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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. RONALD SAND & GRAVEL, Respondent.	CIVIL PENALTY PROCEEDING: Docket No. WEST 2012-1042 A.C. No. 45-03628-28844 Mine: Ronald Sand & Gravel

DECISION

Appearances: Sean Allen, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Boulevard, Suite 216, Denver, Colorado, on behalf of Petitioner

Louie Gibson, Ronald Sand & Gravel, 1221 S. Thorp Highway, Ellensburg, Washington, on behalf of Respondent

Before: Judge Barbour

In this proceeding arising under the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* (2012), the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") alleges that Ronald Sand and Gravel ("Ronald") in 11 instances violated various mandatory safety, training, and reporting standards for the nation's metal and nonmetal mines.[1] The Secretary further alleges that six of the 11 purported violations were significant and substantial contributions to mine safety hazards ("S&S" violations[2]), that 10 of

[1] The standards are set forth at 30 C.F.R. Part 56 (safety), 30 C.F.R. Part 46 (training), and 30 C.F.R. Part 50 (reporting).

[2] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d). A violation is properly designated S&S "if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.* 3 FMSHRC 822, 825 (Apr. 1981). In order to establish the S&S nature of a violation, the Secretary 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 will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving the *Mathies* criteria).

the 11 were caused by Ronald's moderate negligence, and that one was caused by its low negligence. Further, the Secretary asserts that the inspector who cited the alleged violations made correct gravity findings. The Secretary proposes penalties ranging from $243.00 to $100.00. In the aggregate, the proposed penalties total $1,553.00.

After the Secretary's petition was filed, Louie Gibson, Ronald's owner and operator, answered on behalf of the company. The Commission's Chief Judge assigned the case to the court, and the court ordered the Secretary's counsel to contact Gibson to determine whether the case could be settled. After several discussions with Gibson, counsel advised the court that the company wanted a hearing and the case was noticed for hearing in Ellensburg, Washington. On November 15, 2013, counsel stated that he intended to call a witness who, due to fears of physical retaliation, preferred to testify remotely, *e.g.*, via the telephone. Counsel also requested that the hearing take place in a facility with full security, including metal detectors. During a subsequent conference telephone call with counsel and Gibson, the court discussed the possibility of transferring the hearing to the federal or county courthouse in Yakima, Washington, both of which are subject to full security protocols. The parties agreed to the transfer, even though it meant deferring the date of the hearing. The parties also agreed to the court's suggestion that another attempt be made to settle the matter. The court appointed a settlement counsel. After much back and forth, the settlement counsel reported his efforts had failed. Therefore, the case was heard in Yakima on July 15, 2014. At the hearing, Gibson represented the company.

TESTIMONY OF GREGORY ("GREG') NICHOLS

Gregory ("Greg") Nichols lives more than 500 miles from Yakima. He was sworn in and testified via the telephone.[3] Nichols stated that he has 30 years or more of mining experience, but that his career with Ronald was short. It began on March 9, 2012, when the company advertised a job for an equipment operator. Nichols came to the mine to apply. Tr. 19, 21. Nichols was hired and began work on Monday, March 12. He worked a full day on Monday. He did not work on Tuesday, March 13. He worked a half day on Wednesday, March 14, and then, he quit (his version), or he was fired (Ronald's version). Tr. 21-22.

Nichols described the mine as primarily a rock crushing facility at which basalt rock is loaded from an excavator into a crusher and crushed to size. Tr. 23, 36-37. According to Nichols the equipment at the site consists of an "impact mill[[4]], a rolls [*(sic.)*], a screen deck and some . . . conveyor belts." *Id.* Nichols maintained that prior to beginning work he was not given any newly employed experienced miner training. *Id.* Nor was he given a tour of the mine site. Tr. 24. He testified that he did not receive any instructions in recognizing electrical hazards. *Id.* Emergency medical procedures were not reviewed with him. He was not advised about the mine's evacuation plan or the health and safety aspects of the tasks to which he would be

[3] The court took the Secretary's concerns at face value. In allowing Nichols to testify remotely, the court recognized the detriments of remote testimony, but chose to err, if at all, on the side of security.

[4] The "impact mill" was frequently referred to as "the crusher" and the "impactor/crusher."

assigned, and he was not advised of his rights under the Mine Act. *Id.* Nichols stated that he was never asked to sign any training forms and that he was never given any site specific hazard awareness training. *Id.*

Nichols recalled that on his first work day, Gibson asked him to crawl inside the impact mill to repair some plates, a task that required welding. Tr. 25. The metal plates protected the mill from being damaged by rock during the crushing process. Tr. 25-26. Nichols maintained that the entire time he worked on and in the mill, it was not locked or tagged out. Tr. 26-25. Nichols stated that he expressed concern about this to Gibson and that Gibson responded that Nichols would "know when to get out [of the mill] when [he] heard the machine start." Tr. 27. As best Nichols could recall, the key for the mill's motor was in its ignition, at the top of the mill. Tr. 29, 30, 60. Had the key been turned in the ignition, Nichols was "pretty sure" the engine driving the mill would have started, and if the mill went into gear, Nichols stated that it would "have ate me up." Tr. 30, *see also* Tr. 31.

Nichols also maintained that while he was welding inside the mill, Gibson and his helper crawled over the outside of the machine changing some of the mill's outer plates. Tr. 27-28. The vibrations from their work and from the welding caused dust and debris to fall on Nichols, some of which landed on his face. *Id.* Nichols was also concerned about the pinch points to which he was subject inside the mill. He stated that if the interior barrel of the mill rolled while he was inside, his hands could be caught in the moving parts. Tr. 32-33.

Nichols testified that he worked inside the mill for "an hour or so" before the mill was activated and started crushing.[5] Tr. 56. He testified that after he got out of the mill and it started running, he greased a bearing on one of the conveyor belt rollers and freed some jammed rollers. Tr. 33-34. He believed that the moving bearing and its mechanism were not guarded. Tr. 34. Nichols stated, "You could just crawl up on the bearing and get to the grease surface and grease that bearing while it was running. And you were just . . . inches from the rolls while you're greasing it." Tr. 34-35 *see also* Tr. 74. Nichols estimated that the bearing required greasing every 15 to 20 minutes. Tr. 35, 74.

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[5] According to Nichols, after the mill started, the push for production was constant:

> [W]e pretty much crushed eight hours . . . nine maybe. [A]s soon as we got the crusher working we didn't stop. We didn't even stop to talk . . . . [I]t was all hand signals, go do this, go do that . . . dig that out, get that conveyor tracked and running again. We're crushing, we're not shutting down.

Tr. 55; *see also* Tr. 73-74.

After production started, Nichols recalled Gibson feeding rock into the mill with the excavator. Nichols described the work environment as harsh. He and Scott Dunsing, the other miner on the job, worked,

> for eight hours straight in 28-degree weather with the snow blowing sideways and the dust going everywhere all over [Gibson's] truck, all over [Nichols'] car, all over us. It was horrible.

Tr. 56.

Nichols testified that while working at the mine he never was provided with safety glasses or other eye protection, despite the fact the "dust and stuff was really bad." Tr. 41. Nor was he provided with ear protection. He always carried his own ear plugs. Tr. 42. Further, there were no toilet facilities at the mine. Tr. 43.

During his first day on the job, Nichols, who had his own hard hat, did not wear it. Rather, he wore a wool hat to stay warm. Tr. 38. Nichols recalled that Dunsing wore a baseball cap. Gibson wore a hard hat, but intermittently. Tr. 38. In Nichols' opinion, it was hazardous to go without a hard hat because when the mill was operating, fly rock "pop[ped] out of the top of . . . [the mill's] feeder." Tr. 39. The fly rock could travel 20 to 25 feet. Nichols believed that both he and Dunsing were exposed to the fly rock. Tr. 40. He estimated that the fly rock averaged two to three inches in diameter. *Id.*, 80. He stated that when the mill was operating, rocks were "coming out of the sky like meteorites." Tr. 80. He also described the rocks as, "like bullets coming down on top of you." *Id.* Nichols maintained that Gibson told him to stand away from the mill because of the fly rock. Tr. 81.

During his brief time as an employee of Ronald, Nichols lived at the mine in the generator shack (also referred to as the "well house"). Tr. 54. According to Nichols, there was no port-a-potty at the well house, nor anywhere else at the mine. Nichols claimed he "made do" with a bucket and some timbers. Tr. 75-76.

Nichols maintained that on his third day (Wednesday), several problems arose with defective equipment, and Nichols described Gibson as not "in a very good mood." Tr. 44. After a controversy between the two over whether or not Nichols knew how to operate a grease gun, Nichols said to Gibson, "I can't work for you," and Nichols prepared to leave the mine. Tr. 45. Nichols claimed that he reminded Gibson that Gibson owed him money for the time he had worked and that he decided to wait around for Gibson to pay him. *Id.* While he was waiting, Dunsing appeared. Nichols testified that Dunsing was "pretty much crying that [Gibson had] yelled and screamed at him and called him all these words and . . . [Dunsing] asked . . . if I could give him a ride home. And I told him, [s]ure[.]" Tr. 46.

Nichols stated that before leaving the area he had another run-in with Gibson, one that caused Nichols to pay a visit to the county sheriff. Nichols testified:

> [Gibson] was telling me he was going to turn me in for driving on a suspended license . . . And I went to the town hall and talked to the sheriff there about [Gibson] threatening me . . . but it was out of the sheriff's jurisdiction . . . . So he just told me . . . .You can drive if you want, just go back to Wenatchee and get out of here.

Tr. 47.

After meeting with the sheriff, Nichols stated:

> I was waiting around to get my pay. And it took a while so I went back to the mine . . . and there was a bunch of guys there, all [Gibson's] friends . . . and I'm sure [Gibson] told them about me.

Tr. 47.

According to Nichols, at some point before he left the county, Gibson called Nichols "a few names" (Tr. 47), and on Wednesday, December 14, an unnamed employee of Gibson's allegedly told Nichols never to come back to the area where the mine was located, that if he returned, he would be killed. Tr. 48. Nichols testified that the threat prompted him to call MSHA and report conditions at the mine that Nichols believed to be hazardous. Nichols stated:

> [T]he employee told me never to come back to this valley or he'd shoot me. And he told me he was going to call the police on me for driving on a suspended license.
>
> After he threatened me . . . [t]hat's when I called MSHA.

Tr. 52-53.

Also, on that Wednesday, Nichols sent a text to Gibson confirming that he was quitting, that he was, as he put it, "done running [the] crusher." Tr. 64. According to Nichols, Gibson responded, "You coward, get your ass back up here . . . come back up to the mine." Tr. 66. Nichols replied to Gibson, "I guess some people have to learn the hard way." Tr. 67. When asked by Gibson what he meant, Nichols stated:

> That means . . . [y]ou're going to learn that you can't go do that to people and stick people in that position and treat people that way. That's what that text means.

Tr. 67.

Gibson testified that when he called MSHA (Tr. 47-48), he told the person who answered that he wanted an inspector to "come out [to the mine] and see . . . . what [Gibson] put [his] employees through."[6] Tr. 65

TESTIMONY OF INSPECTOR DEAN BROOKS

Nichols' call led MSHA to send its inspector, Dean Brooks, to the mine. However, before traveling to the mine, Brooks went to Nichols's home where he and Nichols talked about Nichols's experiences at the mine and about conditions there. Tr. 49. Then, on March 16, Brooks inspected the mine. Tr. 95.

Brooks testified that he has worked for MSHA for approximately nine years. He estimated that approximately 80% of his time has been spent inspecting mines. Tr. 90. Brooks stated that prior to his March visit he inspected Ronald's operation approximately four or five times. Tr. 92, 112. He described the mine as "set up on the side of a hill." Tr. 92. Brooks recalled the overall mine site as being approximately 300 feet long by 140 feet wide. Tr. 92. He believed that the area had been cleared by using an excavator and a bulldozer. *Id.* In addition to the crushing plant, there were areas for parking equipment and stockpiling product. *Id.*

Brooks testified that his March 16 visit to the facility was ordered by his supervisor in response to Nichols' "hazardous condition" complaint. Tr. 95. Upon arriving at the mine, Brooks determined that mining activity had taken place. According to Brooks, rock had been crushed, sized, and sorted. Although Brooks agreed that mining activity occurred "sporadically," the stockpiles of product indicated to Brooks that the mine "had been in production." Tr. 98. Brooks also noted that haul trucks were used at the mine, as were excavators, a water truck, and pickup trucks. Tr. 97. Upon arriving, Brooks met with Gibson. Tr. 108. At the time, mining was not in progress, but maintenance activities were underway. *Id.*

The March 16 inspection resulted in the issuance of several citations for violations of mandatory safety, training, and reporting standards. During the course of his testimony, Brooks described the conditions that lead him to issue each of the citations. Tr. 106-258.

TESTIMONY OF INSPECTOR MICHAEL NELSON

Michael Nelson is an MSHA inspector and accident investigator. Tr. 260-261. Nelson has been with MSHA since 2009. Nelson testified that he has inspected "[p]robably hundreds" of sand and gravel crushing operations. Tr. 261. On March 6, 2012, ten days before Brooks' visit, Nelson conducted a compliance assistance visit at the Ronald facility. Tr. 262, 263. The plant, which was not yet in operation, was partially set up. Nelson went to the facility because the company was installing a new crusher. Tr. 262-263. Nelson stated that the purpose of his

[6] Nichols also stated, "My motivation for calling MSHA [was] that it was [a] highly dangerous crushing plant and no one needed to be exposed to that place." Tr. 86.

visit was to "point out violative conditions or practices" with regard to the new operation and give the company an opportunity to correct potential violations before work began. Tr. 263. Nelson maintained that he pointed out several possible violations with regard to guarding on the crusher. Tr. 264. He also believed he spoke with someone about lock out/tag out procedures, although he could not recall if Gibson was involved in the discussion. Tr. 265, 270.

LOUIE GIBSON

Louie Gibson testified on behalf of the company. He maintained that everything Nichols alleged was a lie. Tr. 272. According to Gibson, Nichols was motivated to lie because he was fired and he wanted to "get back" at Gibson. *Id.* Gibson pointed out that Nichols only contacted MSHA after he was let go. *Id.*

CITATION NO.	DATE	30 C.F.R. §
8566007	3/16/2012	56.12016

The citation states:

> The portable crusher/screen plant, electrically powered equipment that was being worked on was not properly locked out before beginning work. Two miners were observed installing guards and doing other maintenance around the plant and while the main power-supply gen-set was locked out, no tags were placed to indicate who had put them there or why the generator was locked out. Were an accident to occur because proper lock-out/tag-out procedures were not followed a serious injury could result.

Gov't Exh. 3.

Brooks testified he issued the citation because the company had not "follow[ed] proper lock out/tag out procedures." Tr. 106. In Brooks' opinion the company's failure subjected its miners to the hazards of becoming entangled in the equipment or of being injured by rocks coming off the conveyor. *Id.* Such accidents could be fatal. *Id.*

Brooks stated that lock out/tag out procedures "are taken extremely seriously by MSHA because of the seriousness of injuries that occur" when they are not followed. *Id.* He found, however, that an accident was "unlikely." Gov't Exh. 3. Because the mine is small, there were few miners exposed to the hazard, and the miners all knew one another and where each miner worked. Tr. 107. Brooks therefore believed that the likelihood of a miner being hurt due to the violation "was pretty slim." *Id.*

Nonetheless, in Brooks' view, Gibson should have known about the miners' failure to follow proper lock out/tag out procedures because the standard is "fairly plain," the condition

was "fairly obvious" and Gibson had a training program covering lock out/tag out requirements and was familiar with the requirements. Tr. 109.

Gibson asked Brooks if any names were written on the sides of the locks, and Brooks stated that he could not recall. Tr. 114, 127.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Section 56.12016 requires that before mechanical work is done on electrically-powered equipment, "[p]ower switches shall be locked out" and "suitable warning notices shall be posted at the power switch and signed by the individuals who are to do the work." Brooks' testimony and his contemporaneous notes establish that work was being done on the electrically powered crusher and although the electricity to the plant was locked out, no signed tags were in place warning that work was being done on the plant and identifying those doing the work. Gov't Exh. 3 at 2. In other words, the power switch for the crusher was not properly tagged out. Tr. 106.

The violation was very serious in that a failure to follow proper lock out/tag out procedures could lead to the power being restored while maintenance work was ongoing and when a miner was in the vicinity of the plant's moving parts. A miner easily could be seriously injured or killed. Tr. 106. However, as Brooks explained and found, such an accident was unlikely. *Id.* Gov't Exh. 3 at 2. The fact that very few miners worked at the mine and that the miners were aware of one another's presence and assigned tasks significantly reduced the chances power would be mistakenly restored to the plant. Tr. 106.

The violation was the result of moderate negligence on Ronald's part. Brooks acknowledged the company trained its miners in lock out/tag out procedures. Tr. 109. Nonetheless, the court accepts Brooks' characterization of the lack of signed warning notices as "fairly obvious." Tr. 109. Gibson should have recognized the violation and corrected it. He did not. Thus, he, and through him, the company, failed to meet the standard of care required.

CITATION NO.	DATE	30 C.F.R. §
8566008	3/16/2012	56.20008

The citation states:

> At the mine-site . . . toilet facilities readily accessible to mine personnel and truck drivers was [(*sic*)] not provided. There is a crushing plant set up and at least one miner works on-site, running the plant, doing maintenance or loading trucks, sometimes for 8-hours or more at a time. The nearest toilet is located in a private residence approximately 400 yards away. The renters have dogs that run free and whether the toilet there is available is uncertain. Were a miner to have an accident because conveniently located and accessible

> sanitary facilities did not exist an injury could result.

Gov't Exh. 5.

According to Brooks, during the course of the inspection on March 16, he asked Gibson if there was a port-a-john at the mine. Brooks stated that Gibson responded:

> he didn't think he needed to have one . . . because he owns a . . . [nearby] house . . . . And that he has permission to go in there and use the bathroom. And I think at that time I asked him who lives in the house and he said there's renters there but they won't mind. And then . . . I made a note that there were a couple of dogs running around the house. And this is some distance from the mine site . . . 400 yards.[7] And there wasn't much of a path going across the field[.]

Tr. 119.

In the inspector's view, the conditions did not meet the requirements of the standard, which provides that toilet facilities be "compatible with the mine operations and . . . [that they be] readily accessible to mine personnel." 30 C.F.R. §56.20008(a). Brooks' finding that there was no "readily accessible" sanitary facility at the mine was based on the fact that there was no port-a-john at the mine, that the rental house was approximately 400 yards away, and that the renter's dogs were not leashed. Tr. 121. Brooks concluded that although the condition was unlikely to result in an injury (Tr. 122-123), Gibson should have known that the off-site house did not meet that standard and therefore that the company, through Gibson, was moderately negligent. Tr. 124, Gov't Exh. 5.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Brooks was a credible witness and the court finds the conditions, which are restated in his contemporaneous notes, existed as he described. *See* Gov't. Exh. 5. Further, the court agrees with Brooks that the "arrangement" to use the bathroom at the rental house did not comport with the standard in that the bathroom was not "readily accessible." Even if the house was 100 yards from the mine, as suggested by Gibson (Tr. 125), the presence of the unleashed dogs hindered miners' access to the bathroom. The court also agrees with Brooks that the violation was unlikely to cause an accident. Gov't Exh. 5. The violation was not serious, and the court further agrees with the inspector that Ronald's negligence was "moderate." *Id.*, *Id.* at 2. The court has no doubt that Gibson genuinely believed the house was suitable and in compliance, but, as the court has found, the presence of the unleashed dogs alone should have alerted him to his error.

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[7] When asked on cross examination if the rental house was approximately 100 yards from the mine, rather than 400 yards, Brooks responded that he "didn't think so." Tr. 125.

CITATION NO.	DATE	30 C.F.R. §
8566009	3/16/2012	56.15004

The citation states:

> A miner was observed doing maintenance work around the crusher/screen plant at the Parke Road mine site when he was not wearing safety glasses or other eye protection. He was doing maintenance at the time and using tools where there could be impact or abrasion. The plant which normally produces crushed rock was down for maintenance at the time. This is a windy location and there is dust that gets blown around and fly rock is generated by the crusher, screens and loading operations. When questioned, the miner stated he didn't like wearing eye protection as it's too hard to keep clean and admitted he didn't always wear safety glasses when running the plant. Were a miner to be struck in the eye because he was not wearing eye-protection a serious injury could result.

Gov't Exh. 6.

Brooks testified that he issued the citation because during the inspection he saw miners who were not wearing eye protection while working in a location where there might be a hazard to the miners' eyes.[8] Tr. 127, 136. The miners were Gibson and another man who was working with him.[9] They were engaged in maintenance and repair work. Brooks also noticed dust being picked up by the wind where the men were working. He believed that the dust posed a hazard to the men's unprotected eyes. Tr. 128, 139. Brooks therefore cited the company for a violation of section 56.15004, a mandatory safety standard requiring persons to wear safety glasses when in or around an area of a mine where a hazard exists which could cause injury to their unprotected eyes. By failing to wear eye protection, the miners exposed themselves to the possibility of a foreign object striking one or both of their eyes. Tr. 127-128. Brooks testified that he asked Gibson why he was not wearing eye protection, and Gibson responded that "he didn't like wearing eye protection as [it was] too hard to keep clean." Tr. 129. Brooks stated that Gibson also told him that he didn't always wear safety glasses when running the plant. *Id.*

Brooks found the condition to be S&S. He explained that he did so because he saw the miners working in conditions that could have resulted in scratched corneas "or worse." Tr. 134. Brooks also feared that chips from rocks flying off the crushing equipment could lodge in the

[8] Brooks stated he was alerted to look for possible violations of section 56.15004 by talking to Nichols about working conditions at the mine. Tr. 136.

[9] Although the citation and Brooks' notes restrict the allegation to one unnamed miner, Brooks in his testimony made clear that he saw two miners who in his opinion violated the standard.

miners' eyes, although Brooks admitted that he did not see any fly rock while the men were working around the equipment. Tr. 132.

He believed that the company was moderately negligent in not requiring the miners to wear safety glasses. Brooks stated that Gibson "didn't do everything in his power to make sure that everyone on that site was wearing safety glasses." Tr. 135. Brooks felt that most people would think there was an eye protection problem at the mine given the dust and other flying material. Tr. 136.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

The citation charges the company violated section 56.15004, and the evidence more than proves the violation. Brooks' testimony that the area where the miners were working was very dusty was not refuted, and the court finds it to be a fact. Nor was his testimony contradicted that the miners were not wearing safety glasses even though the dust posed a hazard to their unprotected eyes. Tr. 128, 139. On the basis of these facts, the court finds a violation of section 56.15004.

The court further finds that the violation was both S&S and serious. The court has found a violation of section 56.15004. The court further finds that the discrete health hazard presented by the violation was damage to the eyes of the miners who chose not to wear eye protection. As Brooks observed, scratched corneas or worse could have been the result. Tr. 134. The court concludes that assuming continued maintenance activities in the blowing dust, it was reasonably likely that the lack of eye protection would cause at least one scratched cornea. This is especially true as the court credits Brooks' testimony that Gibson said that he did not like to wear safety glasses because they were too hard to keep clean and that he did not always wear them when running the plant. Tr. 129. The impairment of vision that would result is a serious injury. The fact that a serious injury could result from the violation means that the violation itself was serious as well as S&S.

The court further finds that the company's negligence was high. Brooks maintained that Gibson "didn't do everything in his power to make sure that everyone on that site was wearing safety glasses." Tr. 135. This is undoubtedly true, and the evidence supports finding that Gibson was still more culpable. He was one of the miners who worked in the swirling dust without safety glasses. Tr. 129. As the on-site manager, he was called to a high standard of care, one that he utterly failed to meet.

CITATION NO.	DATE	30 C.F.R. §
8566013	3/20/2012	46.6(a)

The citation, as modified, states:

> This violation occurred on 3/12/12. A miner working at the mine was put to work doing maintenance and repair procedures and other

> activities without first being given new miner training. Two other miners were working at the mine at the time. The [Mine Act] declares that an untrained miner is a hazard to himself and others. Were an accident to occur because a miner was not trained a serious injury could result.

Gov't Exh. 7.

As previously described, Brooks met with Nichols at Nichols' home. Tr. 138-139, 142. During the course of their meeting, Nichols told Brooks that before he started working at the mine, he was not given any training. Tr. 144-146. Following their talk, Brooks visited the mine and issued a citation alleging the company violated section 46.6(a) by putting Nichols to work without first giving him newly employed experienced miner training as required by the regulation. Tr. 142-143; Gov't Exh. 7. Brooks issued the citation despite the fact that the company maintained records purporting to show that Nichols had in fact been trained. Brooks identified a document titled "New Task Training Record/Certificate." Gov't Exh. 9; Tr. 146. The form states that it pertains to Nichols. Brooks testified that he saw the form at the mine although he could not recall when. Tr. 146. The form, which is dated March 12, 2012, indicates the subjects covered during the purported training and the time spent on training for each specified piece of equipment. Gov't Exh. 9. Brooks noted that the form lists all of the equipment at the mine site and indicates that Nichols was trained on everything listed. Tr. 147; *See* Gov't Exh. 9. However, Brooks also noted that although the form has a space titled "Miner's Initials," Nichols's initials do not appear anywhere on the document.[10] Tr. 148.

In addition, Brooks identified a document entitled "Site-Specific Hazard Awareness Training Record/Certificate." Gov't Exh. 9 at 2. Brooks noted that the document is signed by Gibson and that it indicates Nichols was given site-specific training for 45 minutes on March 12. Tr. 148-149. Further, Brooks identified a document titled, "New Miner Training Record/Certificate," which is signed by Gibson and which indicates that Nichols received almost 14 hours of training on March 12. Gov't Exh. 9 at 3. Adding up all of the training that the forms indicate was given to Nichols on March 12, Brooks calculated that Nichols received 21 hours of training.[11] Tr. 150. Brooks was skeptical the forms reflect the truth. Brooks stated:

> [Nichols] says he only worked between nine and 14 hours total. And he described much of that time being spent inside the crusher or working around the plant while the plant was running. So I don't see how he could have possibly received this

[10] Brooks acknowledged that there is no regulatory requirement that miners initial or otherwise sign such a form. Tr. 148.

[11] The three certificates actually indicate that a total of 1,300 minutes, or approximately 21½ hours, was devoted to training Nichols on March 12. Gov't Exh 9 at 1-3.

> much training. And certainly not on [March 12] . . . .
> So, something's not right.

Tr. 150.

Although Brooks agreed it is theoretically possible to give a miner 21 hours of training in a day, he stated that he found it "unlikely." Tr. 150. However, Brooks also agreed that it is permissible to give training on several pieces of equipment at the same time and that there is nothing in the regulations stating how long the training must be. Tr. 158. The regulations simply require that the training must be "adequate." *Id.* Given the possibility of the overlap in hours, Brooks could not "say for sure if [Gibson] did or didn't provide the training." Tr. 159.

Gibson, on the other hand, was adamant that he gave Nichols the required newly employed experienced miner and site specific training. He stated, "[T]hat's exactly what we done." Tr. 160. He testified he provided Nichols with an introduction to the mine that was site specific, he gave Nichols a tour of the mine, he instructed him on recognizing and avoiding electrical hazards, he reviewed the mine's emergency medical procedures with Nichols, he reviewed the mine's emergency evacuation plans, he talked to Nichols about traffic patterns and control of mobile equipment, and he spoke with Nichols about hazardous materials on the work site. Tr. 274-275. According to Gibson, all of the training was given on March 12 while the crusher was being set up. Tr. 276. But, when asked if he gave Nichols instructions on his statutory rights under the Act, Gibson candidly stated he did not. Tr. 275. (He tartly commented that Nichols "knew those evidently." *Id.*) Nor did he explain the company's rules for reporting hazards. *Id.* ("I don't think I did. I don't think I understand that one." *Id.*)

Brooks found that the violation was reasonably likely to result in fatal injuries to Nichols. Gov't Exh. 7; Tr. 153. He stated that an untrained miner is a "hazard to himself and others." *Id.* He noted that Nichols had been exposed to the various hazards that he, Brooks, had found, while Nichols worked as an untrained miner.[12] Brooks thought it reasonable to expect a fatal injury to occur as a result of the lack of training. Tr. 155, Gov't Exh. 7. Brooks was especially concerned about the company's alleged failure to follow required lock out/tag out procedures while Nichols was inside the crusher and about Nichols being struck by fly rock when working near the crusher or being entangled in the crusher's rolls. Tr. 156.

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[12] Brooks listed the hazards as:

> The [hazard] of objects getting in his eyes. The hazard of being inside the [crusher] without it being properly locked out. The hazard of the tags being missing on the main generator. The [hazard] of fly rock when he was down on the ground. The [hazard] of not having a port-a-john in place . . . .[and the hazard caused by] guards that were missing.

Tr. 153.

Brooks believed the company was moderately negligent. Gibson had a training plan in place, as well as policies regarding training. Brooks did not think that Gibson had intentionally denied Nichols training. Rather, he believed that the need to train Nichols had been "overlooked." Tr. 157.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

Section 46.6(a) requires an operator to provide a newly employed experienced miner with specific training before the miner begins work. Seven areas of required training are detailed: (1) an introduction to the work environment; (2) recognition and avoidance of electrical and other hazards; (3) a review of emergency medical procedures; (4) instructions in the health and safety aspects of the tasks to be assigned; (5) instruction on the statutory rights of miners; (6) a review and description of the line of authority of supervisors and miners' representatives and their responsibilities; and (7) an introduction to the rules and procedures for reporting hazards. 30 C.F.R. §46.6(b)(1)-(7). The court concludes the evidence establishes a violation of the standard, but that the violation was not as extensive as the Secretary contends.

The Secretary's allegation, as expressed in the citation, appears to be that Nichols was put to work without being given any new miner training. Gov't Exh. 7. The court finds that the evidence is insufficient to make such a finding. The burden of proving the allegation is on the Secretary, and although Nichols testified he was given no training (Tr. 24), Gibson was certain that this was not so, that Nichols was provided with training. Tr. 160, 174-175. For his part, Brooks admitted that he "could not say for sure" if the required training was or was not provided. Tr. 159. The court finds the evidence on the issue of the company failing to provide all required training before Nichols was put to work to be at best in equipoise, which means the Secretary failed to carry his burden.

However, subsumed within the allegation of an all-encompassing violation of the standard, is the allegation that particular parts of the standard were violated, and here Gibson's admissions support finding a limited violation. Section 46(b)(5) requires that a newly employed experienced miner be instructed on the statutory rights of miners under the Act. Gibson admitted that Nichols was not trained in this regard. Tr. 275. Section 46.6(b)(7) requires that a newly employed experienced miner be introduced to the company's rules and procedures for reporting hazards. Gibson also admitted that Nichols was not trained in this regard. *Id.* Therefore, the court finds that in these two instances, Ronald violated section 46.6(a).

The court also finds that the violation was neither S&S nor serious. In neither instance were the hazards contributed to by the violation reasonably likely to lead to injuries of a reasonably serious nature. It is important to recognize that Nichols was a knowledgeable, experienced miner, not a starry-eyed neophyte. Nichols was familiar with the Mine Act and MSHA's role in enforcement. He knew how to report hazards to the agency and he also knew if he chose to do so, he could report them to Gibson. It is therefore unlikely the violation would have led to any injuries at the mine.

The court further finds that the company's negligence was low. As Brooks acknowledged, the company had a training plan and training policies in place. Tr.157. The court agrees with Brooks that Gibson's failure to instruct Nichols on his statutory rights and his failure to introduce Nichols to the company's rules and procedures for reporting hazards was not intentional. Tr. 157. Gibson was in a hurry to begin crushing, and the court believes that Brooks was probably correct when he stated that Gibson "overlooked" his duty to fully comply with section 46.6(b). Tr. 157. Thus, while the record supports finding that Gibson did not meet the standard of care required of him, it also supports finding that he was not far off the mark.

CITATION NO.	DATE	30 C.F.R. §
8566010	3/20/2012	56.12016

The citation states:

> A violation occurred on 3/12/21012. Miners were reported to have been working inside and around exposed moving parts of the . . . horizontal impactor/crusher without it being properly locked out. Power to the crusher is provided by a diesel drive motor (direct drive) that is started with an electric starter. According to a witness, the key was in the ignition at the time and the functional starting mechanism was beyond the immediate physical control of the miners doing the work. Were an accident to happen because the crusher was not adequately locked out while miners were working inside, a serious injury could result.

Gov't Exh. 10.

Section 56.12016 requires in part that "Electrically powered . . . equipment be deenergized before mechanical work is done on such equipment." It also requires that "[p]ower switches . . . be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on [the equipment]." According to Brooks, who based the alleged violation upon what Nichols told him, the company violated the standard by leaving the key for starting the crusher in the ignition while Nichols was working inside the equipment. Tr. 165. Brooks stated:

> He told me that the key was in the ignition while he was working inside. And that he didn't have control over the starting mechanism for that particular unit while he was inside it.

Tr. 166.[13]

As Brooks understood it, Nichols was "doing maintenance and repairs to the inside portion of the . . . [crusher]." Tr. 166. Brooks assumed that Gibson ordered Nichols to work inside the machine where Nichols was exposed to a "significant hazard." Tr. 166. With the key in the ignition, the impactor's starting mechanism was not disabled. Because the unit could be started with the key, the standard was violated. *Id.* To comply with the standard, the key should have been "pulled out of the ignition and [been] in [Nichols'] possession." Tr. 168. If someone turned the key while it was in the ignition, the equipment's drive motor would start, its clutch mechanism would divert the drive motor's energy to the v-belts, and the crusher would begin to turn. Tr. 174. At that point, Nichols would have been "dragged forward on the conveyor belt," caught in the mechanism, and seriously injured or killed. Tr. 175; *see also* Tr. 171. Recognizing that he based the alleged violation solely upon what Nichols said, Brooks added that he found Nichols credible because, "he knew enough about mining . . . to convince me that he was credible in the events that he was describing." Tr. 179.

Brooks concluded that a very bad accident was "reasonably likely" to befall Nichols because there was nothing to prevent one from happening. Tr. 180. Brooks also found that the operator, through Gibson, was moderately negligent in allowing the violation. He noted that Gibson is qualified to train miners and that as a qualified trainer, he is supposed to know the requirements of the law. Tr. 182. He should have known that a miner cannot go into a crusher without the crusher's key in his or her pocket. *Id.* Brooks described the hazard created by the violation as "pretty obvious." Tr. 183. However, he did not believe that Gibson intended to expose Nichols to harm. Tr. 183.

THE VIOLATION

Brooks was clear that he based the alleged violation solely upon what Nichols told him. Tr. 178. He found Nichols credible in this regard, and so does the court. As Brooks stated, Nichols' story was not "a story most people would make up." *Id.* Moreover, Gibson did nothing to rebut Brooks' version of the facts. Although at the time of the alleged violation another miner was working on site, Gibson did not offer testimony by the miner as to the location of the key. Nor did he otherwise refute Brooks' testimony. The court therefore finds that on March 12, 2012, Nichols was working inside the crusher and the key to the diesel motor that powered the equipment and caused it to move was in the motor's ignition. There was nothing to "prevent the [crusher] from being energized without the knowledge of the person working on [or in] it." Section 56.12016. Ronald clearly violated the standard, as Brooks found.

[13] Brooks was asked if he really believed that Nichols was working inside the crusher. Brooks replied that he did. Brooks stated, "[H]e told me he was in there. And I don't have any reason not to believe him." He observed that it was "not a story most people would make up." Tr. 178.

S&S AND GRAVITY

Brooks found the violation was S&S and reasonably likely to result in a fatal injury to Nichols. Gov't Exh. 10. The court agrees. There was a violation. There was a discrete safety hazard contributed to by the violation, in that with the key in the ignition, the compactor could have been started unbeknownst to Nichols, who being unable to quickly escape, easily could have been maimed or killed. Tr. 175, *see also* Tr. 171. There also was a reasonable likelihood the hazard contributed to (the inadvertent starting of the crusher while Nichols was inside) would result in an injury. First, as mining continued and Nichols worked inside the crusher, he was not visible to anyone starting the crusher's motor. Second, the rush to start production at the facility, increased the likelihood the crusher would be started without a careful determination of Nichols' whereabouts. Once the key was turned and the crusher began operating, Nichols would have been in dire danger of dismemberment or death. Taken together these factors establish the S&S nature of the violation.

Moreover, when considered in the context of the result of the injuries that were likely to occur (dismemberment or death) due to the violation, the court concludes that the violation was very serious.

NEGLIGENCE

Brooks found that the company was moderately negligent in allowing the violation (Gov't Exh. 10, Tr. 183), but the court, having considered the evidence, finds that the company's negligence was high. For all intents and purposes, Gibson was acting for the company. He was present when the violation took place. He placed one of his employees in a location and in a situation that easily could have led to the employee's serious injury or death. These factors mean that Gibson, and hence the company, failed to meet the high standard of care expected of him. Moreover, there were no mitigating circumstance. Gibson knew where Nichols was and he knew or should have known where the key was located. Further, Gibson was qualified to train his miners in the safety procedures called for by the Act and its regulations. Tr. 182. He was aware, knew, or should have been aware of what section 56.12016 requires. Despite this, he allowed the very serious violation to take place under his nose.

CITATION NO.	DATE	30 C.F.R. §
8566015	3/20/2012	56.14107(a)

The citation states:

> This viola[tion] occurred on 3/12/2012 and was reported to MSHA during a hazard complaint investigation. A miner accessed an elevated platform next to the . . . crusher to grease the shaft bearing while the shaft was running. The grease fittings were located near the exposed shaft end and shaft bearing and while there the miner was close (within 12 inches) to the

> unguarded rotating drum roller. Were a miner to contact the moving parts a serious injury could result. The Operator stated that they only do this when the plant is shut down and locked out.

Gov't Exh. 12.

Shortly after Nichols wrote the citation for the violation of the lockout procedures (Citation No. 8566010), he wrote Citation No. 8566015, alleging a violation of section 56.14107(a) Tr. 189; Gov't Exh. 12. The standard provides that all moving machine parts must be guarded against contact.[14] Nichols told Brooks that on March 12 he encountered an entanglement hazard when he was directed to climb on the crusher and stand inches from its moving parts so he could grease a bearing while the crusher was operating.[15] Tr. 193. There was, according to Nichols, no guard on the crusher's roller and its bearing.[16] Tr. 195. When the machine is operating the shaft in which the bearing is located spins. Tr. 193. Gov't Exh. 12 at 5. To grease the bearing, Nichols had to stand on a platform adjacent to the unguarded and spinning bearing and shaft.Tr. 191-192. This put him inches from the moving parts (Tr. 198) and exposed Nichols to the hazard of becoming entangled in the parts. Tr. 192. Once he was caught by the moving bearing or shaft, Nichols could have been drawn into the roller's pinch point. *Id.* Brooks believed Nichols would have been lucky to only lose an arm. Tr.193. Brooks stated that he was not surprised Nichols reported the condition because, in fact, the mine was not a safe place to work. Tr. 199. Brooks maintained that if Nichols had not told him about the condition, he still would have cited it based on what he saw when he inspected the mine. Tr. 194. He described what he observed as an "exposed moving machine part next to an area [which] somebody could access." Tr. 195.

Brooks believed that working close to the moving parts made inadvertent contact reasonably likely to occur. Tr. 193. It would take only a "momentary lapse of consciousness" for Nichols to place his hand on the shaft or for Nichols to slip and fall onto the parts. Tr. 193. In addition, Nichols said that Gibson instructed him to grease the bearing of the shaft. Tr. 196.

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[14] 30 CFR §56.14107(a) states in full:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take-up pulleys, flywheels, couplings, shafts, fan blades; and similar moving machine parts that can cause injury.

[15] Brooks wrote "within 12 inches" on the citation. Gov't Exh. 12. Nichols testified the distance was within six inches. Tr. 193, 198. When determining the existence of the violation and the hazard it presented, the court finds the difference in the measurements immaterial.

[16] Brooks chose to believe Nichols because he "saw other things [at the mine] that confirmed [Nichols's] honesty." Tr. 235. Brooks saw fresh grease in the vicinity of the bearing. Tr. 195. He also found that the moving parts lacked a guard, just as Nichols maintained. *Id*.

Therefore, in Brooks' opinion, Gibson should have known about the lack of a guard. It was visually obvious and other moving machine parts were guarded. *Id.*

Nelson maintained that during the compliance assistance visit, he specifically told Gibson the area needed to be guarded. Tr. 266. Gibson, however, disputed Nelson's account. Gibson asserted that the unguarded area about which Brooks and Nelson testified was not the area cited by Brooks. Tr. 268.

To abate the condition the company installed remote grease lines, thus eliminating the need for a miner to be adjacent to the moving parts. Tr. 197. Gibson also eliminated the platform where Nichols stood and retrained miners about exposure to moving parts. *Id.*

THE VIOLATION

The record fully supports finding the company violated section 56.14107 as alleged. Brooks faithfully reiterated what Nichols told him, and what Nichols said was confirmed by what Brooks saw. Tr. 195. The court finds that a miner could come within a few inches of the unguarded moving parts and that the parts could cause a serious injury if they were contacted by the miner. The court concludes that the cited area should have been guarded. It was not.

S&S and GRAVITY

The violation was both S&S and serious. The first element of the *Mathies* test was established in that the company violated the standard. The second element – that is a discrete measure of danger to safety contributed to by the violation – also was met. The lack of a guard to prevent access to the moving parts meant that a miner was subject to a severe injury should the miner become entangled in the parts. The third element – a reasonable likelihood that the hazard contributed to will result in an injury – was established as well. The work assigned to Nichols put him within inches of the unguarded moving part. While there is no evidence his footing was insecure or that he was otherwise likely to slip, the court takes judicial notice of the fact that being so close to the unguarded, moving parts meant that Nichols'clothing or hand was likely to contact the moving parts. A small move in the wrong direction, a dropped tool, or simply a moment of inattention, and Nichols would have been caught. Finally, Brooks' testimony clearly established that the fourth element of the *Mathies* test was met and that the violation was serious. Brooks noted, and there is really no dispute, that once entangled in the moving parts, Nichols would have been lucky if he only lost an arm. Tr. 193.

NEGLIGENCE

Brooks found the company was moderately negligent, and the court agrees. As Brooks testified, Gibson should have known of the violation. Gibson assigned Nichols to grease the equipment. Tr.196. Nelson and Gibson clashed over whether Nelson advised Gibson the area needed to be guarded, and the court finds there is insufficient corroborative evidence to determine who is correct. Tr. 266, 268. Therefore, the court concludes that the evidence does not establish the company was on actual notice guarding was required. The court finds, as Brooks testified, that other moving machine parts were guarded as required (Tr. 196) and notes there is

no evidence that the company habitually failed to comply. Nonetheless, the lack of a guard was visually obvious. Had the company exercised the care required by the circumstances, a guard would have been in place.

CITATION NO.	DATE	30 C.F.R. §
8566011	3/20/2012	56.15004

The citation states:

> This violation occurred on 3/12/2012. At least 2 [m]iners were reported to have been seen working around and inside the . . . crusher where there was dirt and airborne dust and possible metal fragments that could be knocked loose and present a hazard to the face and eyes. They were hard-face welding and replacing worn metal plates at the time. Safety glasses or goggles were not being worn and reportedly not provided on-site. Were an accident to occur because the miners were not wearing eye protection when working in a hazardous location a serious injury could result.

Gov't Exh. 13.

Brooks issued the citation for an alleged violation of mandatory safety standard C.F.R. §56.15004.[17] When asked why, Brooks replied, "Nichols told me that he had observed miners working on [the] impact crusher without wearing safety glasses." Tr. 202. He further stated, "[T]hey weren't wearing eye protection. That's what the violation is." Tr. 203. Brooks emphasized that Nichols told him when he, Nichols, was working at and in the crusher, dirt and debris were "raining down on him." Tr. 203. In addition, when the crusher was operating there was a hazard to unprotected eyes from fly rock and dust. Tr. 204. The dust was especially prevalent when the crusher was started, something that Brooks also observed at other crusher installations. *Id.* Nichols described the dust as "very bad," and he told Brooks that other miners commented about the problem. Tr. 205. Brooks stated that he too believed that the dust was excessive, that during his inspections of the site Brooks had seen thick, airborne dust "numerous times." Tr. 206.

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[17] 30 C.F.R. §56.15004 states:

> All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

Given the hazards presented by the dust and the other things in the air, Nichols concluded that miners who did not wear safety glasses subjected their eyes to injury from foreign objects. Tr. 204. As for himself, Nichols testified that he "wouldn't think of working around a place like that without safety glasses." Tr. 206. Brooks stated that earlier he had seen miners who were not wearing eye protection at the site and that this bolstered his belief that Nichols was telling the truth. *Id.* He also noted that he had seen Gibson at the site without eye protection. Tr. 209.

In Brooks' opinion, the lack of eye protection was likely to lead to a disabling eye injury. Tr. 207. Brooks also found that the failure to wear eye protection was "fairly obvious" and that the company was moderately negligent in allowing the condition to exist. *Id.* In his contemporaneous notes, Brooks wrote that a miner said that he asked Gibson for safety glasses and that Gibson did not respond. Tr. 208, Gov't Exh. 4 at 11.

THE VIOLATION, ITS S&S NATURE, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

The court finds the violation existed as charged. It is true that the government's allegations are based solely upon what Brooks was told by Nichols – that two miners who were working in and under the crusher were exposed to airborne dirt and dust particles but did not wear safety glasses. Tr. 202, 203; Gov't Exh. 13 at 3. However, in the court's opinion, Brooks' testimony of what he saw and experienced at the mine fully corroborates what Nichols reported. Tr. 204, 206, 209. The court therefore finds that on March 12 two miners were working inside and around the impactor/crusher, and that the eyes of both miners were subject to injury from airborne dirt and dust fragments in that neither miner was wearing safety glasses in violation of section 56.15004.

The violation was both S&S and serious. The *Mathies* requirements have been met. There was a violation. The failure to wear safety glasses while working in an environment where the atmosphere contained airborne dirt and dust particles created a discrete safety hazard, that is the danger of an eye injury or injures from the particles getting into the miners' eye or eyes. Given the prevalence of the airborne particles, especially the dust (*see* Tr. 204, 205, 206), it was reasonably likely an eye injury or injuries would occur. Further, a scratched cornea or worse can cause lost time at work. Such injuries are therefore reasonably serious, and the violation itself was serious.

The court also agrees with Brooks that the violation was the result of the company's moderate negligence. The fact that the miners were not wearing eye protection was obvious. The lack of compliance by the miners should have been noted and corrected. It is fair to state that the company did not meet the standard of care required by the circumstances.

CITATION NO.	DATE	30 C.F.R. §
8566012	3/20/2012	56.15002

The citation states:

> A violation occurred on 3/12/2012. At least one miner

> was reported to be working around and on the crusher/ screen plant where the hazard of flying or falling rock was apparent, without having a hard hat on. The miner was observed standing on the elevated service deck next to a screen and adjacent to the rolls crusher. He was wearing a soft ball-cap type hat. He was also walking and working around other plant locations where a similar hazard existed. Were a miner to be struck on the head when not wearing a hard-hat a serious injury could result.

Gov't Exh. 14.[18]

Brooks testified that he issued the citation because Nichols told him that he, Nichols, and his co-worker, Dunsing, were working on a platform adjacent to the screen deck of the crusher and that Dunsing was not wearing a hard hat. Tr. 211-212. Brooks understood from Nichols that rather than a hard hat, Dunsing was wearing a soft baseball-type cap. Tr. 215. He also understood that Dunsing worked without a hard hat for "several hours."*Id.*

By virtue of being adjacent to the screen deck, Brooks believed that Dunsing was in danger of being hit in the head by fly rock. Tr. 213. Brooks testified that the rock would have come out of the crusher or would have been "kicked out" by the crusher's rollers. Tr. 214. He further observed that when Dunsing climbed off the platform, he would have been even more exposed to dangerous fly rock than he was when standing on the platform. Tr. 214.

Because of the size of some of the fly rock (up to three inches in diameter. Tr. 116), Brooks found that it was reasonably likely Dunsing would have been killed if he were hit on the head. Tr. 215.; Gov't Exh. 14. He testified that it was "fairly obvious" Dunsing was working without a hard hat, and he found that the company was moderately negligent. Tr. 216.

THE VIOLATON

The court finds that the Secretary failed to prove the violation. Obviously, Brooks did not see Nichols and/or Dunsing working without a hard hat on March 12. Rather, the allegation of a violation is based solely upon what Nichols told Brooks happened on March 12. Nichols' motives in reporting the alleged violations were not altruistic, to say the least. Nichols had been fired, and he was angry at his former employer. Moreover, Nichols did not appear to testify, but rather, and at the Secretary's request, offered testimony over the telephone, an arrangement that made it difficult to judge his credibility. The court therefore concludes that allegations based solely on events related by Nichols require at least some corroboration, and unlike other alleged

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[18] 30 C.F.R. §56.15002 states:

> All persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard.

violations based on Nichols' rendition of events, the Secretary in this instance offered no reliable corroborating evidence.

The Secretary tried but failed to provide such evidence. Brooks testified that he thought he remembered that during his inspection, he saw Dunsing working without a hard hat. However, Gibson then reminded Brooks that Dunsing was fired one week before Brooks arrived at the mine. Tr. 221. Upon being reminded, Brooks stated that he "guessed" he had not seen Dunsing working without a hard hat. Tr. 221.

Brooks also testified that when he spoke with Dunsing on the telephone, Dunsing told Brooks he did not want to "cooperate" with Brooks. Tr. 222. Dunsing said that Brooks was being "used by an employee who got fired because he didn't know how to do his job correctly." Tr. 223. Whether or not the statement is true, Dunsing's response highlights why it was necessary for the Secretary to corroborate Nichols' allegations.

CITATION NO.	DATE	30 C.F.R. §
8566017	3/21/2012	56.14107(a)

The citation states:

> On the Pioneer 40x48 portable rolls/screen plant, [t]he tail-pulley for the conveyor was not guarded on the west side. Miners work in the area when the plant is being run, however the pulley is partially guarded by its position behind the frame and no miners work close by. Were a miner to contact the moving parts through the triangular 20-inch by 24-inch opening a serious injury could result.

Gov't Exh. 16.

Brooks testified that he issued the citation because the company failed to guard a moving pulley at the front of the mine's rolls crusher. Tr. 228; *see* Gov't Exh. 16 at 4. Brooks explained that nothing was in place to prevent a miner from contacting the moving part.[19] Tr. 228. Brooks feared that a miner could inadvertently touch the pulley, become entangled in it, and be permanently disabled ("[A]t the least it would probably tear your arm off." Tr. 230) or be killed. Tr. 229, 230. However, he also believed that an injury or a fatality was "unlikely," because, as he testified, "nobody generally works around" the area. Tr. 230. The only real exposure to the hazard came when the pulley's bearings had to be greased (*Id.)*, and while there was some evidence that miners greased the pulley when the crusher was running, Brooks noted that

[19] The pulley is clearly visible in Government Exhibit 16 at 4. Brooks drew a box in blue around the unguarded area. Gov't Exh. 16 at 4; Tr. 229; *see also* Gov't Exh. 12 at 5 (area circled in red); Tr. 229-230.

Nichols did not report that miners had to continuously grease it.[20] Tr. 230-232. In addition to inadvertently extending a hand into the pulley's pinch point, it was possible, according to Brooks, for a miner to trip on the rocks at the base of the crusher and fall into the pinch point. Tr. 231.

Brooks found that the lack of a guard was due to the company's moderate negligence. Gov't Exh. 16; Tr. 233. The unguarded area was visually obvious. Tr. 233. He also speculated that holes in the frame of the crusher below the unguarded area were an indication that a guard had once been affixed to the frame. *Id.* On cross examination, Gibson asked Brooks why an MSHA inspector who was at the mine the previous week did not cite Ronald for the violation. Brooks replied, "I don't know, you'll have to ask him." Tr. 234; *see also* Tr. 239.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

The court finds that the violation existed as charged. The cited pulley was a moving machine part. The pulley could have been contacted rather easily in that, as Brooks testified, there was nothing to block access to it. Tr. 228; *see* Gov't Exh. 16 at 4 (area within hand drawn blue box). Moreover, the evidence establishes that miners at least occasionally had to work in the vicinity of the opening and grease the pulley. Tr. 230-232. While the remote fitting meant that a miner greasing the pulley was unlikely to contact the moving pulley while greasing it, the miner could, as Brooks feared, trip or slip on rocks at the base of the crusher and fall forward toward the pulley in such a way that the miner's hand, arm, and/or clothing would have been caught. Tr. 231. The pulley should have been guarded.

Brooks thought that the unguarded pulley was unlikely to cause a disabling injury (Gov't Exh. 16), and the court agrees. The very limited exposure of miners to the hazard supports Brooks' opinion. Because of the limited exposure, the court finds that this was not a serious violation.

The court further finds that the company's negligence in allowing the violation was low. Brooks noted that the lack of a guard was visually obvious. Tr. 333. However, the remote grease fitting to some extent disguised the fact that a potential hazard lurked beyond the fitting, which may be why an MSHA inspector who visited the mine prior to Brooks may not have issued a citation for the lack of a guard.[21] Tr. 234, 239. Taken in its totality, the evidence suggests that the violative condition was easy to miss.

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[20] The extent of even this limited exposure was put into question when Brooks agreed with Gibson that there was a remote grease fitting for the pulley. Tr. 239. Brooks maintained, however, that some exposure remained because the fitting was "not remoted very far." *Id.*

[21] On the other hand, the "inspection" to which Gibson referred may have been Nelson's compliance assistance visit, a courtesy visit during which citations were not issued. The matter was not clarified, and it is impossible to know.

CITATION NO.	DATE	30 C.F.R. §
8566018	3/21/2012	56.14107(a)

The citation states:

> On the Pioneer 40 x 48 portable rolls/screen plant, the drive belts and sheaves on the east side were not adequately guarded. While the front and side was substantially guarded, a miner could easily reach behind the guard and contact the moving parts through the 16-inch by 16-inch open area. Miners work around the plant but not close to the hazard. Were a person to come in contact with the moving parts a serious injury could result.

Gov't Exh. 17.

Brooks testified that although there was a guard for the moving parts on the crusher's drive motor, the guard was not high enough to prevent someone from reaching over it and ensnaring his or her arm in the turning shims and v-belts. Tr. 241; Gov't Exh 17 at 4 (area circled in blue); Tr. 244; Gov't Exh. 14 at 4 (upper area circled in red). As stated on the citation, the unguarded area measured approximately 16 inches by 16 inches. *Id.* According to Brooks, a person could slip or trip and fall into the moving parts. Or, a person could accidentally reach over the insufficient guard and not be aware moving parts were located in the area into which he or she reached. Tr. 242.

However, Brooks also agreed that there was limited access to the area because miners only occasionally worked in the vicinity of the drive belts and sheaves on the east side of the crusher. When they did, they were usually doing maintenance or, cleanup work, greasing the shaft bearing, or checking the belts.[22] Tr. 242, 245. If such an accident occurred, Brooks thought that the likely result would be a permanently disabling injury, in that the miner would lose a finger, a hand, or an arm. Tr. 243, 246. As Brooks recalled, the unguarded area was "less than shoulder height." Tr. 248.

In Brooks' opinion, the company should have known about the cited condition. Tr. 250. Moreover, Nelson testified that during his compliance assistance visit, he advised Gibson that drive belts and sheaves needed to be guarded, and his testimony was not refuted. Tr. 267.

[22] Brooks later agreed that access might be even more limited than he originally envisioned because it was possible the grease tube for the shaft bearing was "remoted out." Tr. 249. He was not sure. *Id.*

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

The court finds that the violation existed as charged. The testimony of Brooks establishes that the cited pulley sheave and the belts on the east side of the crusher were not adequately guarded. Tr. 241. No evidence was offered countering Brooks' testimony to this effect, and the court finds that the existing guard did not prevent a miner from inadvertently reaching an arm or hand over the guard and into the moving pulley and belts. The court notes that an opening approximately 16 inches square is more than enough space for a miner to insert his or her hand or arm. *See* Gov't Exh. 16 at 4. Moreover, the opening was not so high as to prevent contact by location. Tr. 248. Further, the testimony establishes that miners occasionally accessed the cited area when they were engaged in maintenance, checking the belts, or greasing the bearings. Tr. 242, 245. These miners were subjected to the hazard of being caught in the moving parts.

However, the court also concludes that exposure was so limited, the violation was not serious. The chance of an injury causing accident actually occurring was exceedingly low because miners only occasionally were in the area and because Brooks admitted that he was not sure that one of the activities he feared would subject miners to contact with the moving parts – greasing the bearings of the pulley – was more than minimally hazardous. *See* n. 23 *infra*.

Finally, the court agrees with Brooks that the violation was due to Ronald's moderate negligence. Gov't Exh. 17; Tr. 250 The lack of a guard was visually obvious. Moreover, because of Nelson's warning, the company was on notice a guard was required. Tr. 267. Had Ronald's management exercised the care required by the circumstances, a guard would have been installed.

CITATION NO.	DATE	30 C.F.R. §
8566019	3/21/2012	50.30(a)

The citation states:

> The operator failed to submit the required 7000-2 Quarterly Report form within 15 days following the end of the quarter. The 3rd quarter of 2011 ended on September 30 and the Quarterly Report due on October 15th was not submitted until October 24, 2011. This is a paperwork violation only.

Gov't Exh. 18.

On March 21, 2012, Brooks cited Ronald for a violation of 30 C.F.R. § 50.30(a), a standard requiring each operator of a mine in which a miner works to submit a quarterly employment report.[23] The citation states that the company failed to submit the required form

[23] 30 C.F.R. §50.30(a) states:

within 15 calendar days of the end of the third quarter of 2011. Gov't Exh. 18. The citation goes on to state that it is "a paperwork violation only." *Id.* When issuing the citation, Brooks found that there was no likelihood the failure to submit the form would result in an injury. *Id.* He also found that the failure was the result of the company's low negligence. *Id.*

Gibson stated that he "agreed" with the citation, but he noted that although the information was reported late, it was only "nine days late." Tr. 251.

THE VIOLATION, ITS GRAVITY, AND THE COMPANY'S NEGLIGENCE

After Gibson stated that he agreed with the citation and offered no testimony or other evidence to counter the inspector's gravity and negligence findings, the court found on the record that the violation occurred as charged and that the gravity and negligence of the operator were as described by Brooks. Tr., 251-252. The court affirms these findings.

OTHER CIVIL PENALTY CRITERIA

The court has found violations and it must assess civil penalties taking into account the statutory civil penalty criteria. 30 U.S.C. § 820(i).

HISTORY OF PREVIOUS VIOLATIONS

The Secretary introduced an assessed violation history report that shows in the two years prior to March 16, 2012, two violations were assessed and paid by Ronald. Tr. 120; Gov't Exh. 1. This is a very small history of previous violations.

SIZE OF THE BUSINESS

Although the parties did not reach a stipulation with regard to the size of Ronald's business, and although the company offered no evidence about its size, the court notes that when proposing penalties, the Secretary assigned no penalty points to Ronald due to its size. Petition for Assessment of Civil Penalty, Exh. A. Therefore, based on Exhibit A, the court concludes that Ronald is very small.

ABILITY TO CONTINUE IN BUSINESS

There is confusion in the record regarding this criterion. When asked by the court whether the company agreed that the total of the penalties proposed by the Secretary ($1,553.00)

> Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 . . . and submit the original to the MSHA Office of Injury and Employment Information, . . . within 15 calendar days after the end of each calendar quarter.

would not impact the company's ability to continue in business, Gibson answered that "it would impact it, yes," and the court responded, "I'll accept that . . . as a stipulation." Tr. 17. However, the Secretary never agreed that the proposed penalties would have an impact on the business, and the court wonders if there is a mistake in the transcript and that Gibson actually stated, "it would not impact it," an answer that seems possible given the court's response.

In any event, as the court explained at the beginning of the hearing, the company bears the burden of proof on the issue, and Ronald presented no evidence. Tr. 12. Therefore, the court finds that total penalties of up to $1,553.00 will not affect the company's ability to continue in business.

GOOD FAITH ABATEMENT

At the hearing, counsel for the Secretary agreed that Ronald had exhibited good faith in abating the alleged violations, and the court so finds.

ASSESSMENT OF PENALTIES

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566007	3/16/12	56.12016	$100	$200

The court has found that the violation was very serious although an accident was unlikely and that the violation was due to the company's moderate negligence. Given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $200 is appropriate. The court has departed from the proposed penalty because of its belief the injury or death that would most likely result if the equipment was started outweighs the fact that it was unlikely the equipment would be started while a miner was working around it.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566008	3/16/12	56.20008(a)	$100	$100

The court has found that the violation was not serious, that an injury causing accident was unlikely to occur because of the violation, and that the violation was caused by the operator's moderate negligence. Given these findings and the civil penalty criteria discussed above, the court finds that a penalty of $100 is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566009	3/16/12	56.15002	$100	$200

The court has found that the violation was serious and that the company's negligence was high. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of $200 is appropriate. The court has departed from the proposed penalty because of its belief that the company, as represented by Gibson, utterly failed to meet the standard of care required of it.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566013	3/20/12	46.6(a)	$243	$100

The court has found that the violation was not serious and that the company's negligence was low. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of $100 is appropriate. The court has departed from the proposed penalty because of its finding that the violation was less serious than alleged by the Secretary and because the company also was significantly less negligent than the government alleged.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566010	3/20/12	56.12016	$243	$275

The court has found that the violation was very serious and that the company's negligence was high. Given these findings, the court finds that a civil penalty of $275 is appropriate. The court has departed from the proposed penalty because it finds the company's level of negligence to be higher than did the inspector.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566015	3/20/12	56.14107(a)	$108	$108

The court has found that the violation was serious and that the company's negligence was moderate. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of $108 is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566011	3/20/12	56.15004	$108	$108

The court has found that the violation was serious and that the company's negligence was moderate. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of $108 is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566012	3/20/12	56.15002	$108	$0

The court has found that the Secretary did not prove the alleged violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566017	3/21/12	56.14107(a)	$100	$75

The court has found that the violation was not serious and that the company's negligence was low. Given these findings and the civil penalty criteria discussed above, the court finds a civil penalty of $75 is appropriate. The court has departed from the proposed penalty because it finds that the company was less negligent than the government alleged.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566018	3/21/12	56.14107(a)	$100	$100

The court has found that the violation was not serious and that the company's negligence was moderate. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of $100 is appropriate.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSED PENALTY
8566019	3/21/12	56.14107(a)	$100	$100

The court has found that the inspector's gravity and negligence findings are as stated on the citation. Given these findings and the civil penalty criteria discussed above, the court finds that a civil penalty of $100 is appropriate.

ORDER

Citation No. 8566012 **IS VACATED,** and Citation No. 8566013 **IS MODIFIED** by deleting the S&S finding. Within 30 days of the date of this decision, the company **IS ORDERED** to pay civil penalties that total $1,366 in satisfaction of the violations found above.[24] Upon payment of the penalties, this proceeding **IS DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

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/db

[24] Payment shall be sent to : Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O., Box 790390, St. Louis, MO 63179-0390.