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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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July 28, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEST 93-108-M
Petitioner : A.C. No. 04-00599-05541
 :
 : Docket No. WEST 93-109-M
 : A.C. No. 04-00599-05542
v. :
 : Docket No. WEST 93-110-M
 : A.C. No. 04-00599-05543
 :
PORT COSTA MATERIALS, INC., : Docket No. WEST 93-353-M
Respondent : A.C. No. 04-00599-05544
 :
 : Docket No. WEST 93-366-M
 : A.C. No. 04-00599-05545
 :
 : Docket No. WEST 93-428-M
 : A.C. No. 04-00599-05546
 :
 : Docket No. WEST 93-435-M
 : A.C. No. 04-00599-05548
 :
 : Docket No. WEST 93-485-M
 : A.C. No. 04-00599-05548
 :
 : Port Costa Materials

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor,
U.S. Department of Labor, Seattle, Washington,
for Petitioner;
Mr. Ross Gephart, President, PORT COSTA MATERIALS,
INC., Port Costa, California, and
Mr. Robert Stewart, Corporate Vice President, PORT
COSTA MATERIALS, INC., Port Costa, California,
for Respondent.

Before: Judge Morris

The Secretary of Labor charges Respondent Port Costa Materi-
als, Inc., ("Port Costa") with violating 73 safety regulations
promulgated under the authority of the Federal Mine Safety and
Health Review Act of 1977, 30 U.S.C. 802, et seq. (the "Act").

STIPULATION

At the hearing, the parties stipulated as follows:

The citations and notification of proposed penalty were served upon the Respondent.

The Respondent timely contested both the citations and the proposed assessments of penalty, and therefore, the Federal Mine Safety and Health Review Commission has jurisdiction to hear and decide these matters.

Respondent in these proceedings is Port Costa Materials Incorporated, a corporation. And, further, it has products that enter into commerce and is therefore an employer subject to the Act.

BACKGROUND

Port Costa is a light aggregate mining facility in Port Costa, California.

The first of three separate MSHA inspections was conducted by Inspector Michael Brooks from August 27 through September 9, 1992; the second was conducted by Inspector Arthur Carisoza from January 7 through January 10, 1993; the third was conducted by Inspector Brooks from March 25 through March 26, 1993.

The citations/orders issued during those three inspections and the resultant proposed penalty assessments therefor were timely contested by Port Costa and were docketed by the Federal Mine Safety and Health Review Commission under the docket numbers listed above.

The decision is so structured so as to review the relevant evidence in the numerical sequence of the citations. The citations also follow the transcript. The inspections are designated as Brooks I, Carisoza, and Brooks II.

THRESHOLD ISSUES

Port Costa contends MSHA violated Section 104(a) of the Act and its Program Policy Manual ("PPM"). Specifically, Port Costa argues a portion of MSHA's citations are duplicative and should be dismissed.

The PPM provides, in part, as follows:

104(a) Citations and Orders

Section 104(a) is a major tool for obtaining compliance with the Act, and the mandatory health or safety standards, rules, orders, or regulations. Violations shall be cited by the inspector, giving the operator time for abatement of the violation(s). The citations shall be issued under Section 104(a) or, as appropriate, under Section 104(d) of the Act. After the inspection, the inspector shall meet with the operator or his agent to discuss the violation.

Separate citations shall be issued for: violations of separate standards on one piece of equipment; violations of separate standards in a distinct area of a mine; identical violations on separate pieces of equipment; and, identical violations in distinct areas of a mine. For example, if two haul trucks each have the same violation, there will be two separate violations cited. Likewise, if two distinct areas of a mine have loose rock in the roof or back, there will be two separate violations cited.

However, where there are multiple violations of the same standard which are observed in the course of an inspection and which are all related to the same piece of equipment or to the same area of the mine, such multiple violations should be treated as one violation, and one citation should be issued. For example, "Loose roof or ground was observed in four places along the haulageway between 3 switch and No. 4 X-cut" or, "At the crusher power control panel, insulated bushings were not provided where insulated wires entered five of the metal switch boxes." (Ex. R-2). (Emphasis added.)

Port Costa contends that there are four separate "areas" of its facility as that term is used in the PPM. Port Costa identified the four areas of its plant as the quarry, prep plant, kiln, and load out. (Exhibit R-1 shows the areas.)

Port Costa further asserts the term "area" should be defined in its usual common sense dictionary manner, namely, "a particular extent of space or surface or one serving a specific function; the scope of a concept, operation, or activity (citing Webster's Dictionary).

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Prep Plant: This plant is a single interlocking system consisting of 30 conveyor belts that feed, crush, screen, and recirculate material. If a single belt stops, the entire system shuts down. Therefore, Port Costa argues the Prep Plant is a distinct and separate area of the plant. (Tr. 729). Eight citations involve the absence of guards in the Plant. These citations are numbered: 3913806, 3913807, 3913808, 3913809, 3913810, 3913812, 3913813, and 3913815. Each of these citations constitutes multiple violations of the same standard. Therefore, it is argued that only one citation should have been issued for the Prep Plant.

Kiln Area: In this area, two citations, numbered 3913817 and 3913818, were issued. Both citations arose not only out of a single area but involved the same piece of machinery. It is claimed these citations are duplicative and violate Section 104(a) of the Act.

Load Out Area: In this area, citations numbered 3913824, 3913825, 3913826, 3913827, 3913832, 3913834, 3913835, and 3913838 were issued. Each of the citations in this area involves the alleged inadequacy of machine guards. Therefore, Port Costa argues that only a single citation should be issued.

Also, in the load-out area three additional citations were issued. Those are numbered 3913828, 3913829, and 3913837. Each of these citations involves a violation of 30 C.F.R. 56.12032.

Discussion

Port Costa's arguments lack merit for several reasons. The operator would have the Commission dismiss or combine what it claims are duplicative violations of the same standard on the same piece of equipment or in the same area of the mine. Such a dismissal would conflict with Section 110(a) of the Mine Act which provides that "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. 820(a). Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1981); Spurlock Mining Company, Inc., 16 FMSHRC 697, 699 (April 1994).

I agree with the Secretary that MSHA's "grouping" represents a reasonable and lawful exercise of the Petitioner's prosecutorial discretion under the Act. It balances in a practicable manner the need to identify and seek the correction of the various hazards disclosed during an inspection with an avoidance of needless and redundant paperwork.

The thrust and purpose of the policy is to focus upon the individual and discrete hazards presented at the worksite. Such particularity and specificity in the issuance of citations is required under Section 104(a) of the Act. That statutory re-

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quirement, as well as the Petitioner's grouping policy, further serve the obvious and beneficial purpose of identifying through the citation process the individual and discrete abatement efforts needed to eliminate the presented hazards.

If, for example, machine guarding hazards are present on two separate machines, two separate guarding efforts will be required to eliminate the hazards. This is so whether the guarding violations are identical in nature (and therefore violations of the same standard) or are different in nature (and therefore violations of different standards). Similarly, if two different types of guarding violations are presented on one machine, two separate types of abatement effort will be required to eliminate the two different hazards. On the other hand, if identical hazards (and therefore multiple violations of the same standard) are present on the same machine, the same type of abatement effort on the same machine will be required to eliminate both hazards, and little purpose would be served through the issuance of multiple citations requiring the same abatement effort. The same analysis is equally applicable in the case of the same or different areas of the mine facility. The same effort in the same area is but one abatement effort. Different efforts in the same area remain two abatement efforts.

The Secretary has properly applied his own grouping policy with respect to the citations involved in this proceeding.

In sum, penalties may not be eliminated because the Mine Act requires that a penalty be assessed for each violation. Further, I decline to dismiss or combine the citations herein.

SIGNIFICANT AND SUBSTANTIAL

Whether a violation is S&S will be discussed in the citations where S&S is alleged. In such circumstances, the Judge will follow the existing case law.

The Commission has ruled that an S&S violation is a "significant and substantial" violation described in Section 104(d) 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:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated:

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). (Emphasis in original).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 110 FMSHRC 498 (April 1988); Youghioghney & Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In addition, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 239. Halfway, Inc., 8 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

As hereafter noted, the S&S allegations in some citations have been stricken. This occurred because the Secretary's expert witness was of the opinion that an accident was "unlikely." Such an opinion eliminated the S&S designation. Further, surrounding facts do not rise to the level of establishing an S&S violation in the absence of expert testimony.

BROOKS I INSPECTIONS

Michael Brooks, an MSHA federal mine inspector, is stationed in the Vacaville, California, office. (Tr. 102).

In August 1992, Mr. Brooks inspected Port Costa which is located in Contra Costa County, California. (Tr. 104). Upon arriving at the plant, he was met by Lee Allen, foreman - Production Manager, and Martin De Toro, Jr., miners' representative. (Tr. 106-107).

Docket No. WEST 93-109-M

Citation No. 3913802

This citation alleges a violation of 30 C.F.R. 56.14130(g) which, in pertinent part, states that "seat belts shall be worn by the equipment operator"

Inspector Brooks observed that an employee was not wearing his seat belt while pushing material with a dozer. He was working in the clay storage area. (Tr. 112).

The equipment operator acknowledged he knew he was to wear his seat belt. Management also instructed the dozer operator to wear his seat belt.

Inspector Brooks believed that an injury was unlikely, but a fatality could occur. Such a fatality could result from a head injury. (Tr. 123, 127).

CIVIL PENALTY CRITERIA

The operator's negligence should be considered "moderate." The company offered no mitigating circumstances why its equipment operator was not wearing a seat belt.

Gravity should be considered "low" since an accident was unlikely because the dozer was operating on flat, non-elevated, fairly smooth roadways. (Tr. 242-243).

Port Costa is entitled to statutory good faith since it promptly abated the violative conditions in all Brooks I citations. Abatement will not be discussed further but it is considered in assessing all Brooks I citations.

Discussion

Port Costa contents (Brief at p. 7) that it is not liable since the company's Safety and Procedure Manual requires all employees to wear seat belts. Therefore, any violation of MSHA regulations is beyond the operator's control.

Port Costa's argument is REJECTED.

The Commission and various appellate courts have recognized that the Mine Act (as well as its predecessor, the Coal Act) impose liability without fault. *Asarco, Inc. - Northwestern Mining v. FMSHRC and AMC*, 8 FMSHRC 1632 (1986), 868 F.2d 1195, 1197-1198, 10th Cir. 1989; *Western Fuels Utah, Inc., v. FMSHRC*, 870 F.2d 711, D.C.C.A. 1989; *Bulk Transportation Services*, 13 FMSHRC 1354 (September 1991).

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On the credible evidence, Citation No. 3913802 is AFFIRMED.

Docket No. WEST 93-108-M

Citation No. 3913803

This citation alleges an S&S violation of 30 C.F.R.

56.14107(a) relating to moving machine parts. The regulation provides:

56.14107 Moving machine parts.

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

Inspector Brooks issued this citation when he observed that the self-cleaning tail pulley on the No. 5340 conveyor was not guarded. (Tr. 139, 140). Production Manager Lee Allen identified the conveyor by number.

The equipment was in the scalping tower area of the kiln deck. The exposed tail pulley was 2.5 to 3 feet from the work area. Mr. Brooks did not see any employees in the area; however, any employees in the plant would be exposed to the hazard.

The Inspector considered an injury was reasonably likely since access to the moving parts could be gained by the spillage pile. Contacting exposed parts and resulting injury was reasonably likely.

A self-cleaning tail pulley cleans itself of foreign material. There are steel flutes on the pulley. A worker could contact the pinch points and become entangled. An amputation could result. The conveyor was 36 inches wide. (Tr. 144).

Mr. Brooks could not say if the conveyor was running but the company representative did not deny that there was access to the exposed parts. Access could be gained by climbing up on the spillage pile or going under the tail pulley.

A Bobcat usually moves the spoil pile.

It was stated in Mr. Brooks' notes that the company should have known of the violation. The condition was terminated by guarding.

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Inspector Brooks opined the violation was S&S because an injury was reasonably likely and there was exposure to a permanently disabling injury.

Since this condition was open and obvious, the operator's negligence should be considered "moderate." The company did not present any evidence to justify low negligence.

Access to the conveyor can be by the spillage pile. In view of this fact, gravity should be considered "high" since entanglement with unguarded machine parts can be permanently disabling. Such an entanglement can also cause severe injuries including amputation of an arm. It could also have been abated by removing the spillage.

The evidence is essentially uncontroverted. Citation No. 3912803 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913804

This citation alleges a violation of 30 C.F.R. 56.12028. The regulation provides:

56.12028 Testing grounding systems.

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

Inspector Brooks issued this citation when he learned from Lee Allen that the electrical system had not been tested since September 1990 [the citation was issued on August 31, 1992]. This was the last record Inspector Brooks saw. (Tr. 166). Testing must be done annually. (Tr. 167).

The hazards involve electrical shock. Most plants are 480 volts A.C. Inspections are required annually due to the harsh environment of mining.

Inspector Brooks considered that an injury was unlikely. However, if a fault occurred, an accident could possibly be fatal.

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An issue arose in connection with this citation as to whether another MSHA inspector indicated the electrical system had been tested in January 1992. (Tr. 178-182).

The above evidence is not persuasive since the regulation requires that a record of testing shall be made available to the Secretary or his representative.

Under the conditions noted in the regulation and annually an operator in the regular course of business should test the grounding systems. Failure to do such testing and failure to present evidence of such testing indicates the operator was moderately negligent.

Inspector Brooks considered that what he saw from the previous records and in view of the condition of the mine, he believed it unlikely that an accident could occur. (Tr. 168-169). However, if a fault did occur, the result could be a fatality. In view of the ultimate possibilities, I consider the gravity to be "high."

On the credible evidence, Citation No. 3913804 is AFFIRMED.

Docket No. WEST 93-108-M

Citation No. 3913805

This citation alleges an S&S violation of 30 C.F.R. 56.12035. The regulation provides

56.12035 Weatherproof lamp sockets.

Lamp sockets shall be of a weatherproof type where they are exposed to weather or wet conditions that may interfere with illumination or create a shock hazard.

Inspector Brooks observed that a 110-volt A.C. light did not have a weatherproof type lamp socket and it was exposed to the outside weather conditions. (Tr. 183). The light in the vicinity of the head pulley 2300 conveyor was used on the night shift to illuminate the hopper area.

The light was not permanently fixed and an electrical shock was a reasonably likely hazard. A fatality could occur. Morning fog frequently occurs in this area. The operator should have known of the condition but no mitigating circumstances were presented.

This condition was open and obvious. Accordingly, the operator's negligence should be considered "moderate." There

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were no mitigating circumstances presented to reduce the negligence to "low."

Since an electrocution could occur, gravity should be considered "high," although MSHA does not contend the light was not grounded.

Discussion

Port Costa contends the cited area was not an outdoor facility but was under a roof. (Tr. 759; Ex. R-4). As a result, a waterproof light fixture was not necessary.

I disagree. Morning fog often occurs in this area and weatherproof sockets are required where there is exposure to weather or wet conditions.

Citation No. 3913805 is AFFIRMED.

Docket No. 93-108-M

Citation No. 3913806

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

In the Prep Plant, Inspector Brooks observed that the head pulley and the keyed shaft equipped on the No. 3110 conveyor were not guarded. (Tr. 194). The unguarded part of the head pulley was located on the north side of the conveyor. The hazards were 68 to 78 inches above the walkway level. A walkway provided access to the hazards.

The hazards were moving machine parts. An accident could occur if employees reached into the hazard areas and were pulled into the conveyor. Mr. Brooks believed that a permanently disabling injury could occur. The company should have known of this condition and no mitigating circumstances were presented.

Inspector Brooks considered this to be an S&S violation because a permanently disabling injury was reasonably likely to happen to an employee. (Tr. 196-202).

The head pulley and key shaft were in plain view. In the absence of mitigating circumstances, I concur with the Inspector's opinion that the operator's negligence was moderate. No mitigating circumstances were involved. Exposure to moving machine parts involves high gravity.

On the credible evidence, Citation No. 3913806 is AFFIRMED.

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Docket No. WEST 93-108-M

Citation No. 3913807

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

In the Prep Plant, the bottom side of the tail pulley on the No. 3315 conveyor was not properly guarded. This exposed a pinch area measured to be 6 feet 7 inches (79 inches) above the cat-walk. The hazard of the pinch point area is where the conveyor meets the tail pulley. The hazard could be contacted as it was immediately adjacent to the walkway. (Tr. 205).

In Inspector Brooks' opinion, an injury was reasonably likely because of employee exposure to the pinch areas. In addition, such an injury could be permanently disabling and could involve an amputation.

This was an S&S violation because of the exposure. Employees travel through the area on a regular basis and there is access to the hazard.

The tail pulley was in plain view and the operator's negligence is considered "moderate." Exposure to moving machine parts involves high gravity due to the potential for severe injury.

On the credible evidence, Citation No. 3913807 is AFFIRMED.

Docket No. WEST 93-108-M

Citation No. 3913808

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

Inspector Brooks observed the head and drive pulleys on the #3260 Conveyor were not properly guarded. There was a 26- and 12-inch horizontal measurement from the north and south side on the walkway to the pinch hazard area.

There was a guard on the north side, but it should have been extended since the pinch area remained exposed. There was no guard on the south side of the pulley. Workers had access to the north and south sides of the pulley. The distance from the walkway to the unguarded drive pulley was 36 inches.

The head pulley was about 65 inches above the ground; the height of the head pulley on the south side would be basically the same.

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Inspector Brooks would expect permanently disabling injuries such as amputations to occur. Because of the access and exposure, such an accident was reasonably likely and an employee could be permanently disabled. The criterion is that an accident was reasonably likely. Further, it would involve lost work days or restricted duty.

The operator's negligence is "moderate." The unguarded condition was obvious. Exposure to moving machine parts involves high gravity due to the potential for severe injury.

On the credible evidence, Citation No. 3913808 is AFFIRMED.

Docket No. WEST 93-108-M

Citation No. 3913809

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

Inspector Brooks issued this citation when he observed the No. 3245 conveyor in the Prep Plant was not properly guarded. The bottom side of the tail pulley was exposed and the pinch area was 32 inches above the walkway level. Employees use this area on a regular basis for observation, maintenance, and clean-up.

Due to the exposure of workers, Mr. Brooks considered that an injury was reasonably likely and such an injury could be permanently disabling.

This condition was open and obvious. The operator's negligence should be considered "moderate."

On the credible evidence, Citation No. 3913809 is AFFIRMED.

Docket No. WEST 93-108-M

Citation No. 3913810

This citation alleges an S&S violation of 30 C.F.R. 56.14112(b). The regulation provides

56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to--

(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operations; and

(2) Not create a hazard by their use.

(b) Guards 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.

In the Prep Plant Inspector Brooks observed that a door acting as a guard had been removed. The guard appeared to be a hopper over a screw conveyor with a door to open for observation.

The absence of the door exposed a rotating screw which was 17 inches behind the missing door and 24 inches above the walkway level. (Tr. 261). A worker's hand could enter the two-foot opening and his hand could be mangled or amputated. An employee did not know why the door had been removed but it had been off "over the weekend." (Tr. 264). The door could serve as a guard but it was not in place.

Based on his experience, Mr. Brooks considered the violation "S&S." He observed employees in the area. He further believed an injury was reasonably likely and such an injury could be permanently disabling.

The operator's negligence is moderate. A maintenance program could have corrected the violative condition.

Gravity could be considered "high" since a rotating screw could cause disabling injuries.

On the credible evidence, Citation No. 3913810 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913811

This citation alleges an S&S violation of 30 C.F.R. 56.11012. The regulation provides

56.11012 Protection for openings around travelways.

Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

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In the Prep Plant area the No. 3470 conveyor moves on its track. For 110 feet there is a 10-inch-wide opening between the rails. There is minimal lighting in the area. The openings are 10- to 15-feet deep. Lee Allen stated there were workers in the area on a regular basis. (Tr. 275).

Mr. Brooks opined that an injury was reasonably likely and lost workdays or restricted duty could result.

The operator's negligence was moderate. This condition was open and obvious for 110 feet.

Gravity should be considered "moderate" since lost workdays or restricted duty could result.

On the credible evidence, Citation No. 3913811 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913812

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

In the Prep Plant the head pulley and drive pulley on the pellet silo No. 1 feeder were not guarded properly. The head pulley did not extend back far enough to cover the pinch areas. On the drive pulley, the back side was not guarded; it was 44 inches from the drive-pulley walkway to the pinch points. The pulleys were 64 inches above the walkway. Workers using the area were exposed on a regular basis. (Tr. 288-290).

Mr. Brooks indicated an injury was reasonably likely. He believed any accident would be serious. Accordingly, he concluded the violation was "S&S."

The operator's negligence was moderate. It should have known the existing guards were insufficient.

Exposure to moving machine parts involves a situation of high gravity. Such parts have the potential to cause a permanently disabling injury.

On the credible evidence, Citation No. 3913812 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913813

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

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In the Prep Plant the head pulley and drive pulley on the pellet silo No. 2 feeder No. 3735 was not guarded properly. The guards on the head pulley did not extend back far enough on the north and south sides to cover the pinch areas. The guard on the drive pulleys did not cover the pinch points. It was 45 inches to the bottom side and 64 inches to the top of the pinch points.

The conditions on No. 3735 and No. 3725 were comparable. Guards were within one to two inches of covering the pinch points. The configuration was the same on both sides. It was 36 inches from the walking level to the pinch points. On the south side there was a 19-inch reach to the hazard; the distance on the north side was 15 inches. (Tr. 304-307).

Inspector Brooks considered the violation to be S&S. If the condition was not corrected it was reasonably likely that an accident could occur. Amputation could result if an accident occurred. Workers use this area to go from one side to the other. There are 42 workers at the plant.

The operator's negligence is moderate as the inadequate guards were obvious. Gravity is "high" since entanglement in moving machine parts can cause disabling injuries or an amputation.

On the credible evidence, Citation No. 3913813 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913814

This citation alleges an S&S violation of 30 C.F.R. 56.12030. The regulation provides

56.12030 Correction of dangerous conditions.

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

Inspector Brooks observed several exposed energized conductors at pellet silos No. 1 and No. 2. (The wires were not terminated at the ends or the power was not off to eliminate the voltage hazard.) One such exposed conductor was four to five feet off the ground. Mr. Brooks determined the power with a voltmeter; it was 110 volts. Electrocution is possible with an exposed energized conductor especially if moisture, fog, or rain are present. (Tr. 322-323).

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Based on the facts he found, Mr. Brooks concluded an injury was reasonably likely. Further, based on his experience, such an injury could be fatal.

The operator's negligence was moderate. This condition could have been discovered. Gravity was high since a fatality by electrocution could occur.

On the credible evidence, Citation No. 3913814 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913815

This citation alleges an S&S violation of 30 C.F.R. 56.14112(b). The regulation provides

56.14112 Construction and maintenance of guards.

(b) Guards 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.

In the Prep Plant Inspector Brooks observed that the head pulley on conveyor No. 3695 was not properly guarded. (Tr. 333). There was a guard within inches of the head pulley but it did not cover the pinch points. The distance from the ground to the pinch points measured 48 inches. The pinch points were adjacent to the walkway and not recessed. At the west side there had been a guard. Part of a guard was found on the walkway; it was replaced in five minutes. Mr. Brooks was told that workers come into this area once a shift. (Tr. 337).

Mr. Brooks considered an injury was reasonably likely and employees could become entangled and suffer severe injuries.

The operator's negligence was moderate as the unguarded condition was open and obvious. Gravity was high since exposure to unguarded equipment can result in severe and disabling injuries.

On the credible evidence, Citation No. 3913815 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913816

This citation alleges an S&S violation of 30 C.F.R. 56.9200(d). The citation was issued as an imminent danger order under Section 107(a) and as a Section 104(a) violation.

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The regulation provides:

56.9200 Transporting persons.

(d) Outside cabs, equipment operators' stations, and beds of mobile equipment, except when necessary for maintenance, testing, or training purposes, and provisions are made for secure travel. This provision does not apply to rail equipment.

Inspector Brooks observed a front-end loader trainee riding on the outside of the cab of a 966 E front-end loader in the quarry area. He was on the level where you enter the cab. (Tr. 344).

James Shellhorn, driving the loader, was instructing the trainee (Ramon Deltaro) in its operation. Production Manager Lee Allen was upset over the situation and the trainee stated he knew no one should ride on the outside of the cab. The trainee was not wearing a harness but was riding the loader for a short period of time in a large flat area of the quarry. The imminent danger order was terminated in five minutes.

In Mr. Brooks' opinion, it was highly likely the trainee could be killed by being thrown eight to ten feet to the ground.

The operator's negligence should be considered "high". The trainee knew he was not supposed to ride on the outside of the cab. The cab operator himself should have known of such a prohibition. Gravity should be considered "high" since a fatality could occur under those circumstances.

Discussion

Port Costa states its manual specifically prohibits such action of its employees. This argument was previously discussed and it is again rejected.

The operator further argues that Section 107(a) defines an imminent danger as a "condition or danger that cannot be immediately stopped or arrested." Therefore, since Inspector Brooks ordered the employee to stop riding on the vehicle the classification of this as an "imminent danger" was improper.

I disagree. Port Costa has misread the Mine Act. Section 3(j), 30 U.S.C. 802(j), of the Act states:

(j) "Imminent danger" means the existence of any condition or practice in a coal or other mine which could reasonably be expected

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to cause death or serious physical harm before such condition or practice can be abated:

On the credible evidence, Citation No. 3913816 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913817

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (moving machine parts, supra)

Inspector Brooks observed that the Bull Gear and the Pinion Gear on the rotary kiln were not guarded as required. (Tr. 357).

The cylindrical kiln which rotates was 100 feet long and several feet in diameter. Mr. Brooks did not know the rotating speed of the kiln. The hazard was the exposure to the Bull and Pinion gears which meet 36 inches above the walkway. Persons could be pulled into the hazard by the gears. A walkway with a railing was adjacent to the Bull Gear.

Since the machine is serviced every two days, it is likely that an accident could occur. However, the area was roped off. (Tr. 360).

The operator's negligence was "moderate" since the unguarded gears should have been observed and corrected. Gravity is high since entanglement with moving machine parts can cause disabling injuries or an amputation. (Tr. 368).

On the credible evidence, Citation No. 3913817 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913818

This citation alleges an S&S violation of 30 C.F.R. 56.14112(b). The regulation provides

56.14112 Construction and maintenance of guards.

(b) Guards 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.

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In the Kiln Deck area, Inspector Brooks observed that the guard for the DC drive output shaft was lying on the walkway. The shaft is located at the Kiln Bull gear area. Maintenance is required around this area every two days.

The unguarded portion of each shaft measured 24 inches; the shaft was 30 inches immediately above the walkway. (Tr. 365, 366; Ex. P-2).

The Inspector believed an accident was reasonably likely and it could be a serious injury.

The operator's negligence was "moderate" since the unguarded gears could have been observed and corrected. Gravity was high since entanglement with an unguarded shaft could cause serious injuries.

Port Costa's Witness Lee Allen indicated the DC Drive output was 10 or 12 feet north of the bull gear for the rotary kiln. The guard was lying next to the shaft. This was the guard for the regular drive motor.

On the uncontroverted evidence, Citation No. 3913818 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913819

This citation alleges an S&S violation of 30 C.F.R. 56.11002. The regulation provides

56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

In the Load Out area, no hand railings were provided behind the No. 5385 tail pulley; about 39 inches of railing was missing. The walkway is about 80 feet from the ground level. (Tr. 374).

The Inspector believed an accident was unlikely because this was an isolated area. However, if a fall occurred, it could be fatal. (Tr. 376).

The operator's negligence was "moderate" since this condition could have been seen and corrected. Gravity is "high" since a worker could fall 80 feet.

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The company witness Lee Allen, testifying for the company, indicated that at this point the tail section of the No. 5385 conveyor and the tail pulley come up through the walkway. A person could not go over the edge. Where the conveyor protruded up to the walkway deck level there was no handrail. The citation was terminated when the operator installed a handrail. (Tr. 795). This is not a very traveled area. (Tr. 796).

Discussion

The inspector opined that an accident was unlikely. In view of this fact, the S&S allegations are STRICKEN.

Mr. Allen's testimony fails to establish a defense. Even though a portion of the conveyor and the tail pulley come up through the walkway "railing," apparently this did not exist at all times.

On the credible evidence, Citation No. 3913819 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913820

This citation alleges an S&S violation of 30 C.F.R. 56.14201(b). The regulation provides

56.14201 Conveyor start-up warnings.

(b) When the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. Within 30 seconds after the warning is given, the conveyor shall be started or a second warning shall be given.

Inspector Brooks found that the startup alarm for the No. 5575 conveyor was not functioning as required. The conveyor started without sounding an alarm. The operator said the alarm was not operating. It was, in fact, inoperable. (Tr. 379).

Inspector Brooks opined that, because of the confined space, an accident was unlikely. (Tr. 381). However, workers could fall into the conveyor and an amputation could occur. When the alarm was installed, it could not be heard the length of the conveyor.

The operator's negligence was "moderate"; the company could have seen and remedied this condition. Gravity is "high" because a fatality could result.

Discussion

Port Costa argues that its daily inspection report requires an examination of the start-up alarm. (Brief at 9). Since it was not mentioned in the report nor known to the company representative Port Costa could not have been aware of the violation. This argument was raised in connection with Citation No. 3913802, supra, and it is again REJECTED. In short, the Mine Act imposes strict liability.

Inspector Brooks testified that an accident was unlikely. This testimony fails to support the S&S allegations and that portion of the Citation is STRICKEN.

Citation No. 3913820, as modified, is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913821

This citation alleges an S&S violation of 30 C.F.R. 56.12025. The regulation provides

56.12025 Grounding circuit enclosures.

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

Inspector Brooks found that the 440-volt A.C. drive motor on the No. 5810 conveyor was not properly grounded. (Tr. 385). The motor was a three-phase 7.5 H.P., 440 VAC. The cable size was a three-conductor, size 12. Mr. Brooks did not test the equipment but he indicated there was no ground conductor.

The Inspector believed an accident was unlikely but an injury could be fatal if there was a fault.

Port Costa should be considered "moderately negligent" as it should have known of the violative condition. Gravity should be considered "high" since an electrocution could occur.

Discussion

Port Costa argues (Brief at 8, 9) that the Inspector did not test or examine the motor to determine if it was grounded. (Tr. 798).

I agree. Mr. Brooks did not test the motor but he visually ascertained it was not grounded. He stated, "There was no ground

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conductor equipped at the motor. It was using a size 12-3 cable with no ground conductor and no conduit." (Tr. 385).

The operator was negligent; the condition could have been discovered and remedied. The gravity should be considered "high" since there was potential for a fatality.

Under the circumstances here, Inspector Brooks believed an accident was "unlikely." In view of such evidence the S&S designation is STRICKEN.

The Citation, as modified, is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913822

This citation alleges an S&S violation of 30 C.F.R. 56.12041. The regulation provides

56.12041 Design of switches and starting boxes.

Switches and starting boxes shall be of safe design and capacity.

Inspector Brooks found the disconnect breaker for the container filler conveyor was not functioning. The handle/switch was broken off. The voltage inside the box was 440. The conveyor was not operating since the disconnect switch had disconnected the power. The breaker itself was broken. (Tr. 389, 390).

An accident was reasonably likely to occur and a fatality could result. If a person put a lock on the outside of the box, no one would know the handle was broken.

The operator's negligence should be considered "moderate" since it should have known the breaker switch was broken. Gravity should be considered "high" since a fatality could occur. (Tr. 392).

Company Representative Allen testified the conveyor did not have a number. (Tr. 799).

The switch was broken off inside the box. It was not reported to management.

Exhibit R-5 was identified as Port Costa's lockout procedures.

On the uncontroverted evidence Citation No. 3913822 is AFFIRMED.

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Docket No. WEST 93-109-M

Citation No. 3913823

This citation alleges an S&S violation of 30 C.F.R. 56.12030. The regulation provides

56.12030 Correction of dangerous conditions.

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

Inspector Brooks observed several exposed bare wires in the 110-volt A.C. circuit located in the air compressor room. (Tr. 398). The conductors were exposed because the door was off the electrical box. Workers had access to the air compressor room; electrical shock was the hazard.

Mr. Allen didn't remember if the exposed wires were energized nor did he recall if Mr. Brooks had tested them for power. (Tr. 802, 803).

The operator's negligence is "moderate" notwithstanding the fact that the violative condition was in an isolated area. The condition could have been discovered. The gravity is "high" since a fatality could occur.

The Inspector believed an accident was unlikely. In view of this conclusion and the lack of persuasive evidence, the S&S allegations are STRICKEN.

Citation No. 3913823, as modified, is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913824

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

According to Inspector Brooks the tail pulley of the No. 5537 silo feeder conveyor was not properly guarded. This was in the Load Out Area. The pinch point area was located about six feet above ground level in a travel area. Workers could be exposed to an unguarded tail pulley. (Tr. 404).

The Inspector believed an entanglement was likely if an accident occurred. In sum, if the condition was not corrected a disabling accident could result.

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The operator's negligence should be considered "moderate" since the violative condition was apparent. Gravity should be considered "high" since a disabling injury could occur.

On the uncontroverted evidence this citation is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913825

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

In the Load Out Area Inspector Brooks issued a citation because a tail pulley on the No. 5542 silo feeder conveyor was not properly guarded. The bottom side of the tail pulley exposed pinch points where the conveyor and tail pulley met about six feet above the ground. (Tr. 409).

This conveyor was adjacent to the conveyor mentioned in Citation No. 3913824. A worker could contact the pinch points by placing a hand into the hazard area. If this occurred, a mangled hand or an amputation could result.

Mr. Brooks believed an injury was reasonably likely and, as noted, the injury could be permanently disabling.

The operator's negligence should be considered "moderate" since the violative condition was apparent. Gravity is "high" due to the potential for severe injury.

Mr. Allen indicated the company was cited for the same basic condition as involved in the previous citation. (Tr. 806).

In order to terminate the citation, a piece of expanded metal was put underneath the tail pulley section.

On the uncontroverted evidence, Citation No. 3913825 is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913826

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

In the Load Out Area the head pulley and the tail pulley on the No. 5410 feeder conveyor were not properly guarded. The head pulley, two feet above the walkway, was not properly guarded on both sides. (Tr. 414). There were exposed pinch points. The

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tail pulley had a guard but there was no guard on the bottom. The exposed pinch points were measured at a height of 58 inches above the floor. Workers in the vicinity have access to the hazard. An accident could result in an amputation.

Mr. Brooks opined that if the condition were not corrected, an injury was reasonably likely. Further, the resulting injury would be permanently disabling.

The operator's negligence should be considered "moderate" as the violative condition was apparent. Gravity was "high" since a permanently disabling injury could occur.

Mr. Allen testified for Port Costa that this condition was terminated by putting expanded metal on the sides of the head pulley and the bottom of the tail pulley. (Tr. 807, 808). This area is inspected by a worker in the swing and graveyard shifts. (Tr. 808, 809).

On the uncontroverted evidence, this citation is AFFIRMED.

Docket No. WEST 93-109-M

Citation No. 3913827

This citation alleges an S&S violation of 30 C.F.R. 56.14112. The regulation provides

56.14112 Construction and maintenance of guards.

(b) Guards 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.

Inspector Brooks testified the head pulley and the tail pulley of the No. 5410 feeder conveyor were not properly guarded. Pinch areas were exposed 58 inches above the spillage pile. (Tr. 414).

In Mr. Brooks' opinion, an injury was reasonably likely if the hazard were not corrected. Workers could become entangled by placing their hands in the chain and sprocket.

The operator's negligence was "moderate" since the violative condition was apparent. Gravity was "high" since workers could become entangled.

Mr. Allen testified this conveyor was not in operation at the time of the inspection.

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The old guard had been damaged and a new one was being fabricated. (Tr. 809, 810). Mr. Allen believed the old guard was inadequate from the start. (Tr. 810).

Discussion

Mr. Allen's testimony is uncontroverted that a new guard was being fabricated. This constitutes "making adjustments" within the meaning of the regulation.

On the credible evidence, Citation No. 3913827 is VACATED.

Docket No. WEST 93-109-M

Citation No. 3913828

This citation alleges an S&S violation of 30 C.F.R. 56.12032. The regulation provides

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Inspector Brooks issued this citation when he saw there was no junction box for the winch motor at the No. 5900 stacker boom. (The function of a junction box is to furnish access, to exclude dust and moisture, and to insure conductivity.)

Mr. Brooks considered that severe burns or electrocution could occur. However, he did not consider that an accident would be likely. (Tr. 428, 429).

The operator's negligence was "moderate" since the missing junction box was obvious. The gravity was "high" since, if an accident occurred, a fatality could result.

Discussion

Mr. Brooks testified he did not believe an accident was likely. His testimony and the total evidence fails to confirm the S&S designation and such allegations are stricken.

Citation No. 3913828, as modified, is AFFIRMED.

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Docket No. WEST 93-110-M

Citation No. 3913829

This citation alleges a violation of 30 C.F.R. 56.12032. The regulation provides:

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

In the Load Out Area Inspector Brooks observed that three electrical junction boxes containing energized conductors lacked covers. The boxes were located in an isolated area; the workers did not enter this area on a regular basis. (Tr. 434, 435).

The operator was negligent since the missing covers should have been readily apparent. The gravity was "high" since a fatality could occur.

Witness Allen indicated the area cited was on the same piece of equipment cited in the previous citation. (Tr. 813).

On the uncontroverted evidence, Citation No. 3913829 is AFFIRMED.

Docket No. WEST 93-485-M

Citation No. 3913830

This citation alleges an S&S violation of 30 C.F.R. 56.11001. The regulation provides

56.11001 Safe access.

Safe means of access shall be provided and maintained to all working places.

Inspector Brooks issued this citation upon observing that there were no handrails or walkways leading from the No. 5800 to the No. 5900 stacker boom area. A worker would enter this area to start the conveyor or rotate the shaker. The elevated area contained openings and tripping hazards. Access usually was gained by climbing over openings of the No. 5900 stacker boom. Due to the hazard, a worker could fall 25 to 30 feet to the ground. (Tr. 439, 443).

Willie Davis, an MSHA supervisor, accompanied Inspector Brooks into the No. 5900 stacker boom area. He would not cross

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the open area at the end of the walkway. (Tr. 492-493). He further agreed with the Inspector's evaluation. (Tr. 499).

Inspector Brooks testified an accident was reasonably likely. Lost workdays or restricted duty could be the result. (Tr. 442, 443).

The operator's negligence was "moderate" since the violative condition was apparent. Gravity was "high" since a fall of 25 to 30 feet could result in a disabling injury.

On the uncontroverted evidence Citation No. 3913830 is AFFIRMED.

Docket No. WEST 93-435-M

Citation No. 3913831

This citation alleges an S&S violation of 30 C.F.R. 56.11002. The regulation provides

56.11002 Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

Inspector Brooks observed there were no handrails provided on the elevated walkway of the No. 5800 conveyor. Also, there were no handrails on the south outbound side of the walkway for about 150 feet in length. The outbound side was 20 feet above the ground. Employees use this area on a regular basis. (Tr. 448).

In Mr. Brooks' opinion, an injury was reasonably likely if the violative condition were permitted to continue.

The operator's negligence was "moderate" since the violative condition was apparent and could have been corrected. Gravity was "high"; if a worker fell 20 feet, he could easily sustain fractures or more severe injuries.

Mr. Allen indicated the No. 5800 conveyor was located in the Loadout area.

This condition existed since 1973 and no other inspector has cited it.

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Because of the machine itself, it took some engineering to abate the citation. Fold down/up handrails were installed. Inspector Brooks terminated the citation with such insulation.

In January 1993, another inspector concluded the fold down/up handrails were a hazard themselves. (Ex. R-6 to R-10, Tr. 831-842).

Discussion

The defense here raises estoppel issues against MSHA. However, estoppel does not lie in these circumstances.

Citation No. 3913831 is AFFIRMED.

Docket No. WEST 93-110-M

Citation No. 3913832

This citation alleges an S&S violation of 30 C.F.R. 56.14112. The regulation provides

56.14112 Construction and maintenance of guards.

(b) Guards 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.

In the Load Out Area, Inspector Brooks observed the drive belts and pulleys at the No. 5390 head pulley conveyor were not properly guarded. (Tr. 457). The guard was lying on the walkway. The unguarded belt was 44 inches above the walkway. Pinch points created by the belts and pulleys presented a hazard. Workers could contact the area and an amputation was likely. (Tr. 458).

Mr. Brooks expressed the view that an accident was reasonably likely to occur if the condition were not corrected. Further, such an injury could result in an amputation.

The operator was negligent since it could have observed and remedied this condition. Gravity was "high" in view of the potential for severe injuries resulting from an entanglement.

Mr. Allen was not present when this citation was issued. He knows nothing about the condition. (Tr. 814).

On the uncontroverted evidence, Citation No. 3913832 is AFFIRMED.

Docket No. WEST 93-110-M

Citation No. 3913833

This citation alleges an S&S violation of 30 C.F.R. 56.11099. The regulation provides

56.11009 Walkways along conveyors.

Walkways with outboard railings shall be provided wherever persons are required to walk alongside elevated conveyor belts. Inclined railed walkways shall be nonskid or provided with cleats.

Inspector Brooks testified the inclined wooden walkway along the No. 5390 conveyor had several missing cleats. The walkway was 80 to 100 feet long and at an angle of 25 to 30 degrees. About 15 feet lacked cleats which should have been 16 to 18 inches apart. The walkway was on the top of a silo of the highest places in the plant. It was 80 to 100 feet above ground level. The hazard was a possible trip and fall. (Tr. 463).

In Mr. Brooks' opinion, an accident was reasonably likely. A resulting injury could be a bruised knee, sprain, or bruises.

The operator was moderately negligent. The violative condition could have been observed and remedied. The gravity was "high" in view of the possibility of a severe fall.

Mr. Allen indicated the walkway is used only rarely. A more convenient way was available to go to the lightweight silos. The walkway was not dangerous.

Discussion

I reject Mr. Allen's testimony that this walkway was not dangerous. A worker could fall 80 to 100 feet to the ground. This was an S&S violation.

On the credible evidence, Citation No. 3913833 is AFFIRMED.

Docket No. 93-110-M

Citation No. 3913834

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

Inspector Brooks testified the drive pulleys at the No. 5520 Symon Screen were not properly guarded. The screen was used at

~1547

the top of the silo to size products coming onto the conveyor. The back side of the pulleys, two feet from the walkway, were not guarded. Workers were in the immediate area and fingers and hands could be caught in the pinch points. (Tr. 469, 470).

Inspector Brooks indicated it was reasonably likely that an injury would occur if the condition were not corrected. Such an accident could reasonably be permanently disabling.

The operator was moderately negligent; it could have observed and remedied these conditions. Gravity was "high" since fingers and hands could be caught in the pinch points.

Mr. Allen indicated he was not present when the citation was issued. (Tr. 814).

Based on the uncontroverted evidence, Citation No. 3913834 is AFFIRMED.

Docket No. WEST 93-110-M

Citation No. 3913835

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

In the Loadout Area Inspector Brooks cited the self-cleaning tail pulley on the No. 5521 conveyor. The tail pulley, 30 inches above the spillage level, was not properly guarded. On the sides of the pulley there was some guarding but some of it contained openings large enough to put a fist through.

Mr. Brooks' notes indicate there were holes but the notes do not reflect their size. He would not write a citation if there had only been grease holes. Employees travel by the area on a regular basis to service the equipment. (Tr. 474).

Inspector Brooks testified an accident was reasonably likely in these circumstances. If it occurred, the equipment could mangle a hand or an arm.

The operator was moderately negligent; it could have observed and remedied this condition. Gravity was "high" since a hand or an arm could become entangled in the moving machine parts. There was also the potential of tripping and falling to the ground.

Mr. Allen testified he was not present when this citation was issued. (Tr. 818).

Based on the uncontroverted evidence, Citation No. 3913835 is AFFIRMED.

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Docket No. WEST 93-110-M

Citation No. 3913836

This citation alleges an S&S violation of 30 C.F.R. 56.20003. The regulation provides

56.20003 Housekeeping.

At all mining operations--

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

Inspector Brooks observed that there were several work places on the 100-foot by 30-foot tops of the LWA (lightweight aggregates). The silo work places were not being kept clean and orderly. (Tr. 577).

The No. 5510 screen deck had several six-foot by six-foot pieces of screen lying on the walkway creating a hazard. In some areas, spillage had accumulated within 20 inches of the tops of the handrails. Two or three silos and maybe six or eight were involved. The hazards also involved spillage and unsafe access since pieces of screen presented a tripping hazard. It was 80 feet to ground level. (The silos can be seen in approximately the center of Exhibit R-1.)

In Mr. Brooks' opinion, an injury was reasonably likely if the condition continued unabated. If workers fell, they could strain ankles and wrists as well as break bones. A fatality could happen if a worker fell 80 feet to the ground.

The operator was moderately negligent; the violative condition was obvious. Gravity was high due to the potential of an 80-foot fall.

Mr. Allen was not present when this citation was issued. (Tr. 818).

On the uncontroverted evidence, Citation No. 3913836 is AFFIRMED.

Docket No. WEST 93-110-M

Citation No. 3913837

This citation alleges an S&S violation of 30 C.F.R. 56.12032. The regulation provides

~1549

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Inspector Brooks issued this citation when he observed a junction box with several exposed energized conductors. The 8-by 12-inch opening lacked a cover. It was located at the top of No. 2 silo, alongside the No. 5521 conveyor. The Inspector was not able to determine if workers were in the area. The hazard involved the exposed internal conductors. Most of the plant had 440 volts A.C. but the Inspector did not know the voltage of the exposed conductors. (Tr. 599).

The Inspector considered an accident to be unlikely because the junction box was situated at below the working level at the top of No. 2 silo. However, if an accident occurred, a worker could sustain burns or electrocution. (Tr. 602).

The operator was moderately negligent since the company could have observed and remedied this condition. Gravity was "high." Although an accident was not likely, if it did occur, it could cause a fatality.

Mr. Allen testified he was not present when this citation was issued. (Tr. 819, 820).

Discussion

Since there is no evidence that an accident was reasonably likely, the S&S allegations are STRICKEN.

On the credible evidence, Citation No. 3913837 is otherwise AFFIRMED.

Docket No. WEST 93-110-M

Citation No. 3913838

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

Inspector Brooks issued this citation when he observed the self-cleaning tail pulley on the No. 5575 conveyor was not guarded as required by regulation.

Employees work around the pulleys on a regular basis and they were exposed to the rotating fins of the pulley. There was a 12-inch horizontal reach to the hazard and a 28-inch reach from

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the back side. The hazards were below the seven-foot limit. (Tr. 605, 606).

Workers could sustain cuts or be mangled if entangled with the metal flutes on the stationary part of the pulley. Workers clean the tail pulley once each shift, according to Foreman Jasso.

Inspector Brooks indicated an accident was reasonably likely if the condition were not corrected in a timely manner. Such an accident would result in a permanent injury.

The operator was moderately negligent. It should have observed and corrected the violative condition. Gravity was "high" since there was a potential for entanglement and a severe injury.

Mr. Allen did not offer any contrary evidence on behalf of the operator. (Tr. 820).

On the uncontroverted evidence, Citation no. 3913838 is AFFIRMED.

Docket No. WEST 93-110-M

Citation No. 3913839

This citation alleges an S&S violation of 30 C.F.R. 56.9300(a). The regulation provides

56.9300(a) Berms or guardrails.

(a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.

Inspector Brooks observed the "main haul road" located on the south side of the plant lacked berms as required. The roadway is 20 feet wide and curves slightly. (Tr. 615). Alongside the roadway was a 20-foot dropoff at an angle of about 90 degrees for a distance of 150 feet. The roadway is at a five degree angle. Commercial trucks and a 966 front-end loader use the road. The "main haul road" was a company designation. [Inspector Brooks marked the road on Exhibit R-1.]

The hazard involved here was the possibility of a vehicle overturning. If this occurred, head injuries and a possible fatality could occur.

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Inspector Brooks further concluded that an accident was reasonably likely if the condition were not corrected.

The operator was moderately negligent; the violative condition could have been corrected.

The gravity is "high" since head injuries and/or a possible fatality could occur.

On the uncontroverted evidence, Citation No. 3913839 is AFFIRMED.

Docket No. WEST 93-108-M

Citation No. 3913840

This citation alleges a violation of 30 C.F.R. 56.14132(b). The regulation provides

56.14132 Horns and backup alarms.

(a) Manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

(b)(1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have--

(i) An automatic reverse-activated signal alarm;

Inspector Brooks asked the operator of a White Freightliner vacuum truck to back up the vehicle. He then found the vehicle had no backup alarm. (Tr. 631, 632). An alarm serves to warn any person behind the vehicle.

There was not much traffic in the area nor did the Inspector see any employees in the vicinity.

Mr. Brooks considered that a fatality could result from this condition but, in his opinion, the violation was not S&S.

The operator was moderately negligent since it could have discovered this violative condition.

Gravity should be considered "high" since a fatality could result from the violative condition.

On the uncontroverted evidence, Citation No. 3913840 is AFFIRMED.

CARISOZA CITATIONS

THRESHOLD ISSUES

The threshold issue is whether an MSHA Inspector's notes are admissible in an enforcement proceeding as direct evidence of a violative condition.

ART S. CARISOZA, a former MSHA Inspector, issued 27 contested citations involving Port Costa. At the commencement of the hearing, Counsel for the Secretary represented that Mr. Carisoza was no longer an MSHA employee. He had been subpoenaed as a witness but the Secretary declined to move for enforcement of the subpoena. (Tr. 35-38). Counsel for the Secretary also filed three letters concerning Mr. Carisoza (Exs. J-1, J-2, and J-3).

In his initial response to the subpoena [on February 8, 1994], Mr. Carisoza stated seven reasons why he could not appear as a witness. On February 9, 1994, Counsel for the Secretary replied to Mr. Carisoza's letter. On February 10, 1994, Mr. Carisoza, by letter, moved to quash the subpoena because of hardship, excessive travel (Seattle to Southern California), lack of agreement with MSHA on compensation, and possible conflict of interest. (See Exs. J-1, J-2, J-3).

Port Costa objected to the use of the Inspector's notes and objected to the failure of the Secretary to produce Mr. Carisoza since the Administrative Procedure Act grants a party the right of cross-examination.

In the absence of a motion to enforce the Carisoza subpoena, the Judge ordered the hearing to proceed.

WILLIE J. DAVIS was called as a witness. He testified that he has been an MSHA Supervisory Mine Inspector since 1988 and in MSHA's employ since 1978. (Tr. 42-43). If an MSHA Inspector observes a violation of federal law, he notes the violations on his safety field notes, MSHA Form 4000-49. When he leaves the site, these notes contain all of the pertinent information to issue the appropriate action as to observed violations.

It is MSHA's procedure that a Form 4000-49 should be filled out with respect to each condition noted by the Inspector. A blank copy of MSHA's Form 4000-49 was identified. (Tr. 45).

Mr. Davis further identified Exhibit P-1 as a copy of Mr. Carisoza's original field notes.

Mr. Carisoza's inspection at Port Costa began as an inspector on January 7, 1993. Subsequently, he reviewed his notes with Mr. Davis.

~1553

This discussion was at the completion of the regular inspection and before Mr. Carisoza returned to the mine site for a closing conference. (Tr. 46). Mr. Davis did not attend the closing conference. (Tr. 48).

Mr. Carisoza's 27 citations are now docketed under WEST 93-353-M, WEST 93-366-M, WEST 93-428-M, WEST 93-435-M, and WEST 93-485-M.

Exhibit P-1, the Inspector's field notes on MSHA Form 4000-49, contain places to identify the Inspector, the mine, the date, and time, as well as the operator, its I.D. number, and location. In addition, the form identifies the persons accompanying the Inspector. A space on the form is available for any Citation/Order number. In addition, there are categories such as condition or practice; area or equipment (Machine Number/Description), Hazard, Exposure (Number of men), Location (Measurements), Employee Comments. (Ex. P-1).

Discussion

Port Costa strenuously objected to the use of Mr. Carisoza's notes. While the Judge expressed some reservations as to the admissibility of such field notes, he concluded such documents were admissible. The Commission has always expressed the view that hearsay is admissible in its administrative proceedings.

A number of the Carisoza citations are alleged to be S&S. As to such allegations, I agree with the Secretary that "consideration of whether or not something is S&S necessarily involves much more of whether or not there is a particular box on an official form that has been checked." [Section II, Inspector's evaluation under 10(c) of the field notes contains a "yes" or "no" box for "Significant and Substantial."]

I further concur with the Secretary that "the [S&S] determination flows from the facts and the reasonable inferences from the facts that can be drawn." (Tr. 61).

The issue now presented is whether records of regularly conducted activity are admissible in evidence. Rule 803(6) of the Federal Rules of Evidence provides:

(6) Records of regularly conducted activity.

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by a person with knowledge, if kept in the course of regularly conducted business activity, and if it was the regular practice

of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

If such a report is admissible in evidence, the availability of the declarant is immaterial. In re King Enterprises, Inc., 678 F.2d 73, (8th Cir. 1982); Kuhlman, Inc. v. United States v. Fendley, 522 F.2d 181 (5th Cir. 1975), Lewis v. Baker, 526 F.2d 470 (2d Cir. 1975).

On the basis of Mr. Davis's testimony, it follows that Exhibit P-1 was admissible and it was received in evidence. Further, Port Costa's objections were OVERRULED.

In transcribing Mr. Carisoza's notes to this decision, certain spaces were left blank with an underline because the missing word or words were not legible to the Judge. In addition, Mr. Carisoza's notes are not handwritten but printed. The printing in this decision follows the line format used by Mr. Carisoza in his field notes.

Docket No. 93-353-M

Citation No. 3636548

This citation alleges in part that the main electrical substation at the quarry operation did not have the dry vegetation removed from inside the fence surrounding the substation to minimize a fire hazard potential.

It is alleged these conditions constitute a non-S&S violation of 30 C.F.R. 56.4130(b). The regulation provides:

56.4130 Electric substations and liquid storage facilities.

(b) The area within the 25-foot perimeter shall be kept free of dry vegetation.

Mr. Carisoza's field notes (Ex. P-1, pp. 24, 25) as to condition state as follows:

ELECTRICAL SUB AT QUARRY
DRY WEEDS INSIDE FENCE

~1555

BEEN HERE LONG TIME
RAIN TODAY
DEAD GRASS-WEEDS

The notes also indicated the location of a

6-FOOT INSIDE FENCE

Mr. Carisoza's notes indicate the operator was moderately negligent. Further, it was noted the condition should have been seen every day.

The occurrence of the event under gravity was rated "unlikely." The injury resulting, as contemplated by the occurrence, was "lost work days or restricted duty." "Burns" were also noted.

Discussion

The evidence indicates the area within the 25-foot perimeter of the electrical substation was not kept free of dry vegetation. This constituted a violation of the regulation.

On the credible evidence, Citation No. 3636548 is AFFIRMED.

Docket No. 93-353-M

Citation No. 3636549

This citation alleges, in part, that the portable extension light (drop light) used at the No. 3115 conveyor location over the bunker of silos did not have a guard protecting the exposed light bulb (flood-lamp type) that was energized.

It is further alleged these conditions constituted an S&S violation of 30 C.F.R. 56.12034 which provides:

56.12034 Guarding around lights.

Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Mr. Carisoza's field notes (Ex. P-1, pp. 26, 27) state:

ELECTRICAL SUB AT QUARRY
USED AT THE 3115 CONVEYOR
Location over bunker DID NOT
have a guard protecting the
exposed light-bulb flood-lamp
type.

~1556

Mr. Carisoza's notes under gravity classify the occurrence of the event as "reasonably likely." Further, the injury resulting as contemplated by the occurrence was "lost work days or restricted duty."

Mr. Carisoza's notes indicate Port Costa was moderately negligent. It was further noted that the condition should have been seen.

Discussion

Mr. Carisoza's notes indicate the violative condition was "located waist-high" at the No. 3115 conveyor. Further, it is indicated that the hazard was burn or shock.

The facts in the notes establish the S&S allegations.

Citation No. 3636549 is AFFIRMED.

Docket No. 93-353-M

Citation No. 3636550

This citation alleges, in part, that the portable 110-volt extension light (floodlight) used at the No. 3275 transfer chute area of the mill did not have a guard over the unprotected bulb to reduce a shock or burn hazard potential.

It was further alleged that these conditions constituted an S&S violation of 30 C.F.R. 12034 which provides:

56.12034 Guarding around lights.

Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

Mr. Carisoza's notes described the condition as:

EXTENSION CORD DROP-LIGHT
KILN 1 FLOOD LAMP
3275 TRANSITION CHUTE
NO PROTECTION SET OVER HANDRAIL
CAN BE CONTACTED BURN/SHOCK
CATWALK AREA - MOVED MANUALLY

Mr. Carisoza's notes described the gravity as "reasonably likely." It was further noted that there was wet weather and the

~1557

light was ungrounded and energized. The notes also described a possible injury as "fatal."

The notes identify Port Costa as being "moderately negligent."

Discussion

The notes indicate that a drop-light flood-lamp can be contacted and a worker burned or shocked. The S&S allegations are AFFIRMED.

Citation No. 3636550 is AFFIRMED.

Docket No. 93-353-M

Citation No. 3636551

This citation alleges, in part, that the portable extension light at the No. 3275 transition chute area of the mill was not grounded to reduce the shock hazard potential.

It is further alleged the described conditions constituted an S&S violation of 30 C.F.R. 56.12025 which provides:

56.12025 Grounding circuit enclosures.

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

Mr. Carisoza's field notes (Ex. P-1, pp. 30, 31) indicate the following:

DROP LIGHT AT 3275 TRANSITION CHUTE -
NOT GROUNDED - EXTENSION CORD GAD PRONG
MISSING - LIGHT UNGROUNDED ALSO - HANDLED
MANUALLY - COMMON PRACTICE - WET CONDITIONS

It was further noted that the 15 or 20 men in the mill were exposed to the hazards of burns and 110-volt shock.

Mr. Carisoza's notes under "gravity" indicate the occurrence of the event was "reasonably likely." Further, the resulting injury was noted as "permanently disabling." In addition to the unprotected lights, wet conditions were involved.

The operation was "moderately" negligent as this condition should have been seen. It was also commonplace throughout the plant.

Discussion

No evidence established that these were "all metal enclosing or encasing electrical circuits." This is an essential item of proof in connection with this regulation.

Citation No. 3636551 is VACATED.

Docket No. 93-428-M

Citation No. 3636552

This citation alleges there was an excessive buildup of spilled material around the tail pulley walkway and in the west walkway of the No. 3450 conveyor. The area was not clean to minimize a slip/trip hazard potential. It is alleged those conditions were an S&S violation of 30 C.F.R. 56.20003(a), which provides:

56.20003 Housekeeping.

At all mining operations--

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly.

Mr. Carisoza's notes (Ex. P-1, pp. 32, 33) describe the following condition:

EXCESSIVE SPILLS - BUILT UP AROUND
WALKWAYS OF NO. 3450 CONVEYOR
SLIP/TRIP PRESENT - SPILLS UP TO
TOP HANDRAILS PACKED DOWN FROM
WALKING OVER IT - WET MUDDY - RAIN

Employee comments on the form were: "Allen agreed, said spills BAD. NO EXCUSE."

Under "gravity" of Mr. Carisoza's notes it is indicated that the occurrence of the event was "reasonably likely." The condition was also described as "wet muddy." In the event of an injury as contemplated by the occurrence, "lost workdays" or "restricted duty" could result.

The notes classify the operator's negligence as "moderate" because this condition should have been seen. It was further indicated that it "should have been seen during daily exams."

Discussion

While Mr. Carisoza marked the box to show this was an S&S violation, no evidence was introduced to show how this hazard could result in an injury of a reasonably serious nature. Accordingly the S&S allegations are STRICKEN.

Citation No. 3636552, as modified, is AFFIRMED.

Docket No. 93-353-M

Citation No. 3636553

This citation alleges that the 440-volt 4 conductor S/O cable to the shop-long saw had been spliced with twist tape connectors and then taped. The tape had unwrapped itself. The splice did not protect against moisture, was not mechanically strong, and did not provide insulated protection to that of the original cover jacket. It is alleged that the described condition was a violation of 30 C.F.R. 56.12013 which provides:

56.12013 Splices and repairs of power cables.

Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be:

- (a) Mechanically strong with electrical conductivity as near as possible to that of the original;
- (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and
- (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Mr. Carisoza's field notes (Ex. P-1, p. 34) do not identify this citation by number. The notes concerning the condition state:

440-volt S/O CABLE TO -
 - SPLICED WITH TWISTERS AND
 TAPE PULLED APART
 CONNECTORS VISIBLE - METAL DROPPED.

Discussion

The failure to identify his field notes to the particular citation and the vagueness of the description cause me to con-

~1560

clude that the evidence as to this particular citation is not reliable.

Accordingly, Citation No. 3636553 is VACATED.

Docket No. 93-428-M

Citation No. 3636554

This citation alleges in part that the main 225-A circuit breaker for the circuit breaker panel was removed and the multiple 30-amp individual breakers were utilized for overload protection only. It is alleged this condition violated 30 C.F.R. 56.12001 which provides

56.12001 Circuit overload protection.

Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.

Mr. Carisoza's field notes (Ex. P-1, p. 36BB) appear in sequence. As to condition it reads:

THE CIRCUIT BREAKER PANEL FOR THE
SHED DID NOT HAVE THE IN
PLACE TO PROTECT AGAINST ACCIDENTAL
CONTACT WITH THE EXPOSED BUSS BARS.

Discussion

The citation and the regulation address overload protection. However, the only available evidence deals with accidental contact with exposed buss bars.

The Secretary failed to prove his case and Citation No. 3636554 is VACATED.

Docket No. 93-353-M

Citation No. 3636555

This citation alleges in part that the portable extension light at the blending bins did not have a guard. It is alleged this condition violated 30 C.F.R. 56.12034 which provides:

56.12034 Guarding around lights.

Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.

~1561

Mr. Carisoza's field notes (Ex. P-1, pp. 43, 44) as to condition read:

DROP LIGHT AT TOP OF BLENDING BIN
(12) NOT PROTECTED -
110-VOLT YELLOW DROP CORD
ACCIDENTAL CONTACT WITH THE

Mr. Carisoza's notes also show 12 men were exposed to the hazard of burn/shock - 110 v.

Discussion

The notes basically state that the drop light was not protected. Further, 12 men were exposed to the burn/shock hazard.

Citation No. 3636555 is AFFIRMED.

Docket No. 93-353-M

Citation No. 3636556

This citation alleges in part that the cover plate for the electrical control junction box at the front of bin 12 was off while the 110-v electrical power was energized. It is alleged this condition violated 30 C.F.R. 56.12032 which provides:

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Carisoza's field notes (Ex. P-1, p. 45, 46) as to condition read:

(top line
illegible). Bin 12 11-v NOT PRO-
TECTED - 110-VOLT LYING ON _____ .

The Secretary failed to present sufficient facts to establish a violation of the present regulation.

Citation No. 3636556 is VACATED.

~1562

Docket No. 93-353-M

Citation No. 3636557

This citation alleges in part that the door to the main circuit breaker panel was left open. A small fan was positioned to blow air on the breaker. It is alleged this condition was an S&S violation of 30 C.F.R. 56.12032. The regulation provides:

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Carisoza's field notes (Ex. P-1, pp. 47, 48) describe the following condition:

M 5030 I.D. FAN MAIN BREAKER PANEL
480-VOLT CIRCUIT HEATING UP - DOOR
OPEN
USING FAN TO COOL UNIT

Under "gravity" in Mr. Carisoza's notes the occurrence of the event was shown as "reasonably likely." Further, it was indicated people were in the room on a daily basis and a flash had occurred previously. The injury resulting, as contemplated by the occurrence, could be fatal. Also, a 480-volt shock as well as a fire and burn were noted as possible.

Mr. Carisoza's notes classified the operator's negligence "moderate." The violative condition was in plain view as it should have been noted during daily checks.

Discussion

A fan cooling a unit through an open door certainly indicates the cover plate was "not kept in place at all times," as provided in the regulation.

Citation No. 3636557 is AFFIRMED.

Docket No. 93-428-M

Citation No. 3636558

This citation alleges the MCC room that houses major electrical equipment was not posted with danger warning signs. It is

~1563

alleged this condition violated 30 C.F.R. 56.12021 which provides:

56.12021 Danger signs.

Suitable danger signs shall be posted at all major electrical installations.

Mr. Carisoza's field notes (Ex. P-1, p. 50) contain the second page of MSHA Form 4000-49. However, the first page of the form is missing.

Since there was a failure of proof, Citation No. 3636558 is VACATED.

Docket Nos. 93-428-M, WEST 93-485-M

Citation Nos. 3636559, 3636560, 3636561, 3636569, 3636575, and 3636576

These six citations allege the catwalks, travelways, work decks, and stairways [at various identified areas] within the milling facility were not being kept reasonably clean to reduce or minimize potential slipping, tripping, and stumbling hazards created by the conditions presented. It is alleged these conditions were an S&S violation of 30 C.F.R. 56.20003(a) which provides:

56.20003 Housekeeping.

At all mining operations--
(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

Mr. Carisoza's field notes (Ex. P-1, pp. 79AA, 80AA, 81, 82, 83AA) involve six housekeeping citations at locations inspected between 0919 hours and 1215 hours (p. 80AA). The notes relate to all citations in which he described the following conditions:

HOUSEKEEPING HAZARDS NOTED DURING
INSPECTION - WHILE DOING INSPECTION
IT WAS NOT THAT WORKERS WERE NOT
PICKING UP ITEMS AFTER REPAIR OF
MAJOR SPILLS PLANTWIDE

Page 80AA of the notes contains 13 lines. The legible items include:

SPILLS - BIG SPILLS
CATWALK _____
PIPES OF _____

~1564

PALLETS
SHOVELS

Further, Mr. Carisoza's notes indicate that 25 men were exposed to slip/trip, stumbling hazards. In addition, it was indicated this condition was plantwise. Employees' comments stated "all agreed housekeeping a problem plantwise." (Ex. P-1; p. 78AA).

Mr. Carisoza's notes under "gravity" indicated that the occurrence of the event was "reasonably likely." Further, it was noted that the major cause was LTA's poor housekeeping practices. A resulting injury as contemplated by the occurrence would be "lost work days" or "restricted duty." (Ex. P-1, p. 79AA).

The notes at page 79AA indicate the operator was moderately negligent. Further, the company should have set priorities.

Discussion

The Carisoza notes received in evidence establish violations of the regulation.

Citation Nos. 3636559, 3636560, 3636561, 3636569, 3636575, and 3636576 are AFFIRMED.

Docket No. 93-353-M

Citation No. 3636562

This citation alleges in part that two portable extension lights used at the extruder screw did not have guards over the lights to protect a person against a burn or shock hazard potential from the unprotected lights. It is alleged these conditions were an S&S violation of 30 C.F.R. 56.22034 which provides:

56.12034 Guarding around lights.

Portable extension lights and other lights that by their location present a shock or burn hazard, shall be guarded.

The top two lines of Mr. Carisoza's notes (Ex. P-1, pp. 51 and 52) are legible. These indicate:

DROP LIGHTS 110-V USED PANEL 480-
VOLT EXTRUDER - NOT GUARDED

The field notes also show five men were exposed to fire/burn.

~1565

The field notes in relation to gravity state that the occurrence of the event was "reasonably likely." Further, "a wet area" and "continued practice plantwide" were noted. Mr. Carisoza's notes also reflect that the injuries resulting, as contemplated by the occurrence, were "lost work days or restricted duty."

The field notes indicate the operator was moderately negligent. This was also identified as "common practice plantwide."

Discussion

The Carisoza notes indicate a drop light was not guarded and five men were exposed to fire/burn.

Citation No. 3636562 is AFFIRMED.

Docket No. 93-366-M

Citation No. 3636563

This citation alleges in part that the cover that holds 110-volt bin indicator bell in place at the extruder control panel was off, exposing the conductors inside the box to accidental contact. It is alleged this condition violated 30 C.F.R.

56.12032 which provides

56.12032 Inspection and cover plates.

Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.

Mr. Carisoza's notes (Ex. P-1, pp. 53, 54) as to the violative condition are all essentially illegible. Due to a failure of proof, Citation No. 3636563 is VACATED.

Docket No. 93-428-M

Citation No. 3636564

This citation alleges in part that the two water/shower-eye washing stations at the scrubber area of the mill where caustic waters are used did not work when checked. It is alleged these conditions violate 30 C.F.R. 56.15001 which provides:

56.15001 First-aid materials.

Adequate first-aid materials, including stretchers and blankets, shall be provided at

~1566

places convenient to all working areas.
Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

Mr. Carisoza's notes (Ex. P-1, pp. 55, 56) describe the following condition:

SCRUBBER AREA BATH-EYE WASHING
STATION DO NOT FUNCTION

[The final two lines are
illegible.]

The form further indicates four or more men in the scrubber area were exposed to the hazard of burn to eyes/face.

Mr. Carisoza's notes further indicated the operator's negligence was "high." The notation states "Mgmt knew they were here and not hooked up." Gravity indicated as "unlikely" and a "minimum hazard."

Discussion

The facts from Mr. Carisoza's notes indicate water and neutralizing agents were not available. Further, workers were exposed to the hazard of burns to eyes and face.

Citation No. 3636564 is AFFIRMED.

Docket No. 93-485-M

Citation No. 3636565

This citation alleges in part that the low and restricted head clearances at the top of the No. 5510 area silos (Light-weight Silo Area) were not posted with warning signs to alert employees of the restricted clearances. It is alleged these conditions violate 30 C.F.R. 56.11008 which provides:

56.11008 Restricted clearance.

Where restricted clearance creates a hazard to persons, the restricted clearance shall be conspicuously marked.

Mr. Carisoza's notes (Ex. P-1, pp. 57, 58) under "condition" indicated the following:

PVC
PIPE ACROSS STAIRWAY AND LOW
CROSSBEAM BRACE _____

OF STAIR _____ -

Discussion

The evidence by Mr. Carisoza's notes failed to establish a violation of the regulation. However, additional evidence was involved here. In his failure to abate the order (No. 3636785), Inspector Brooks testified the company was cited because of the "areas on top of the lightweight silos with low and restricted head clearances with no warning signs to alert employees to these types of areas." Further, Inspector Brooks observed "there were no signs posted to warn persons of the crossbeams, pipes, and braces where people travel." (Tr. 694).

On the uncontroverted evidence, Citation No. 3636565 is AFFIRMED.

Docket No. 93-435-M

Citation No. 3636566

This citation alleges in part that the No. 5930 conveyor belt at the top area of the lightweight silos was not equipped with emergency stop cords or guardrails along the unprotected side to protect a person from falling onto or into the moving conveyor. It is alleged these conditions constitute an S&S violation of 30 C.F.R. 56.14109 which provides:

56.14109 Unguarded conveyors with adjacent travelways.

Unguarded conveyors next to the travelways shall be equipped with--

(a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily activate the conveyor drive motor; or

(b) Railings which--

(1) Are positioned to prevent persons from falling on or against the conveyor;

(2) Will be able to withstand the vibration, shock, and wear to which they will be subjected during normal operation; and

(3) Are constructed and maintained so that they will not create a hazard.

Mr. Carisoza's notes (Ex. P-1, pp. 59, 60) under "condition" indicate:

5930 NO STOP CORD
[not legible]

~1568

SIDES. 30 FT LACK HORIZONTAL
24" WIDE MODERATE SPEED
OTHERS IN AREA HAVE
INSTALLED/CHANGED

The notes also indicate three men were exposed to the "hazard of a fall onto moving belt."

Mr. Carisoza's notes under "gravity" indicate the occurrence of the event was "reasonably likely."

Mr. Carisoza's field notes describe the operator's negligence as "moderate." The operator's other belts have cords. Further, this violative condition should have been seen during daily checks. As to gravity, Mr. Carisoza indicated a fatality was "unlikely." However, cuts and bruises can be reasonably serious injuries.

Discussion

The notes fail to establish that the unguarded conveyor was next to a travelway. The location of the travelway in such a position is critical with this regulation.

Citation No. 3636566 is VACATED.

Docket No. 93-428-M

Citation No. 3636570

This citation alleges in part that the No. 5415 inclined conveyor at the fine ground area of the milling facility was not equipped with emergency stop cords or guardrails along the traveling areas around this conveyor. It is further alleged these conditions constitute an S&S violation of 30 C.F.R.

56.14109. The regulation regarding "Unguarded conveyors with adjacent travelways" is set forth in the previous citation, No. 3636566.

Mr. Carisoza's notes (Ex. P-1, pp. 63, 64, 65) are essentially illegible as to the "condition." They do not assist the Judge in arriving at a conclusion in this matter.

Due to a failure of proof, Citation No. 3636570 is VACATED.

Docket No. 93-428-M

Citation No. 3636571

This citation alleges in part that the side guards of the No. 5320 hot belt tail pulley at the rotary kiln area were damaged and contact could be made with the moving pulley and

~1569

conveyor belt nip points. It is further alleged these conditions constitute an S&S violation of 30 C.F.R. 56.14112(a) which provides:

56.14112 Construction and maintenance of guards.

(a) Guards shall be constructed and maintained to--

(1) Withstand the vibration, shock, and wear to which they will be subjected during normal operation; and

(2) Not create a hazard by their use.

Mr. Carisoza's notes (Ex. P-1, pp. 66, 67, 68) read:

GUARDS EXPANDED METAL ON TAIL
PULLEY OF
NO. 5330 _____ BELT DAMAGED

_____ TO PROTECT AGAINST _____ WITH
NIP

A drawing of the Carisoza notes (on page 68 of Exhibit P-1) contains the comment:

GUARD BELT - OUT OF POSITION

In considering gravity, the notes (at p. 67, Ex. P-1) stated that the occurrence of an event was "reasonably likely." Further, the injury resulting, as contemplated by the occurrence, could be "permanently disabling." The notes further reflect "loss of body parts or fatal."

Mr. Carisoza's field notes indicate the operator was moderately negligent. Further, the condition was in plain view and it should have been seen during daily exams.

Discussion

Mr. Carisoza's notes contain insufficient facts to establish a violation of 30 C.F.R. 56.14112.

Citation No. 3636571 is VACATED.

~1570

Docket No. 93-435-M

Citation No. 3636572

This citation alleges in part that the sides, sprockets, and pulleys of the No. 5890 bucket elevator at the V-7 area of the milling facility were not guarded where contact could be easily made from both ground level and from the work deck. It is further alleged these conditions constituted an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts), supra.

Mr. Carisoza's notes (Ex. P-1, pp. 69, 70, 71) as to "condition" read:

#5890 BUCKET ELEVATOR BELT
SPROCKETS,
PULLEYS - NOT GUARDED
GAD _____ CONTACT CAN BE MADE
TOP OF BIN-HEAD EXPOSED
_____ SIDES _____

ACCESS AROUND UNIT

The hazard was described as:

CONTACT MOVING PART EXPOSED
LOSS OF BODY PART

In considering gravity, Mr. Carisoza's notes indicate the occurrence of an event was "reasonably likely." Further, employees were seen walking around the area. It was further noted that the injury resulting, as contemplated by the occurrence, would be "permanently disabling." In addition, there could be loss of body parts.

The notes indicate the operator was "moderately negligent." The condition was in open view and it should have been seen during daily checks.

Discussion

The field notes establish the belt sprockets and pulleys were not guarded.

Citation No. 3636572 is AFFIRMED.

~1571

Docket No. 93-428-M

Citation No. 3636573

This citation alleges that the V-belt drives of the No. 5880 conveyor belt were unguarded thereby violating 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

Mr. Carisoza's notes (Ex. P-1, pp. 72, 73, 74) describe the following condition:

V-BELTS AND PULLEY AT NO. 5880 BELT
TO BUCKET _____ NOT GUARD -
MOVES FAST 6 FT HIGH OR HEAD HIGH -
SPILLS IN AREA PUT IT WITHIN
CONTACT - MEN SEEN IN AREA
MEN SEEN WORKING

The hazard was described, in part, as:

LOSS OF HAND - FINGERS

Mr. Carisoza's notes classify the operator's negligence as "moderate." It was also indicated the condition was in an open area and should have been seen on daily checks. In considering "gravity" the notes reflect the occurrence of the event was "unlikely." However, the injury, as contemplated by the occurrence, could be "permanently disabling."

Discussion

The notes indicate the No. 5800 V-belt and pulleys were not guarded.

Citation No. 3636573 is AFFIRMED.

Docket No. 93-435-M

Citation No. 3636574

This citation alleges the metal guard for the V-belt drive of the No. 5890 bucket elevator was lying on the work deck thereby violating 30 C.F.R. 56.14112(b). The regulation reads:

56.14112 Construction and maintenance of
guards.

(b) Guards shall be securely in place while
machinery is being operated, except when

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testing or making adjustments which cannot be performed without removal of the guard.

Mr. Carisoza's notes (Ex. P-1, pp. 75, 76, 77) describe the following condition:

METAL GUARD OFF OF BUCKET
DRIVE BELT - LYING ON DECK
BELT RUNNING - WORK DECK
AROUND HEAD PULLEY AREA & V-BOLT
SPILLS ON DECK - MODERATE SPEED OF
BELT
PULLEY FAST

The hazard was described as:

_____ UNGUARDED V-BELTS
POSITION
NECK HIGH OR SO

The notes classify the operator's negligence as "moderate." The condition was in plain view and in a work area. As a result, they should have been seen. In considering gravity, Mr. Carisoza's notes indicate the occurrence of the event "unlikely." However, an injury resulting could be permanently disabling. Loss of hand/fingers was further noted.

Discussion

The notes indicate the metal guard was off the bucket drive belt.

Citation No. 3636574 is AFFIRMED.

BROOKS II

104(a) Citation and 104(b) Orders

Inspections by Michael Brooks were also conducted in March 1993. On that occasion he issued one citation and seven orders for failure to abate.

A failure to abate order is issued under Section 104(b) of the Act. For an analytical frame of 104(b) orders, see Mid-Continent Resources, Inc., 11 FMSHRC 505 (April 1989).

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Docket No. WEST 93-485-M

Order No. 3636782

On March 25, 1993, Inspector Brooks issued Order No. 3636782 under Section 104(b) of the Act when he observed that safe access had not been provided to the No. 5900 stacker boom. (Tr. 645). Nothing had changed from when he issued Citation No. 3913830 on September 8, 1992. (Tr. 647).

The order was subsequently terminated on April 2, 1993. At that time, the company removed the controls that rotate the stacker boom. This provided safe access. (Tr. 648).

Discussion

On the credible evidence, Order No. 3636782 is AFFIRMED.

Docket No. WEST 93-435-M

Citation No. 3636783

This citation alleges an S&S violation of 30 C.F.R. 56.14107(a) (Moving machine parts, supra)

During his inspection on March 25, 1993, Inspector Brooks noticed the third bin pulley on the No. 5800 conveyor take-up area was not properly guarded. The existing guarding did not provide enough protection to comply with the regulation. It was 44 inches (vertically) from the metal walkway to the pinch area, and a 15-inch horizontal reach. (Tr. 676).

In Inspector Brooks' opinion, a disabling type of injury could occur to a worker if he were pulled into the machine parts. Further, it was reasonably likely that such an accident could occur if this condition were not corrected in a timely fashion.

On the credible evidence, Citation No. 3636783 is AFFIRMED.

Docket No. WEST 93-435-M

Order No. 3636784

This Order was issued under Section 104(b) of the Act. The order alleges the operator failed to abate Citation No. 3636566 issued by Inspector Carisoza.

The Judge overruled the operator's continuing objections that were previously considered in relation to Mr. Carisoza's evidence.

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The Carisoza evidence failed to establish a violation.

Although Inspector Brooks testified as to the issuance of the order, no evidence was offered to prove that the unguarded No. 5930 conveyor was next to a travelway. (Tr. 683-693).

In sum, the evidentiary failure of evidence in connection with Citation No. 3636566 was not remedied.

Due to a failure of proof, Order No. 3636784 is VACATED.

Docket No. WEST 93-485-M

Order No. 3636785

This Order was issued under Section 104(b) of the Act. The order alleges the operator failed to abate Citation No. 3636565 issued by Inspector Carisoza.

Inspector Brooks testified as to his order. (Tr. 693-696). He observed that no signs had been posted to warn persons of crossbeams and the like where they travel. (Tr. 694).

Based on the credible evidence, Order No. 3636785 is AFFIRMED.

Docket No. WEST 93-485-M

Order No. 3636786

This Order was issued under Section 104(b) of the Act. The order alleges the operator failed to abate Citation No. 3636569 issued by Inspector Carisoza.

Inspector Brooks went to the tops of the lightweight silos to investigate and terminate the Carisoza citation. (Tr. 698).

He found there were still tripping and stumbling hazards on top of the silo areas. There were large amounts of spillage, discarded parts, belting, metal parts, and a ladder in the walkway. (Tr. 699).

The order was terminated the day of the inspection.

Housekeeping problems might occur on a recurrent basis. It would take a matter of time for the accumulation to occur.

Order No. 3636786 is AFFIRMED.

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Docket No. WEST 93-435-M

Order No. 3636787

This Order was issued under Section 104(b) of the Act. It alleges the operator failed to abate Citation No. 3636572 issued by Inspector Carisoza.

During his inspection, Mr. Brooks checked to determine whether the operator had complied with the regulation. Mr. Brooks found the sides, sprockets, and pulleys of the No. 5890 bucket elevator had not been guarded. (Tr. 707). The sprockets on pulleys were within seven feet of the ground.

The order was terminated the following day when the guards were installed. (Tr. 709).

On the credible evidence, Order No. 3636787 is AFFIRMED.

Docket No. WEST 93-435-M

Order No. 3636789

This Order was issued under Section 104(b) of the Act. It alleges the operator failed to abate Citation No. 3636574 issued by Inspector Carisoza.

In the area of the No. 5890 bucket elevator, Inspector Brooks found no apparent effort had been made to put the V-belt back on. The guard was lying adjacent to the V-belt drive. Further, the equipment was in operation. (Tr. 711).

The order was terminated the following day.

On the credible evidence, Order No. 3636789 is AFFIRMED.

Additional Port Costa Evidence

The company's evidence does not address the issues of whether a violation occurred but its evidence is generally admissible under the broad umbrella of statutory good faith.

GARY SILVEIRA, a Port Costa maintenance mechanic testified that in the last two years there has been an abrupt change in the company's maintenance efforts. The catwalks had been replaced, new guarding fabrication has been done, and lighting has improved. (Tr. 536-568).

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EDWARD MOAN, operations manager for ECCO Engineering, confirmed they started working at the Port Costa plant in February 1992. He described various work at the plant. (Tr. 593-595).

LARRY E. MORRISON, business agent for International Longshoreman Warehouse Men's Union, Local 6, has been the business agent for Port Costa.

In May 1992, Port Costa contracted major capital improvement work. The company also brought in contractors to expedite safety work in the plant. (Tr. 569-574).

ERNST F. VORHAUER of ECCO Engineering confirmed that he did a lot of in-house safety training at Port Costa.

Mr. Vorhauer also did not know of any injuries at Port Costa. (Tr. 596-598).

LEZLEE WILES handles public relations and accounts receivable for Port Costa.

In September 1992, Mr. Willie Davis called Mr. Stewart. At the time, Mr. Stewart was at the plant and Ms. Wiles asked if she could take a message. Mr. Davis said, "if he had to come out to our plant to go over citations, he would write us up for any violation he found at that time." Ms. Wiles considered his statement unfriendly and somewhat threatening." (Tr. 880-881).

The statements attributed to Mr. Davis might be considered to show prejudice or bias against Port Costa. However, he basically stated his duties as a federal compliance officer.

Ms. Wiles' testimony as to the truck traffic on Carquinez Scenic Drive at Port Costa adds nothing to the merits of the cases. (Tr. 881-887).

LEE ALLEN also testified for Port Costa. His testimony has been reviewed in connection with some citations.

He has been in the employ of Port Costa for 20.5 years. His current position is Production Manager. As such, he is responsible for all production personnel, shipping and receiving. (Tr. 719).

Prior to 1992, the plant was pretty well run-down. Mr. Allen was aware of violations by the plant even though he didn't go on MSHA inspections.

Mr. Allen was not aware of any employee being injured by an inadequate guard or by an electrical shock. (Tr. 721).

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Mr. Allen identified the four general areas of the plant. (Tr. 722). He further identified Port Costa's material flow sheet. (Ex. R-3; Tr. 723).

Mr. Allen accompanied Inspector Brooks in August 1992 for four days. (Tr. 726, 727). The flow of materials starts with the lowest No. 2150. From there the numbers increase. (Tr. 728). The equipment is all interlocked.

In Mr. Allen's opinion, the guarding in place was adequate. The guard passed prior inspections. (Tr. 731).

After the first two of days of his inspection, Mr. Brooks seemed to get a little frustrated.

As to some of the guards, he said they didn't extend back far enough. It seemed to Mr. Allen that it was Mr. Brooks' discretion as to the reach. (Tr. 732, 733).

Mr. Allen identified the No. 5900 stacker conveyer. Before Mr. Brooks' visit, a worker could come up a stairway, then go along No. 5610 and across the No. 5615. Then he can get a stairwell that goes up from No. 5800. He then walks down the No. 5800 (there are a couple of steps up). He walks around the mid-pulleys of the No. 5800 and then another stairwell that goes back down the No. 5800 conveyer catwalk. He walks across the catwalk and then up another stair to get to a stairwell and then he steps onto the stacker boom. (Tr. 734).

In the position it was, there was no ladder for a worker to climb upon. The stacker belt is one unit even though it has two numbers on it. (Tr. 735). The stacker system is like a tractor on a big rig with the trailer behind it. (Tr. 735).

Moving the electrical boxes off the tower made access more difficult because you had to have the stacker in one position to access it. (Tr. 737).

Additional Civil Penalty Criteria

Certain civil penalty criteria have been previously discussed. Additional criteria include the operator's history of previous violations, the size of the business of the operator, the effect of the penalties on the operator's ability to continue in business, and the good faith of the company.

Port Costa's history of previous violations is contained in Exhibit P-3. The first inspections were conducted by Mr. Brooks beginning August 27, 1992. Port Costa's history by the Secretary's computer printout indicates Port Costa received a total of

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145 citations before Inspector Brooks' initial inspection. The Judge further recognizes that some of the prior history occurred before the present management of Port Costa assumed responsibility for the company's activities.

Mr. Ross Gephart testified as to the effect of the penalties on the company's ability to continue in business. He took over as President of Port Costa Materials in January 1992. At that time, the three main areas of safety concern were electrical safety, catwalks, and truck traffic safety. (Tr. 892-909).

The witness introduced certain financial statements of PLA Holdings, the parent company of Port Costa Materials. (Ex. R-16 through R-21; Tr. 893). The Judge received the documents in camera. They were sealed and can only be opened by the Presiding Judge or the Commission. They are part of the record, but the Judge indicated that by the time the case is heard on appeal, the release of the propriety information at that time should not adversely affect the company. (Tr. 895).

In sum, the evidence also shows that Port Costa Materials contributed a substantial portion of the holding company's losses in 1991. (Tr. 897; Ex. R-16, R-17).

Mr. Gephart further submitted the company's 1992 OSHA/MSHA form of reportable injuries. Mr. Gephart's opinion, none of the reported injuries were a result of a mechanical condition.

Both Messrs. Gephart and Stewart share MSHA's view that it was not a safe plant. (Tr. 912).

A \$4,000,000 plus capital plan is in temporary limbo for two reasons: (1) the expiring union contract and (2) the multiple citations from MSHA for 1993 for \$154,000. The company does not have the money to pay the MSHA fines. (Tr. 913, 914).

Mr. Gephart believes the letter written by the Acting Assistant Secretary of Mine Safety and Health, Mr. Edward Hugler, is inaccurate in stating that conditions [at Port Costa] have deteriorated in the last two years. On the contrary, Mr. Gephart believes the conditions have improved. (Tr. 914-915). Further, safety is one of the company's stated goals. (Tr. 920). Mr. Gephart indicated PLA Holdings is a very small business. (Tr. 900-901).

Through 1993, safety improvements on the capital side cost \$571,000. (Tr. 901). Routine repair work for correcting MSHA deficiencies are not reflected in the company documents. (Tr. 901). The company spent in excess of \$1,000,000 on safety in the last two years in the Port Costa plant. (Tr. 902).

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In the last two years, the company's insurance or experience modification factor has been reduced from 142 percent to 115 percent. Also, workmen's compensation insurance was reduced over 50 percent. In dollar terms, this reduction is approximately \$10,000 a month. (Ex. R-20; Tr. 906).

After he took over as president in 1992, Mr. Gephart focused on workman's compensation and other priority issues.

In 1992, they were inundated with MSHA safety violations. Mr. Gephart felt Port Costa is fortunate that a serious accident has not occurred.

Discussion

I agree with Port Costa that it has been fortunate that no serious injuries had occurred at its plant.

Port Costa's evidence shows it has incurred substantial losses in 1991 (Tr. 894), and while 1993 earnings are not complete, further losses are indicated. (Tr. 899).

However, the Commission has held that civil penalties may not be eliminated because the Mine Act requires that a penalty be assessed for each violation of 30 U.S.C. 820(a). Tazco, Inc., 3 FMSHRC 1895, 1897 (August 1991). Further, the Commission has noted that financial statements showing a loss are not sufficient to reduce penalties. Peggs Run Coal Co., 3 IBMA 404, 413-414 (November 1974); Spurlock Mining Co., Inc., 16 FMSHRC 697 (April 1994).

In the instant case, the evidence is insufficient to establish that the imposition of penalties will cause Port Costa Materials to discontinue in business. The company appears to have a substantial cash flow at this time.

Port Costa demonstrated statutory good faith in abating the Brooks I citations.

Concerning the operator's size: the record reflects that Port Costa has 28 production workers; 4 supervisors; 3 administrators and 8 maintenance workers. (Tr. 179).

Considering all of the statutory criteria for assessing civil penalties, the Judge believes the penalties assessed in the order of this decision are appropriate.

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The citations listed in the left-hand column have been affirmed or vacated. If affirmed, the civil penalties listed after such citation are appropriate and they are assessed. If the citations are vacated, the word "vacate" will appear in the right-hand column.

ORDER

BROOKS I INSPECTION

Citation/Order No.	Penalty Assessed
3913802	\$350.00
3913803	\$400.00
3913804	\$350.00
3913805	\$525.00
3913806	\$400.00
3913807	\$400.00
3913808	\$400.00
3913809	\$400.00
3913810	\$350.00
3913811	\$450.00
3913812	\$400.00
3913813	\$400.00
3913814	\$450.00
3913815	\$350.00
3913816	\$600.00
3913817	\$400.00
3913818	\$350.00
3913819	\$200.00
3913820	\$300.00
3913821	\$200.00
3913822	\$300.00
3913823	\$200.00
3913824	\$400.00
3913825	\$400.00
3913826	\$400.00
3913827	Vacate
3913828	\$350.00
3913829	\$350.00
3913830	\$500.00
3913831	\$300.00
3913832	\$350.00
3913833	\$300.00
3913834	\$400.00
3913835	\$400.00
3913836	\$350.00
3913837	\$350.00
3913838	\$400.00
3913839	\$350.00
3913840	\$300.00

CARISOZA CITATIONS

Citation/Order No.	Penalty Assessed
3636548	\$100.00
3636549	\$300.00
3636550	\$300.00
3636551	Vacate
3636552	\$100.00
3636553	Vacate
3636554	Vacate
3636555	Vacate
3636556	Vacate

Citation/Order No.	Penalty Assessed
3636557	\$300.00
3636558	Vacate
3636559, 3636560 (Footnote 1)	\$600.00
3636561, 3636569	
3636575, 3636576	
3636562	\$250.00
3636563	Vacate
3636564	\$300.00
3636565	\$300.00
3636566	Vacate
3636570	Vacate
3636571	Vacate
3636572	\$300.00
3636573	\$300.00
3636574	\$300.00

1 The Secretary followed the grouping of citations and the civil penalty of \$600 is for the six housekeeping violations.

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BROOKS II

104(a) Citations and 104(b) Orders

3636782	\$1000.00
3636783	\$ 300.00
3636784	Vacate
3636785	\$1000.00
3636786	\$1000.00
3636787	\$1000.00
3636789	\$1000.00

John J. Morris
Administrative Law Judge

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