET NO. LAKE 92-279-M

Citation No.	Date	30 C.F.R.	Civil Penalty
3893134	1/14/92	56.14214(b)	\$500.00

Given the fact that USX is large in size, that the violation was serious and that the failure to sound the horn at the crossing was not an isolated incident, as well as considering the other statutory civil penalty criteria, I assess a civil penalty of \$500.

DOCKET NO. LAKE 93-306-M

Citation No.	Date	30 C.F.R.	Civil Penalty
4097196	3/17/92	56.14112(b)	\$500.00

Given the fact that USX is large in size, that the violation was serious and that in the 24 months prior to March 17, 1992, thirteen previous assessed violations of section 56.14112(b) have been cited and assessed at the plant, as well as considering the other statutory civil penalty criteria, I assess a civil penalty of \$500.

~2349

Citation No.	Date	30 C.F.R.	Civil Penalty
4097197	3/17/92	56.12034	\$50.00

The parties have settled this violation for \$50 and I have approved the settlement. I therefore assess a civil penalty of \$50.

ORDER

USX is ORDERED to pay civil penalties in the assessed amounts as set forth above. In addition, in Docket No. LAKE 93-306-M, the Secretary is ORDERED to modify Citation No. 4097197 by deleting the S&S finding. In Docket No. LAKE 93-5-M, Citations Nos. 4097174 and 4097478 are VACATED.

USX is DIRECTED to pay the civil penalties of MSHA within thirty (30) days of the date of this decision. The Secretary is DIRECTED to modify Citation No. 4097197 within thirty (30) days of the date of this decision. Upon receipt of payment and upon modification of the citation, these proceedings are DISMISSED.

David F. Barbour
Administrative Law Judge

Distribution:

Miquel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, 230 South Dearborn Street, 8th Floor,
Chicago, IL 60604 (Certified Mail)

James Ranta, United Steelworkers of America, Local 1938, 307
First Street, North, Virginia, MN 55792 (Certified Mail)

William M. Tennant, USS, a Division of USX Corporation, 600 Grant
Street, Room 1580, Pittsburgh, PA 15219-4776 (Certified Mail)

\epy