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SOL (MSHA) V. RIVERTON CORP.
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. VA 94-53-M
	:	A.C. No. 44-00101-05539
v.	:	
	:	Docket No. VA 94-55-M
RIVERTON CORPORATION, Respondent	:	A.C. No. 00101-05540
	:	Quarry #1

DECISIONS

Appearances: Glenn M. Loos, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner/respondent;
Dana L. Rust, Esq., McGuire, Woods, Battle and Boothe, Richmond, Virginia, for the contestant/respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c), seeking civil penalty assessments for thirty-four (34) alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. A hearing was held in Charlottesville, Virginia, and the parties appeared and participated fully therein.

Issues

The issues presented in these proceedings include the fact of violation, whether some of the violations were "significant and substantial", and the appropriate civil penalty assessments to be made for the violations. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301 et seq.

2. Sections 110(a) and 110(i) of the Act.

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

Admissions

The respondent has admitted that it is the owner and operator of the mine at which the citations in these proceedings were issued, and that its mining operations are subject to the jurisdiction of the Mine Act, as well as the Commission and the presiding judge in these proceedings.

Discussion

In the course of the hearings the parties were afforded an opportunity to discuss settlements of all of the contested violations in these proceedings, and evidence was presented with respect to the six statutory civil penalty assessment criteria found in section 110(i). In addition to trial counsel, the MSHA inspector who issued all of the disputed citations, and the respondent's manager of operations were present in the courtroom and actively participated in the settlement negotiations. Arguments in support of the proposed settlement disposition of thirty (30) of the citations were presented on the record, and I issued bench decisions approving those dispositions pursuant to Commission Rule 31, 29 C.F.R. 2700.31. My bench decisions are herein reaffirmed.

John E. Gray, the respondent's Manager of Operations, confirmed that the respondent's mining operation at the No. 1 Quarry consists of a limestone quarry that produces material for use in its masonry plant for the production of masonry products, agricultural lime, and pre-mix cement products. He characterized the operation as an "old" quarry and plant that has been in operation for many years. He stated that the operation has an annual production of approximately 400,000 to 600,00 tons. Petitioner's counsel asserted that MSHA's records reflect a production of 431,797 tons for the year 1992 (Tr. 53-54).

MSHA Inspector James E. Goodale, who issued all of the citations in these proceedings, agreed to the age, size, and scope of the respondent's mining operations, and he stated that mine management was cooperative and timely abated all of the citations in good faith (Tr. 31-32).

The respondent conceded the fact of violations with respect to citation Nos. 4288839, 4288843, 4288849, 4288711, 4288715, 4288842, and 4288848, and agreed to accept the citations as issued and to pay the proposed penalty assessments.

The petitioner agreed to delete the "S&S" designations with respect to Citation Nos. 4288845, 4288714, and 4288844 and to modify the citations to non-"S&S". The petitioner amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars ($50) for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments.

The petitioner agreed to vacate citation Nos. 4288853, 4288846, and 4288708 (Tr. 34-36; 61-62).

The remaining Citation No. 4288838, issued on December 8, 1993, citing an alleged violation of 30 C.F.R. 56.14107(a), was submitted to me for summary decision by agreement and stipulations by the parties.

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The respondent conceded the fact of violations with respect to Citation Nos. 4288824, 4288825, 4288826, 4288830, 4288831, 4288835, 4288836, 4288841, 4288847, 4288850, and 4288851, and agreed to accept the citations as issued and to pay the proposed penalty assessments.

The petitioner agreed to delete the "S&S" designations with respect to citation Nos. 4288832 and 4288852, and to modify the citations to non-"S&S". The petitioner amended its proposed penalty assessments to reflect proposed penalties of fifty-dollars ($50), for each of the citations. The respondent agreed to accept the amended citations and to pay the amended proposed penalty assessments. The parties agreed that Citation No. 4288852, should be amended to reflect a violation of 30 C.F.R. 56.2003(a), rather than 30 C.F.R. 56.4102, as initially cited.

The petitioner agreed to vacate Citation Nos. 4288823 and 4288834. The petitioner further agreed that the negligence finding of the inspector with respect to Citation No. 4288827 should be modified from "moderate" to "low", and that the initial proposed penalty of $50 should be amended to reflect a proposed penalty assessment of $25. The respondent agreed to accept the amended citation and to pay the penalty assessment of $25 (Tr. 36-40; 62).

The remaining Citation Nos. 4288828, 4288829, and 4288840, issued on December 7 and 8, 1993, citing alleged violations of 30 C.F.R. 56.14107(a), were submitted to me for summary decision by agreement and stipulations by the parties.

With regard to the four outstanding citations concerning the interpretation and application of guarding standard 30 C.F.R. 56.14107 (Citation Nos. 4288838, 4288828, 4288829, an 4288840), the parties submitted posthearing briefs in support of their respective motions for summary decision, and they have stipulated to the following:

1. Inspector James Goodale was acting in his official capacity when he issued Citation Nos. 4288838, 4288828, 4288829 and 4288840, and true copies of the citations were served on the respondent.

2. The respondent owns the Euclid diesel haul trucks, Co. #T-12, Co. #T-16 and Co. #T-14, and the Cat 920 front end loader which were cited in Citation Nos. 4288838, 4288828, 4288829 and 4288840, and all of this equipment was operational at the time the citations were issued.

3. The cited V-belts are part of the diesel engine assembly of each piece of equipment in question. The engine compartment is covered by a hood on the top and by a radiator grill on the front. The side compartment facing the tires is partially open and a gap exists between the engine compartment and the wheels. (Photographs of each cited vehicle are included as joint exhibits with the motions filed by the parties).

4. The open sides of the engine compartment together with the gap between the engine compartment and the wheels allows access to and contact with the engine assembly.

5. The gaps in the sides of the engine compartments of the vehicles were not guarded by the vehicle manufacturers.

All of the citations were issued as non-"S&S" violations, with "moderate" negligence findings, and the cited conditions are described as follows:

The V-belts on the diesel engine of the Euclid haul truck Co. #12 were not guarded to prevent contact with pinch points or moving parts. The belts were approx. 4 1/2 feet above ground level. No exposure in this area while machinery is being operated (No. 4288838).

The V-belts on the diesel engine of the Euclid haul truck Co. #T16 were not guarded to prevent accidental contact with pinch points or moving parts. The belts were approx.

> 4 1/2 feet above ground level. No exposure in this area while machinery is operating (No. 4288828).
>
> The V-belts on the diesel engine of the Euclid haul truck Co. #T14 were not guarded to prevent accidental contact with pinch points or moving parts. The belts were approx. 4 1/2 feet above ground level. No exposure in this area during operations of this equipment (No. 4288829).
>
> The V-belts on the diesel engine of the Cat 920 front end loader were not guarded to prevent contact with pinch points or moving parts. The belts were approx. 4 feet above ground level. No exposure in this area during operations of equipment (No. 4288840).

The legal issue presented with respect to the citations is whether the guarding requirement of 30 C.F.R. 56.14107(a), applies to mobile machinery -- trucks and a front end loader in particular -- or only to stationary machinery. Section 56.14107(a) states as follows:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.
>
> Section (b) of section 56.14107, provides as follows:
>
> Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

Petitioner's Arguments

In response to the respondent's argument that moving parts of mobile machinery such as the cited trucks and loader are not required to be guarded pursuant to section 56.14107(a), the petitioner asserts that the general safety purpose of the mine Act, together with the history, language and purpose of the regulation and the existing case law supports a finding that the moving parts of mobile machinery are subject to the guarding requirement of 56.14107(a).

In support of its argument, the petitioner states that the Mine Act is remedial safety legislation with a primary purpose of protecting miners, and as such, it should be liberally construed and not interpreted in a limited or narrow fashion.

The petitioner argues that its interpretations of the Act and its regulations are entitled to deference and that when Congress has spoken directly to an issue in a statute so that its

intent is clear, that intent must be given effect. If the Act is silent or ambiguous on a specific issue, the petitioner believes that the trial judge must defer to the petitioner's interpretation, so long as it is reasonable and consistent with the purpose of the Act, and not in conflict with its plain language, and that this deference must be shown especially when the petitioner and the Commission agree on an interpretation of the regulation in issue.

The petitioner asserts that the history of section 56.14107(a), makes clear that the purpose in promulgating this regulation was to insure that all hazardous moving machine parts be guarded to protect persons from coming into contact with those parts, and that the regulation was intended to apply to the moving machine parts of mobile machinery such as vans, pickup trucks, and larger, off-road vehicles, 53 Fed. Reg. 32509 (August 25, 1988). The petitioner further believes that the objective of the regulation is to prevent contact, and that guards must enclose moving parts to the extent necessary to achieve this goal.

The petitioner further argues that since it has consistently interpreted section 56.14017(a), as covering the moving parts of mobile equipment, its interpretation is entitled to deference because it is consistent with, and promotes, the remedial safety purpose of the Act. Further, the petitioner believes that the fact that the regulation does not explicitly refer to mobile machinery is irrelevant because such regulations are often written in a brief and simple manner "in order to be broadly adaptable to myriad circumstances", Kerr-McGee Corporation, 3 FMSHRC 2128, 2130 (December 1982).

The petitioner asserts that in Thompson Brothers Coal Co., Inc., 6 FMSHRC (September 1984), an identical case under the analogous safety standard found in 30 C.F.R. 77.400(a), the Commission considered the question of whether that regulation was violated when the mine operator failed to guard the cooling fan blades and air compressor belts and pulleys on the engines of two Euclid R-50 dump trucks. The petitioner asserts that the Commission set forth the test for proving a violation of 77.400(a), and required that the Secretary, "prove: (1) tha the cited machine part is one specifically listed in the standard or is 'similar' to those listed; (2) that the part was not guarded; and (3) that the unguarded part' may be contacted by persons' and 'may cause injury to persons.'" Thompson Brothers Coal Co., Inc., supra at 2096.

The petitioner points out that working with facts indistinguishable from those in the present cases, the Commission found that the Secretary had proven all three factors and affirmed the Administrative Law Judge's finding that a violation of 77.400(a) existed, and affirmed findings that the cooling

fan and the air compressor belts and pulleys were "similar moving machine parts," that these parts were accessible and unguarded and that contact, however unlikely, with these parts could cause injury. Therefore, the Commission found a "reasonable possibility of contact and injury."

The petitioner concludes that the Thompson Brothers decision provides persuasive precedent in support of the citations issued in the instant cases. Although Thompson Brothers interpreted a Part 77 regulation, rather than a Part 56 regulation, the petitioner points out that the language of section 77.400(a), is virtually identical to the language of section 56.14107(a). The petitioner further points out that the purpose of the two regulations is identical in that they are both designed to protect miners from being injured or killed by contacting the moving parts of machinery. Finally, the petitioner asserts that identical fact patterns exist in both cases so that the reasoning of Thompson Brothers is equally applicable to the facts of the present cases.

The petitioner asserts that the argument that the Commission did not consider the question of whether section 77.400(a), applies to trucks is not persuasive. The petitioner believes that when the Commission affirmed the judge's decision finding a violation of section 77.400(a), it implicitly decided that the regulation required guards over all types of moving machine parts, whether they were located on stationary equipment or not, that the only real concern of the Commission was whether the citation concerned the type of moving machine part listed in the regulation or other similar exposed moving machine parts, and that the question of whether these parts were located on stationary or mobile equipment was not deemed relevant. The petitioner concludes that the Commission did not explicitly address the question because it is obvious, given the history and text of the regulation, together with the above-stated legal standards for construction and interpretation under the Act, that moving machine parts of trucks are subject to the guarding requirements of 30 C.F.R. 77.400(a) and 30 C.F.R. 56.14107(a)

The petitioner states that Inspector Goodale determined that the guarding requirement of 30 C.F.R. 56.14017(a), was being violated on three Euclid haul trucks and one front end loader at the respondent's No. 1 Quarry. He observed that the V-belts on the engine assemblies of the trucks were not guarded to prevent contact with pinch points or moving parts of the engines. The trucks each had a hood covering the top of the engine and a grill covering the front of the engine, but the sides of the engine compartment were open and allowed contact with the moving parts of the engine. While the inspector realized that it was unlikely that a person would come in contact with the V-belts of the engines when the trucks were running, the petitioner believes

that he correctly determined that some potential for an injury existed and issued the citations in question.

In view of the foregoing arguments, the petitioner believes that it is entitled to a finding that the guarding requirements of section 56.14107(a), apply to the cited mobile machinery in these cases, and not only to stationary equipment, and that as a matter of law, it is entitled to a summary decision in its favor.

The Respondent's Arguments

The respondent states that like most vehicles, the cited haul truck engines are guarded by a hood on top and a radiator grill on the front. Further, the trucks are not large enough for a person to stand underneath them, and that only a mechanic who intended to perform maintenance on the truck could access the engine assembly from underneath. Although there are small gaps on the sides of the truck engine compartment that are not guarded by the manufacturer, a person would have to climb over or around the wheels and the wheel assembly to access the engine compartment from the side.

With regard to the front-end loader, the respondent states that the engine assembly is also covered on the top, front, and back, and partially covered on the sides. To access the engine compartment from the side, a person would have to climb over or around the vehicle's wheels, and these areas were not guarded by the vehicle's manufacturer.

The respondent states that the petitioner has a fundamental obligation to give mine operators fair warning of the conduct it prohibits or requires. Respondent asserts that a regulation must give "a reasonably prudent person notice that it prohibits the cited conduct", Pontiki Coal Corp., 15 FMSHRC 48 (January 1993), and that "even a broad standard cannot be applied in a manner that fails to inform a reasonably prudent person that the condition at issue was prohibited by the standard", Mathies Coal Co., 5 FMSHRC 300 (March 1983).

The respondent points out that section 56.14107(a), is found in Subpart M of Part 56, Title 30, Code of Federal Regulations, entitled "Maintenance and Equipment", and that while some of the regulations found in this subpart expressly cover mobile equipment, section 56.14107(a) does not state that it applies to haul trucks, front end loaders, or any other form of mobile equipment. The respondent believes that this omission is significant because the term "mobile equipment" is expressly defined in 56.14000, and used in other regulations contained in Subpart M, including 56.14100, 56.14101, 56.14103 and 56.14132, while other regulations contained in Subpart M go even further and specify with particularity the exact types of vehicles which are covered, e.g., 56.14106 expressly covers only "fork-lift

trucks, front-end loaders and bulldozers"; 56.14131 covers only "haulage trucks." Section 56.14107(a), provides no such guidance.

The respondent states that other regulations found in Subpart M are clearly not intended to cover vehicles, (56.14109, conveyors adjacent to travelways; 56.14116, hand held power tools). The respondent asserts that all of the Commission's reported cases decided under section 56.14107, reported on Westlaw, and where the machinery or equipment involved in the citation is actually identified, involved stationary equipment (19 case citations omitted).

The respondent asserts that the petitioner's official comments published in the Federal Register when section 56.14107, was promulgated in 1988, represent its only statement regarding the scope and intent of this regulation, and that nothing in these comments indicates that the petitioner intended the regulation to cover haul trucks or front end loaders. To the contrary, respondent believes that the comments establish that the petitioner intended the regulation to cover, at most, vehicles which were so large that a person could actually walk underneath them. The respondent believes that these vehicles presented "special hazards" because there was a realistic possibility that someone walking underneath one could accidentally contact moving machine parts. In contrast, the respondent asserts that ordinary vehicles were not within the scope of the rule because the engine hood and vehicle size would, in most cases, provide adequate protection, and it cites MSHA's comments as follows at 53 Fed. Reg. 32509 (1988):

> In those situations, the vehicle size and engine hood would act to prevent access and contact with the exposed moving parts, and no additional guard would be required. However, larger, off-road vehicles present special hazards because of the greater accessibility to their moving machine parts. In some instances, persons can walk directly under the vehicle to inspect the engine and be exposed to its moving parts.

The respondent points out further that MSHA also indicated in its comments that it did not expect operators to install new guards on the large, off-road vehicles which were covered by the regulation, and operators using these vehicles could rely on manufacturer-installed guarding. The respondent cites the following MSHA comments at 53 Fed. Reg. 32509, in support of its conclusion:

> In most instances, these parts are already guarded by the manufacturer, but guards are sometimes removed during repair work and not replaced. MSHA's objective is to ensure that these guards remain in place.

The respondent believes it is entitled to summary decision because section 56.14107, does not clearly cover haul trucks or front end loaders, and nothing in the regulation itself suggests that it applies to such vehicles or any other form of mobile equipment. Respondent maintains that Subpart M's title, "Machinery and Equipment," does not indicate that all of the regulations in the subpart apply to mobile equipment, and that many of the regulations in the subpart clearly were not intended to cover vehicles, while other regulations in the same subpart specify with particularly that they cover mobile equipment such as front end loaders and haul trucks. The respondent concludes that MSHA was required to use the same specificity in section 56.14107, and as a minimum was required to indicate if the regulation covered mobile equipment. The respondent further concludes that in its present form, section 56.14107, fails to give fair notice that mobile equipment is covered, and that this is confirmed by the fact that every Commission case decided under the regulation involves stationary equipment. Because of the critical ambiguities in the regulation, the respondent believes that the citations should be vacated.

The respondent argues further that MSHA has stated in the comments accompanying the regulation that ordinary vehicles, like the respondent's front end loader or haul trucks, are adequately protected by their engine hoods and vehicle size, and that the regulation applies, at most, only to vehicles which are so large that a person can walk directly underneath them, thus presenting "special hazards because of the greater accessibility to their moving machine parts." 53 Fed. Reg. 32509 (1988). The respondent concludes that the failure of the petitioner to give notice that the regulation covered mobile equipment, either in the regulation itself, or in its regulatory comments, preclude it from now expanding the scope of the regulation.

The respondent states that MSHA commented that mine operators may rely on guarding supplied by vehicle manufacturers, and that its chief concern was operator's removing such guards. Respondent emphasizes that it has not removed any manufacturer-installed guarding from the cited equipment and that it properly relied on that guarding.

The respondent concludes that the petitioner's reliance on the Commissions decision in Thompson Bros. Coal Co., supra, is misplaced. Respondent argues that Thompson Brothers was decided under section 77.400, and while it bears some similarity to section 56.14107, the petitioner's official comments when section 56.14107 was promulgated represent its clearest statement regarding the scope and definition of that regulation. The respondent does not believe that the petitioner may use a case decided under section 77.400 to expand that definition.

The respondent argues that the principle issue in Thompson Brothers was whether there was substantial evidence to support the judge's decision, and that the Commission concluded that the judge's findings were supported by the evidence, and therefore affirmed his decision after finding no basis for overturning his credibility determinations and resolution of conflicting testimony. The respondent concludes that the decision is inapposite to the facts presented in the cases at hand.

Findings and Conclusions

The present language of section 56.14017(a), was published in the Federal Register on August 25, 1988, during MSHA's rulemaking updating, clarifying, and revising its equipment and machinery standards, and the final rules became effective on October 24, 1988. 53 Fed. Reg. 32509 (August 25, 1988). Respondent is correct in its assertion that MSHA's Federal Register comments with respect to the promulgation of this standard appears to be the only statement regarding the scope and intent of section 56.14107(a), and the petitioner has not cited any additional MSHA comments or statements in this regard.

The petitioner's assertion that it has consistently interpreted section 56.14107(a), as covering the moving parts of mobile equipment is not well taken. MSHA's metal and nonmetal safety and health Guide to Equipment Guarding, published in 1980, and covering the requirements of mandatory standards 55, 56, and 57.14-1, does not mention mobile equipment or vehicles, and all of the illustrations and information in that publication with respect to mechanical guarding is limited to stationary machinery.

During its consideration of proposed revisions of its Part 55, 56, and 57 machine guarding standards, MSHA commented that its equipment Guide was "well received by the mining community" and MSHA believed that the proposed rules' use of the concepts set forth in that guide will provide a clearer statement of the requirements for guarding, 49 Fed. Reg. 8377 (March 6, 1984). However, as noted, that publication is silent on the application of MSHA's moving machine parts guarding standards to mobile equipment or vehicles. As far as I can determine, MSHA's guide to equipment guarding has not been revised or updated to make it clear that mobile equipment and vehicles are covered by the standard. Indeed, if one were to rely on that guide as the clear definitive word on the intent of the guarding standard in question, one could reasonably conclude that since it does not even mention mobile equipment or vehicles, the guarding requirements covered therein are limited to stationary machinery such as the types discussed and depicted in that publication, and not to mobile equipment or vehicles such as the trucks and loader cited in these cases.

MSHA's current policy guidelines with respect to the application and interpretation of sections 56/57.14107, do not even mention mobile equipment or vehicles. Under the circumstances, MSHA's policy and guide, which are intended to inform and educate the industry with respect to the application of the regulatory moving machine parts guarding regulations can hardly be characterized as providing consistent, longstanding, and clear interpretations by MSHA that section 56.14107(a), is intended to apply to the moving parts of mobile equipment or vehicles.

During the 1988, rulemaking and in response to some industry comments that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions, MSHA noted that based on accident statistics in which person suffered serious or fatal injuries by moving machine parts, in most instances those persons were performing deliberate or purposeful work-related actions with the machinery and that the installation of a guard to enclose the moving machine parts would have prevented most of the injuries. MSHA stated that the objective in promulgating section 56.14107, "is to prevent contact with these machine parts", and that it applies where the moving machine parts can be contacted and cause injury. 53 Fed. Reg. 32509 (August 25, 1988).

The respondent's assertion that MSHA stated in its rulemaking comments that "ordinary vehicles" such as its haul trucks and front end loader are adequately protected by their engine hoods and vehicle size and that the regulation applies, at most, only to vehicles which are so large that a person can directly walk underneath them is inaccurate and taken out of context.

MSHA's 1988 rulemaking comments with respect to the application of section 56.14107, made reference to small vehicles such as vans or pickup trucks and they were made in response to ta question as to whether section 56.14107, would require guarding beyond that provided by the manufacturer for the engine cooling fan on such vehicle. MSHA responded as follows at 53 Fed. Reg. 32509:

> In those situations the Vehicle size and the engine hood would act to prevent access and contact with the exposed moving parts, and no additional guard would be required.

With regard to the application of Section 56.14107, to "larger, off-road vehicles", MSHA commented as follows at 53 Fed. Reg. 32509:

> * * larger, off-road vehicles present special hazards because of the greater accessibility to their moving machine parts. In some instances persons can walk directly under the vehicle to inspect the engine and be exposed to its moving parts. In most instances, these parts are already guarded by the manufacturer but guards are sometimes removed during repair work and not replaced. MSHA's objective is to ensure that these guards remain in place.

The respondent's reliance on MSHA's comments that operators may rely on guarding supplied by vehicle manufacturers, and that it did not remove any manufacturer installed guarding from the cited equipment is irrelevant. The respondent stipulated that none of the cited machine parts were guarded by the vehicle manufacturer.

The parties have stipulated that the cited v-belts are part of the engine assembly of the cited haul trucks and loader, and although the engine compartments are covered by a hood on the top and by a radiator grill on the front, they further stipulated that the side engine compartments facing the tires are partially open and a gap existed between the engine compartment and the wheels. None of the gaps in the sides of the engine compartments were guarded by the vehicle manufacturers. The parties further stipulated that the open sides of the engine compartments, together with the gaps between the engine compartments and the wheels, allowed access to, and contact with the engine assemblies.

Although the respondent argues that the cited trucks are not large enough for a person to stand underneath them, it has confirmed that a mechanic who intended to perform maintenance on the trucks could access the engine assemblies from underneath, and that a person could access the engine compartment from the side, but would have to climb over or around the wheels and the wheel assembly to access the engine from that location.

With regard to the front-end loader, there is no evidence that it is large enough to allow someone to access the engine assembly from under the machine. However, the respondent confirmed that the engine compartment can be accessed from the side, and a person could do this by climbing over or around the vehicle's wheels.

The respondent has cited 19 decided cases concerning section 56.14107, and points out that all of them involved stationary equipment. One of the cited cases, Overland Sand & Gravel Company, 14 FMSHRC 1337, 1346 (August 1992), concerned an affirmed violation of section 56.14107(a), for an unguarded pinch point of a v-belt drive and alternator pulley of the main diesel engine of a sand and gravel dredge. Another cited case, GFD

Construction Company, Incorporated, 15 FMSHRC 223, 230 (February 1993), concerned a violation of section 56.14107(a), for an unguarded drive shaft of a diesel powered sand dredge pump.

In Highlands County Board of Commissioners, 14 FMSHRC 270, 291 (February 1992), I affirmed a violation of section 56.14107(a), for an unguarded belt drive on a discharge pump located on a platform on the water in a pit area.

In affirming the violation, I concluded that the cited pump belt drive was a moving machine part within the meaning of section 56.14107(a), and that the obvious intent of the standard is to prevent contact with a moving part. I also concluded that even though no one was on the platform while the cited pump was running, and that it was turned off when maintenance was performed, these preventive measures only mitigated the gravity and potential hazards against which the standard is directed, and could not serve as a defense to the violation.

In Walsenburg Sand & Gravel Company, 11 FMSHRC 2233 (November 1989), Commission Judge Cetti affirmed a violation of the guarding requirements of section 56.14001, which was in effect at that time and required the guarding of moving machine parts virtually identical to those required to be guarded by section 56.14107(a). In that case, the inspector cited a caterpillar road grader for an inadequately guarded engine fan blade. The engine had no side panels, and the inspector indicated that he would not have issued the citation if the engine had a side panel because he would have considered this adequate protection for the fan blade. The mine operator defended on the ground that the grader was manufactured in 1951 without any side panels, the engine had a shroud semi-covering around the fan blade that guarded half the blade, and the grader had operated for 27 years without any accident or injury. Judge Cetti considered all of this in finding that the exposure to contact with the motor fan blade was very limited, and he affirmed the citation as a non-"S&S" violation.

In Thompson Brothers Coal Company, 4 FMSHRC 1763, 1764 (September 1982), Commission Judge James Broderick specifically found that the unguarded cooling fan blades and air compressor belts and pulleys in the engine compartment of two Euclid R-50 dump trucks were moving machine parts similar to those listed in the cited guarding standard section 77.400(a), and were accessible and might be contacted by persons examining or working on the vehicles. Judge Broderick stated as follows at 4 FMSHRC 1764:

> Respondent attempted to show that it was virtually impossible for a person not suicidally included to contact the parts in question while moving. On this issue, I accept the testimony of the inspector, and

> conclude that a person working around the engine or inspecting it while the engine was running, could inadvertently come in contact with one of the moving parts. Should a person come in contact with one of the moving parts described above, it might cause an injury to that person.

The Commission affirmed Judge Broderick's decision at 6 FMSHRC 2094 (September 1984), and it adopted a "likelihood of contact and injury" test after analyzing the "may cause injury" language found in surface mining standard section 77.400(a). The Commission noted that while the operator asserted in its petition for discretionary review that the machine parts in question were not the kind to which the standard applied, it did not further develop this issue in its supporting brief. Thus, it would appear to me that the question of whether the cited standard applied to mobile mechanical equipment, including vehicles, and was not limited to stationary machinery, was not specifically addressed by the Commission because the parties failed to develop this question on appeal and not, as suggested by the petitioner, that it was obvious and not deemed relevant by the Commission. Although the thrust of the Commission's decision focused on the likelihood of contact and injury within the meaning of the challenged regulatory language, the Commission specifically ruled as follows at 6 FMSHRC 2096-2097:

> There is no question that the cooling fan blades and air compressor belts and pulley were not guarded when the citations were issued. We also find that these machine parts were the types of machine parts to which the standard applies. (Emphasis Added).
>
> There is no dispute that the engines on these trucks were physically accessible and that on occasion mechanics could be called on to examine or work on the engines while the engines were idling. The judge specifically credited the testimony of the inspector that a miner checking or working on the engine while the engine was running could come into contact with any of the cited machine parts. Thompson's witnesses all agreed that contact was possible even though they regarded it as unlikely. At a minimum, contact could result from such causes as a sudden movement, stumbling, or momentary distraction or inattention. We find no basis for overturning the judge's resolution of conflicting testimony regarding the possibility of contact. The judge also found that the possibility of such contact was "minimal." 4 FMSHRC at 1765. On the facts of this case, we construe a "minimal" possibility of contact to be within the realm of reasonable possibility. Given the physical accessibility of the engine compartment, the fact that mechanics could check

> and work on running engines, and that contact with the cited machine parts could occur, we conclude that a reasonable possibility of contact existed. (Emphasis Added).

In Thompson Brothers there was credible evidence that mechanics would occasionally be called on to examine or work on the truck engines while the engines were idling and that a miner checking or working on the engine while it was running could come into contact with any of the cited machine parts. In the instant case, the parties presented no evidence or information as to whether or not any maintenance, repairs, or visual inspections are ever performed in the cited trucks or loader while parked with the engines running.

I note that section 56.14105, requires that repairs or maintenance of machinery or equipment be performed only after the power is off and the equipment in machinery is blocked against hazardous motion. Section 56.14204, prohibits the manual lubrication of machinery or equipment while it is in motion where the application of the lubrication may expose persons to injury. Section 56.14100(b), requires timely correction of equipment and machinery defects to prevent the creation of a hazard to a person. Section 56.14100 (d) requires that self-propelled mobile equipment with defects that make continued operation hazardous to persons be taken to of service until the defects are corrected.

The citations issued in these cases were all classified as non-"S&S" and the inspector noted that there was no hazard exposure while the machinery was in operation and that an injury was unlikely. He also found that if an injury did occur, it could reasonably be expected to be permanently disabling. I conclude and find that all of these facts go to the question of gravity and may not serve as a defense to the validity of the violation.

Although Thompson Brothers concerned a violation of section 77.400(a), rather than of section 56.14107(a), the guarding requirement of both standards are virtually identical and they both apply to surface mining areas. I agree with the petitioner's arguments that the identical purpose of the two standards is to protect miners from contacting moving machine parts, that the Commission and its judges have followed case law established under analogous standards of Parts 56, 75 or 77 of Title 30, Code of Federal Regulations, and that the Commission's Thompson Brothers holding is equally applicable to the facts of the instant cases.

I conclude and find that following its regulatory Federal Register comments in connection with the revisions of section 56.11407(a), MSHA has not done a good job in updating and revising its publications to make it clear that

section 56.14107(a), applies to mobile equipment such as the types of trucks and loader cited in these cases. However, I cannot conclude that MSHA's failure in this regard is so egregious as to warrant the vacation of the citations and the dismissal of these cases.

I further conclude and find that MSHA's Federal Register comments in connection with the aforementioned rulemaking, coupled with the Commission's decision in the Thompson Brothers Coal Co. Case, supra, which I find controlling, provided adequate notice that the guarding requirements of section 56.14107(a), apply to mobile machinery such as the trucks and loader cited in these cases, and not only to stationary equipment. Accordingly, based on the facts and stipulations presented in these cases, I conclude and find that the violations have been established, and the contested citations ARE AFFIRMED.

I further conclude and find that the respondent's No. 1 quarry and plant operations constitute a medium-to-large mining operation. I have also reviewed all of the citations and abatements issued by Inspector Goodale and I conclude and find that the respondent timely abated all of the cited conditions in good faith.

With respect to Riverton's history of prior violations, MSHA's counsel produced a computer print-out of the mine compliance record for the period beginning in October, 1983 through March, 1994. Counsel asserted that the respondent's history of prior violations does not warrant any penalty assessment increases over those which have been made in these proceedings, and upon review of the print-out, I agree.

In the absence of any evidence to the contrary, I conclude and find that the payment of the penalty assessments agreed to by the parties in settlement of the violations in question, as well as the proposed penalty assessments for the four contested guarding citations, will not adversely affect the respondent's ability to continue in business.

I further conclude and find that the four contested guarding violations were non-serious and were the result of a moderate degree of negligence on the part of the respondent.

ORDER

In view of the foregoing findings and conclusions, IT IS ORDERED AS FOLLOWS:

Docket No. VA 94-53-M

The following Section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments shown below.

Citation No.	Date	30 C.F.R. Section	Assessment
4288838	12/8/93	56.14107(a)	$50
4288839	12/8/93	56.14132(a)	$50
4288843	12/8/93	56.20003(a)	$157
4288849	12/8/93	56.11002	$50
4288711	12/15/93	56.20003(a)	$157
4288715	12/15/93	56.14107(a)	$204
4288842	12/8/93	56.20003(a)	$50

Section 104(a) Citation Nos. 4288853, 4288846, and 4288708 ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED and DISMISSED.

Section 104(a) Citation Nos. 4288845, 4288714, and 4288844 ARE MODIFIED to non-"S&S" citations, and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalty assessments of fifty-dollars ($50) for each of the citations ($150 total).

Docket No. VA 94-55-M

The following section 104(a) citations ARE AFFIRMED, and the respondent IS ORDERED to pay the civil penalty assessments shown below.

Citation No.	Date	30 C.F.R. Section	Assessment
4288824	12/7/93	56.16005	$50
4288825	12/7/93	56.12013	$50
4288826	12/7/93	56.12032	$50
4288828	12/7/93	56.14107(a)	$50
4288829	12/7/93	56.11001	$157
4288830	12/7/93	56.12030	$50
4288831	12/7/93	56.12030	$50
4288835	12/7/93	56.11001	$157
4288836	12/7/93	56.4130(b)	$50
4288840	12/8/93	56.14107(a)	$50
4288841	12/8/93	56.12032	$50
4288847	12/8/93	56.20003(a)	$204
4288850	12/8/93	56.12030	$50
4288851	12/8/93	56.2003(a)	$50

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Section 104(a) citation Nos. 4288823 and 4288834 ARE VACATED, and the petitioner's proposed civil penalty assessments ARE DENIED AND DISMISSED.

Section 104(a) "S&S" Citation Nos. 4288832 and 4288852 ARE MODIFIED to non-"S&S" citations and as modified they ARE AFFIRMED. The respondent IS ORDERED to pay civil penalties of fifty-dollars ($50) for each of the citations ($100 total). Citation No. 42888852 IS FURTHER MODIFIED to reflect a violation of mandatory safety standard 30 C.F.R. 56.20003(a).

The inspector's negligence finding with respect to section 104(a) non-"s&S" citation No. 4288827, IS MODIFIED to reflect a low, rather than moderate degree of negligence, and as modified, IT IS AFFIRMED. The respondent IS ORDERED to pay a civil penalty assessment of twenty-five dollars ($25) for the violation.

Payment of all of the aforesaid civil penalty assessments in these proceedings shall be made by the respondent to MSHA within thirty (30) days of the date of these decisions and Orders, and upon receipt of payment, these cases are dismissed.

George A. Koutras
Administrative Law Judge

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