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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING: Docket No. SE 2014-71-M A.C. No. 01-00027-335066
v.	
NATIONAL CEMENT CO. OF ALABAMA Respondent	Mine: National Cement Co.

DECISION

Appearances: Daniel Brechhuhl, Esq., U.S. Department of Labor, Office of the Solicitor, Denver, Colorado for Petitioner

Jay St. Clair, Littler Mendelson, Birmingham, Alabama for Respondent

Before: Judge Barbour

In this civil penalty case, arising under sections 105(d) and 110(i) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), as amended (30 U.S.C. §§ 815(d), 820(i)), the Secretary of Labor ("Secretary") on behalf of his Mine Safety and Health Administration ("MSHA") seeks the assessment of civil penalties for 24 alleged violations of various mandatory safety standards for the nation's metal and non-metal mines. The standards are set forth at 30 C.F.R. Part 56. In citing the alleged violations MSHA's inspectors made findings as to whether the violations were significant and substantial contributions to mine safety hazards ("S&S" violations). They also made findings regarding the violations' gravity and the negligence of National Cement Company of Alabama, Inc. ("National Cement"). The violations purportedly occurred at a cement plant owned and operated by National Cement. The plant is located in Ragland, Alabama.

Following issuance of the citations, the Secretary proposed civil penalties. When the company contested the Secretary's assessments, the Secretary filed the subject petition requesting the Commission assess the penalties as proposed. The company answered, admitting it was subject to the Mine Act, but denying the violations occurred, or, if they did, that the proposed penalties were appropriate. The Commission's Chief Judge assigned the case to the court, which directed the parties to engage in discussions to determine if any of the alleged violations could be settled. The court advised the parties that it would receive evidence and arguments concerning all of the allegations the parties could not settle. The parties ultimately agreed to settle 20 of the violations. The rest were tried on December 2, 2014, in Birmingham, Alabama.

THE MINE and THE INSPECTIONS

At its Ragland facility the company mines, crushes, grinds, and processes limestone to make powdered cement. Tr. 184. The cement is stored at the facility and is then shipped by truck and rail to customers throughout the southeastern United States. *Id.* Jeffery Golden, the company's human resources manager, testified that of the five similar cement plants in Alabama, National Cement's plant is fourth in size. Tr. 186-187. One hundred and twenty workers are employed at the plant, which operates three shifts around-the-clock. Tr. 47, 185, 187. Although Golden described National Cement as "one of the very small companies in the cement industry"(Tr. 186), when calculating proposed penalties, the Secretary regarded the plant as a medium sized operation, and given the number of miners who work at the facility and the annual hours worked, the court concludes the Secretary is correct. *See* Petition for the Assessment of Civil Penalty, Exhibit A.

On September 3, 2013, MSHA Inspector Rayford Stan Fendley, who at the time had been an inspector for seven plus years, traveled to the plant to conduct a four day inspection. Tr. 45-47. Fendley was accompanied by MSHA Inspector Michael S. Cohen and another inspector, both of whom participated in the inspection. The inspection resulted in the alleged violations, each of which was set forth in a citation issued pursuant to section 104(a) of the Mine Act. 30 U.S.C. §814(a).

THE ALLEGED VIOLATIONS

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8723970	9/3/13	56.14100(c)	$1795

The citation states:

> No safety chains or wire ropes were installed on the portable pressure washer trailer. The trailer was not tagged or placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items used to prohibit further use until the defects are corrected [*sic.*]. Serious injury could result should the trailer become disengaged from the tow vehicle. Standard 56.14100(c) was cited 4 times in two years at [the] mine . . . (2 to the operator, 2 to a contractor).

Gov't Exh. 3 at 1.

Section 56.14100(c) states,

> When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment, shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

Fendley testified that on September 3 he inspected the trailer used to transport the mine's pressure washer. The trailer was not in service. Tr. 54. Rather, it was parked in the plant's shop area, but not in an area specially designated for equipment in need of repair. Tr. 54-55; Gov't Exh. 3 at 2. The inspector noticed that although the tongue on the trailer's hitch was stable and in excellent condition (Tr. 50), there were no safety chairs or wire ropes in the area of the hitch.[1] Tr. 49. *See* Gov't Exh. 3 at 3. He further testified that safety chains or wire ropes are almost always provided by the trailer manufacturer and are standard safety equipment on a trailer. Tr. 51-52. In fact, Fendley never had seen a trailer without safety chains. Tr. 72.

The purpose of the chains or wire ropes is to secure the trailer to the equipment pulling it in case the trailer "accidentally disengage[s] from its towing apparatus." Tr. 49. A moving, uncontrolled, and unhitched trailer poses a danger to miners working or traveling near it. In the inspector's opinion, the lack of the chains or ropes made the trailer a "defective item" within the meaning of section 56.14100(c). Despite this, there was nothing to alert miners that the trailer was defective and could not be used until the chains or ropes were provided.[2] Tr. 55. In Fendley's view, the trailer should have been removed to a designated area that was specifically set aside for defective equipment, or it should have been tagged and thus have been prevented from being used until the chains or ropes were installed. *Id.* The Inspector believed that the failure to take the trailer out of service or mark the trailer as defective violated section 56.14100(c).[3]

Fendley saw no other defects on the trailer, and he thought it unlikely that the missing chains or ropes would result in an accident. Tr. 58. Still, an accident was possible. Even properly hitched trailers can disengage and move in an out-of-control manner. A person who is struck by an unhitched, moving trailer can be injured fatally. Tr. 58-59. However, because the trailer's hitch mechanism was in good condition and because when it was used at the plant the trailer was towed at low speeds, Fendely found that an accident due to the violations was "unlikely." Gov't Exh. 3 at 1.

The fact that the missing safety equipment was obvious indicated to Fendley that someone from mine management should have been aware of the condition. More to the point, he maintained

[1] The hitch mechanism is comprised of a triangular shaped tow bar that is attached to the trailer. A metal tongue projects from the tow bar and couples onto a ball that is mounted to the vehicle towing the trailer. Safety chains or wire ropes are usually attached to the hitch mechanism at the tow bar or on the tongue. *See* Gov't Exh. 3 at 4.

[2] Section 56.14209(b) states, "Unless steering and braking are under the control of the equipment operator on the towed equipment, a safety chain or wire rope capable of withstanding the loads to which it could be subjected shall be used[.]"

[3] Fendley testified that the company could have simply taken the trailer out of service by removing a tire or wheel or by letting air out of one of the tires. Tr. 57, 74-75. If a tire or wheel had been removed or if the tires had been flat, Fendley would not have regarded the lack of safety chains or wire ropes as a violation because further use of the trailer would have been prohibited by the missing wheel or flat tire(s). *Id.* However, the tires were inflated and on the trailer. Tr. 75. In contrast to Fendley, Scott White, the company's mobile equipment supervisor, testified of the trailer's four tires, the two on the left were flat and that he and Fendley walked around the trailer and looked at all of the tires. Tr. 83.

that Tom Hayes, the production manager, told him that mobile equipment supervisor, White, whose job it was to maintain and repair all equipment at the mine, knew of the cited condition. Tr. 59, 67-69. [4]

The alleged violation was terminated by placing a lock and a tag reading, "danger equipment locked out," on the tongue of the hitch. Gov't Exh. 3 at 5; Tr. 59.

Scott White testified that the trailer was not in service because the pressure washer's generator and one of its control valves were defective. Tr. 80. He stated that the washer had been out of service for three or four weeks. According to White, the two left tires on the trailer "went flat from sitting there." *Id.* White, who was with Fendley during the inspection (Tr. 82), maintained that the inspector asked if the trailer had chains. Tr. 81. Because "you could clearly see that it didn't," White told Fendley that the trailer was out of service and why. *Id.* White did not recall if the trailer came from the manufacturer with safety chains or wire ropes. *Id.* Because he knew that a contractor was coming to do the necessary repairs on the washer, White stated that he had not "inspected . . . and [gone] over" the trailer. Tr. 84.

THE VIOLATION

The violation occurred as charged. The court finds that as testified to by Fendley and as admitted by White, the trailer, which is "equipment" within the meaning of the standard and whose steering and braking is not controlled by the equipment operator or by the trailer itself, was not provided with safety chains or wire ropes as is required by section 56.14209(b) and therefore was "defective" within the meaning of section 56.14100(c). The court agrees with Fendley's common sense testimony that even though the hitch was in excellent condition, it could fail when it was in use and endanger miners working or traveling in the vicinity. Tr. 50-51, 58-59. Therefore, the court finds that the lack of safety chains or wire ropes made "continued operation [of the trailer] hazardous to persons." 30 C.F.R. §56.14100(c). The trailer should have been taken out of service and kept in a designated area, or it should have been tagged or otherwise removed from service. Because it was not, the company violated section 56.14100(c).[5]

GRAVITY and NEGLIGENCE

The court finds Fendley's analysis of the gravity of the violation persuasive. His testimony confirmed that while it was unlikely the trailer would unhitch and move unrestrained and out of control (Tr. 58), it could have happened, and if it happened the result could have been fatal to a miner traveling or working in the vicinity of the uncontrolled and uncontrollable trailer. The company did not dispute that it was possible, and the court finds that the violation was serious.

Fendley also found that the company was highly negligent in allowing the violation. Gov. Exh. 1 at 1. The court concludes that the company was moderately negligent. While it is true, as

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[4] When Fendley was cross examined, it became clear that Fendley may have been told by Hayes that Scott White knew the trailer was "in for repairs" not because White knew that the chairs or ropes were missing but because the pressure washer needed to be fixed. Tr. 69-70.

[5] The court does not credit White's testimony that the trailer's two left tires were flat. It is clear to the court that if they had been flat, Fendley would not have issued the citation. Tr. 57. Fendley specifically stated that he looked at the tires and they were not flat. Tr. 74-75. The court believes him.

Fendley noted, that the lack of chains or ropes was obvious and thus compliance with section 56.14100(c) was required, the record also supports finding, as White testified, that use of the trailer, while not impossible, was unlikely because of the broken pressure washer and the fact that the contractor had not yet come to repair it. Thus, White understandably lacked a sense of urgency to observe the defect and either take the trailer out of service or tag it. Tr. 84. This was ordinary negligence.

CITATION NO.	**DATE**	**30 C.F.R. §**	**PROPOSED PENALTY**
8723974	9/4/13	56.11001	$807

The citation states:

> Safe access was not being maintained to the bed of the . . . service truck. Cable slings, pipes, scrap iron and plastic buckets located on the bed of the truck created a slip, trip, and/or fall hazard and prevented safe access to the equipment located in the back of the truck. Serious injury could result from a slip, trip, and/or fall. Standard 56.11001 was cited 2 times in two years at [the]mine . . (2 to the operator, 0 to a contractor.)

Gov't Exh. 5 at 1.

Section 56.1101 states, "Safe means of access shall be provided and maintained to all working places."

On September 4 Fendley inspected a flatbed pickup truck that was used at the mine by repairmen. The truck's bed was littered with various pieces of equipment, among which were cable slings, scrap iron, plastic buckets, drop cords, a welder and a ladder. Tr. 98, 103; *see* Gov't Exh. 5 at 4. Based on his experience working at other mines, Fendley believed miners regularly accessed the truck's bed during the course of their work day. Tr. 98. He testified that trucks such as the one he cited were routinely used at the plant to transport people, tools, equipment, and materials. *Id.* The bed of the cited truck was typical in size, approximately 4 feet wide by 8 feet long. Tr. 100. The tailgate had been removed (Tr. 113), and Fendley believed miners usually accessed the bed from its open tailgate end. Tr. 101. Because of the height of the bed and of the bed's side panels, Fendley doubted miners always accessed the truck's bed by climbing over its sides, nor did he believe they often reached over the sides to load and unload equipment. *Id.* He thought that in most instances they climbed onto the bed from the tailgate end and then moved around the bed as they loaded or retrieved items. Tr. 102. In Fendley's opinion, when miners climbed onto the bed and moved around, they subjected themselves to the hazard of tripping or slipping on the equipment and being injured. Fendley stated, "If they need something . . . they're going to go across this material without clearing it out of the way." Tr. 104.

Fendley testified that because miners needed to go up and onto the truck bed to load and retrieve equipment and materials, the bed was a "working place" within the meaning of section

56.11001[6]. The inspector believed a slip or fall accident was reasonably likely because of the truck bed's littered state and because miners had to "go through [the] stuff" to do their jobs. *Id.* He also testified that he believed a fall would likely result in a sprain or a strain and/or cuts, "nothing that would be permanently disabling, but it would cause [a] person to not be able to fully perform [his] job." Tr. 107-108. Finally, he thought that one person would be affected because normally one person at a time would be on the truck bed. Tr. 108.

Fendley found the condition to be S&S. The discrete safety hazard about which he was concerned was a tripping hazard. Tr. 111. There was, he stated, a "good likelihood" someone "could get their feet tangled up" and fall. *Id.* Adding to the likelihood of a fall was the fact that a metal bar was positioned approximately four feet over the truck bed toward the cab end of the bed. Gov't Exh. 5 at 4; Tr. 111-112. A miner trying to retrieve something from the back of the bed would have to bend over to pass under the bar, and this added to the chance the miner would lose his balance. Tr. 111. Fendley testified that the only way to avoid the hazard was to keep the bed clean and orderly. Tr. 112. If miners had left "a clean path up the middle of [the] bed to access . . . equipment," Fendley would not have issued the citation. Tr. 118.

Fendley could not say that a management person had "direct knowledge" of the condition, but in his opinion someone from management should have known about it. The conditions was obvious. Tr. 108. It was, he stated, "readily visible to the casual observer." Tr. 109.

Company welder and repairman, Ray Silvey, testified that he used to truck for welding and repairs. Tr. 120. Silvey was on the job when the citation was issued, but he did not recall what he was doing. Silvey maintained that when things were loaded onto the truck bed he stood on the ground at the rear of the truck and hand loaded the equipment and materials. He did not get up on the bed. Tr. 122. He could not "recall a time" when he got on the truck bed to load materials. *Id.* According to Silvey, the only time he was on the bed was when he fueled the welding machine, which was once a week, at most. *Id.* Usually, when he or another miner was on the bed, loose items were not present. He stated, "We clean [the bed] regularly . . . . [W]e don't get to it every single day, but I'm not going to climb over anything to fuel the welder." Tr. 123. Silvey stated that he never had to climb over anything "substantial" when he was on the bed of the truck. *Id.* Otherwise, he stayed on the ground and dragged equipment off the bed as he needed it. Large items like the acetylene tanks were loaded and unloaded from a loading dock, where access to the bed was not required. Tr. 123. Further, the ladder and all of the welding tools could be retrieved from the side of the truck. Tr. 124-125.

THE VIOLATION

The court finds that the violation occurred as charged. There is no doubt that the truck bed was cluttered with equipment. A photograph taken of the bed when the violation was issued confirms, as Fendley testified, that numerous items were scattered about the bed. Gov't Exh. 5 at 3; *Id.* at 4. There was no path, clear or otherwise, to travel from the tailgate area of the bed to the area closest to the cab. Gov't Exh. 5 at 3.

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[6] 30 C.F.R. §56.2 defines a working place as, "any place in or about a mine where work is being performed." When asked why the bed of the truck met the definition, Fendley stated, "Because miners have to go [on the bed] in performance of their job. That's part of the areas [(*sic.*)] they have to access to do their job." Tr. 107.

The court also finds that the bed was in fact a "working place," that is, a "place in or about the mine where work is being performed," the work being loading and unloading equipment. 30 C.F.R. §56.2. The court does not credit Silvey's testimony that he only got on the bed of the truck when it was necessary to refuel the welding machine. Clearly, it was much easier to access the truck bed from its open end than from over its sides, and human nature, being what it is, the court concludes that in most instances, most miners, including Silvey, accessed and left the truck bed the easiest way possible. In so doing, miners, including Silvey, subjected themselves to possible slips and falls and resulting injuries due to the equipment cluttering the bed. The court fully agrees with the inspector that the lack of a clear path on the truck bed means that safe access was not provided on the bed and that this violated section 56.11001.

S&S and GRAVITY

The court does not agree with the inspector's S&S and gravity findings.[7] *See* Tr. 127-126. Rather, the court finds that it was unlikely the violation would result in an injury. Given the fact that the obstacles on the bed were obvious, the possibility of a miner stumbling or tripping on the disorderly equipment was significantly reduced. The obvious clutter means that a miner was more likely to watch where he was stepping. Moreover, the crossbar under which a miner had to bend to reach the cab end of the bed was just as likely to serve as a brace to steady the miner as a cause for the miner to lose his footing. Further, given the confined space of the bed and the short distance a miner would fall, the court finds that should a slip or stumble occur, it was unlikely the force generated by the mishap would be enough to result in a broken bone or a cut. Rather, in the court's opinion, the most likely result would be a bruise and/or a sore spot, if that. It might make a miner uncomfortable but no more than that, and it would be a stretch to find a slip or fall would be likely to result in an injury of a reasonably serious nature. For these reasons, the court also finds that in addition to the violation not being S&S, it was not serious.

NEGLIGENCE

As Inspector Fendley noted, the condition of the flat bed was open and obvious. The violation should have been observed and corrected. It was not, and the court finds that the violation was due to National Cement's moderate negligence.

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[7] A violation is S&S, "if, based upon the particular facts surrounding the violations there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). The Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, 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 in question will be of a reasonably serious nature.

Mathies Coal Co. 1, 3-4 (Jan. 1984).

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8725985	9/4/13	56.12032	$1,304

The citation states:

> The appx. 9"x 9" junction box cover, for the East and West Hydrophobe Pumps, was not secured in place. Primary voltage inside the electrical box is 120 volts which exposed miners to a shock. Standard 56.12032 was cited 10 times in two years at [the] mine . . . (10 to the operator, 0 to a contractor).

Gov't Exh. 7

Section 56.12032 states, "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs."

On September 3 MSHA Inspector Michael S. Cohen conducted an inspection at the plant. Tr. 131. Cohen testified that during the course of the inspection he saw "at least 100" junction boxes. *Id.* One of those was located next to the chemical storage facility. Tr. 132. The box formed a metal (steel) enclosure in which 120 volt electrical wires were connected [8]. Tr. 134-135, 139. Cohen noticed that the steel cover of the junction box was down but that the cover was not latched. Tr. 137, 145. Cohen believed the unlatched cover was a violation of section 56.12032, which requires cover plates on junction boxes to be "kept in place." 30 CFR § 56.12032. Although Cohen agreed that gravity helped keep the cover in place (Tr. 145) and that once closed, there was some resistance or friction that made the cover harder to open (Tr. 146), Cohen explained that the manufacturer of the particular box included a latch at the bottom of the box, and if the latch was not closed an explosion or arc inside the box could "blow the door open and . . . somebody could get burned or seriously

[8] The company offered the actual box as an exhibit. Co. Exh. A. Examination of the exhibit allows the court to provide a more complete description of the box than that offered by Inspector Cohen. The box measures approximately 8 1/4 inches wide by 10 1/4 inches long by 4 inches deep. The cover of the box is hinged at the top. Half inch flanges on the sides and bottom of the cover overlap the sides and bottom of the box, effectively preventing access to the inside of the box unless the cover is raised. At the bottom of the box is a draw latch. The latch part of the mechanism is soldered to the bottom of the box and the keep part of the mechanism is soldered to the flange at the bottom of the cover. *See* Co. Exh. A. All that is necessary to close the cover is for a person or for gravity to pull down on the cover. When this is done, the flanges of the cover easily fall over the sides and the bottom of the box preventing all but purposeful or accidental access to the inside of the box. To latch the cover, the bail of the latch mechanism must be intentionally slipped over the keep of the latch and the tongue of the latch must be pushed toward the back of the box. Once latched, the cover can only be opened by the deliberate action of a person pulling the tongue toward the front of the mechanism which loosens the bail, and which then falls from the hook. After this happens, the cover can be lifted. Cohen agreed that even if the box cover is not latched, gravity helps keep the cover in place and that the effort to open the latched cover is only minimally different from the effort to raise the unlatched cover. Tr. 147-148.

injured."[9] Tr. 138, *see also* Tr. 139. On the other hand, if the latch was closed and there was an explosion or an arc he believed the resulting fireball or blast would be contained inside the box. *Id.*; *see also* Tr. 140. There was nothing that Cohen noticed that indicated repairs or testing were underway and therefore the exception in the standard that allows the cover plate to be open, did not apply. *Id.* According to Cohen, there are many "different kind[s] of junction boxes on the market [and e]very one of them has a similar type of either latch or mechanical fastener that holds the cover plate in place." *Id.*. During his training as an inspector, Cohen was taught that if the latch or fastener is not employed on a junction box, section 56.12032 is violated. Tr. 152.

Cohen did not try to lift the cover. Rather, the company had its electrician come to the box, lift the cover, and verify the voltage. Tr. 150. Cohen assumed everything inside the box was as it should be because "all [the electrician] did was verify the voltage and latch the cover and . . . [the inspection party] moved on from there." Tr. 150. Latching the cover abated the alleged violation. *Id.*

Cohen also noted that the standard had been cited 10 times between September 3, 2011, and September 3, 2013. He termed this a "significant history." Tr. 141. Based on the 10 prior citations, the inspector believed the company was highly negligent. Tr. 144.

THE VIOLATION

The court concludes that the Secretary did not prove the violation. The standard requires that the cover be "kept in place at all times except during testing and repairs." There is no dispute that testing and repair of the pump starters or of the electrical connections inside the box were not underway when the violation was cited. Tr. 135. There also is no dispute that when the violation was cited only gravity held the cover in place and only friction offered some resistance to opening the cover. Tr. 145-146. Finally, there is no dispute that the latch at the bottom of the box was open, not closed. Tr. 137, 145.

The court has struggled with whether the failure to close the latch is essentially a *per se* violation of the standard. As counsel for the operator pointed out, there is no specific regulatory requirement that the cover be latched or locked. Tr. 180. On the other hand, as counsel for the Secretary pointed out, the box was manufactured with a latch presumably to "protect people that would be subject to [the] area [where the box is located.]" Tr. 176. (The court interprets counsel for Secretary's argument as being that the court should above all effectuate what counsel deems the purpose of the standard by finding that an unlatched or unpinned box is in and of itself a violation of section 56.12032.) However, the court has concluded that rather than read into the standard something that is facially missing in order to effectuate what the Secretary presumes to be the standard's purpose, the court should resolve the issue of the existence of the violation in a more elementary and prosaic manner – by applying the words of the standard to the facts.

"In place" refers to the position of the cover, and here all agree that the cover was properly positioned. "Kept" is the past tense of " to keep," a transitive verb connoting "restraint." Mirriam-Webster, Inc., *Webster's New International Dictionary* (1993) at 1236. The force of gravity restrained the cover plate from moving from its closed position and friction offered some resistance to it opening. Tr. 145-146. If analysis of the words of the standard ended here, the court might find

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[9] When asked how there could be an explosion inside the box, Cohen stated it would require, "somebody taking a wire, a loose wire, [and] ground[ing] it out internally" or "it could just be a broken wire." Tr. 148-149.

that the conditions cited by the inspector did not violate section 56.12032.[10] However, the standard contains other words that require further analysis. The words, "at all times," form an inclusive phrase encompassing both when the alleged violation is cited and the coming time as mining continues. The court accepts Inspector Cohen's testimony that as mining continued if wires inside the box became loose or broken and touched one another, an electrical explosion or arc could occur. Tr. 139. There is no testimony to the contrary, and the inspector's opinion is entitled to considerable weight. The critical question, therefore, is whether the Secretary established that such an explosion or arc would produce forces sufficient to lift the cover and allow flames to escape the box and enter the mine atmosphere, and it is here that the Secretary's case comes a cropper.

The Inspector's testimony is conflicted and inconsistent. Early in his testimony, Inspector Cohen stated, "If you have an electrical arc, flash or explosion inside this box, the fireball or pressure can blow the door open, and therefore, somebody could get burned or seriously injured." Tr. 137-139. However, on cross examination he admitted that he did not know if this was so. The admission is contained in a colloquy between counsel for the company and the inspector in which counsel pursued a line of questions probing the basis for the inspector's belief that an electrical malfunction inside the box could result in the cover being raised. Tr. 149.

Counsel: So how could there be and explosion inside [the box?]

Inspector: Have somebody taking a wire, a loose wire, ground it out internally.

Counsel: You mean, if they were working inside?

Inspector: It could be just a broken wire.

Counsel: Oh, so you're talking about just a short?

Inspector: Yes, sir. Yes.

Counsel: Of 120 volts?

Inspector: Yes, sir.

Counsel: You think that'd blow the cover off?

Inspector: I don't know.

The court concludes that to prevail, the Secretary had to offer other testimony or documentary evidence as to the force produced by an electrical malfunction inside the cited box and the effect of the force on the box's unlatched cover. He did not.

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[10] The court recognizes circumstances can arise in which a cover is technically "kept in place," that is, it is in a closed position, but defects in the plate (e.g. holes due to corrosion or other causes) render the cover functionally equivalent to an open cover and hence result in a violation of the standard. *See e.g.*, (*TM Incorporated – Knife River Materials*, 33 FMSHRC 1210, 1238-1240 (ALJ Zielinski)). However, such circumstances are not before the court.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8725995	9/4/13	56.12032	$1,304

The citation states:

> The Kiln Shell Fan disconnect box cover, located next to the auxiliary fans, was not secured in place. The primary voltage inside the box was 480 volts which exposed miners to a shock or electrocution. Standard 56.12032 was cited 14 times in two years at [the] . . . mine (14 to the operator, 0 to a contractor).

Gov. Exh. 9 at 1.

As previously noted, Section 56.12032 states "Inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing and repairs."

Inspector Cohen testified that on September 4 he observed another junction box whose cover was not kept in place. Wires carrying 480 volts of electricity passed through the box. Tr. 154. The electricity was "on" and flowing into and out of the box. Tr. 155, 158, 164. Although the inspector testified that the box was partly opened, the evidence is in conflict.[11] However, it is clear that the box was not fastened shut. Tr. 155. The box was manufactured with a hasp, but there was no pin or lock through the hasp, securing the cover against opening. According to Inspector Cohen, if the cover had been pinned or locked, there would have been no safety issue and no violation. Tr. 156; *See also* Tr. 168. Cohen agreed that the force of gravity closed the cover. He stated, "If you flipped [the cover] open and let it go, it would close down[.]" Tr. 158. Although he could not recall for certain, the inspector acknowledged that there also might have been a "dimple" on the lower edge of the cover and if the dimple lodged in a corresponding depression in the lower body of the box, the two would have helped to keep the cover closed. 163. Cohen thought it improbable that the condition would injure a miner. *Id.* However, if an injury occurred, it would likely be fatal to the miner involved. Tr. 155. Because of the previous violations of section 56.12032 cited at the mine in the two years between June 4, 2011, and June 4, 2013, Cohen found that the condition was due to the company's "high" negligence. [12] Tr. 157; Gov't Exh. 8.

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[11] Cohen stated, "The door was partially open. That's why I issued the citation." Tr. 158. However, in his contemporaneous notes he stated that the "front cover [was] down and not secured or locked in place." Tr. 165; Gov't Exh. 9 at 2. Earlier in his testimony when asked why he thought it was unlikely the condition he cited would result in a fatal accident, he stated, "[T]he cover was down, but it was not fastened or latched." Tr. 154. Cohen acknowledged that nowhere in his notes did he mention that the door was partially open, but he excused himself by stating that, "Nobody's perfect." Tr. 166. However, shortly thereafter, he again stated, "The cover was found down." *Id.* Moreover, Cohen's supervisor understood that the cover was not partially opened. Cohen agreed that the supervisor subsequently modified Cohen's negligence finding from "high" to "moderate" to reflect that "the box was closed." Tr. 157.

[12] As previously mentioned, the finding was modified to" moderate" negligence by Inspector Cohen's supervisor "to reflect that the box was closed." Tr. 157.

To abate the violation the company took a piece of wire or welding rod and inserted it through the hasp preventing the cover from opening without removing the fastener. Tr. 160, 167; *See similarly configured* Co. Exh. B. In Cohen's opinion, the wire served the same purpose as a lock in preventing the cover from opening accidentally. Tr. 161.

THE VIOLATION

The court concludes that the Secretary did not prove the violation. Had the Secretary established the cover of the box was partly open, the violation would have been established because a partly open cover is clearly one that is not kept in place at all times and testing or repairs were not underway. But the evidence is in conflict on this point. On one hand, the inspector described the cover as "partially open." Tr. 158; 166. On the other, in his written notes and in other testimony he described the cover as "down" and as being "found down. Gov't Exh 9 at 3; Tr. 166. Moreover, in a photograph of the junction box that purports to show the box as cited, the cover appears to in fact be down. Gov't Exh 9 at 4. Further, Inspector Cohen agreed that his supervisor modified the inspector's negligence finding because the cover was closed. Tr. 157. Given the conflicts in the evidence and the lack of corroboration that the cover was partly open, the court cannot find that the cover was in fact partly open and hence that the standard was violated.

None-the-less, it is undisputed that the cover was not locked or pinned and the Secretary still could have proven the violation if he offered testimony that an internal explosion or arc would have been forceful enough to blow open the cover. He did not present any oral or written evidence on the effect on the cover of the forces produced by an internal explosion, arc, or other electrical malfunction of conductors carrying 440 volts of electricity. Despite this deficiency, had the Secretary established that forces produced by a malfunction of the 120 volt conductors in the junction box for the Hydrophobe Pumps produced forces sufficient to blow open that box's unlatched cover, the court might have been able to conclude that the presumably greater forces produced by a malfunction of the 440 volt conductors would have blown open the cover of the smaller Kiln Shell Fan disconnect box, but the record does not allow the court to find the premise necessary to reach the conclusion. Therefore, based on the record before it, the court holds that the Secretary failed to establish that the cover of the Kiln Shell Fan disconnect box was not "kept in place at all times."

OTHER CIVIL PENALTY CRITERIA

The parties stipulated that the company exhibited good faith in abating the violations. Tr. 25. They further agreed that the amount of any civil penalties assessed will not affect the company's ability to continue in business. Tr. 25-26. The Secretary maintains that the company has a "very large" history of prior violations. Tr. 27. The Secretary submitted a computer printout purporting to show all violations cited and assessed at the mine that became final between June 3, 2012 and September 2, 2103. Gov't Exh. 2. There are 84 such final violations. The court finds that the company has a large history of prior violations. *See* Tr. 26-34 (discussion between the court and counsels). Finally, the parties did not stipulate as to the size of the company. However, given the points assigned by the Secretary for the size of the mine and the mine's controlling entity, points the company did not dispute, the court finds the company is of a medium size. *See* Petition for Assessment of Civil Penalty, Exh. A; "The Mine and The Inspection" discussion *supra*.

ASSESSMENT OF CIVIL PENALTIES

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8723970	9/3/13	56.14100(c)	$1,795	$1,000

The court finds that the violation was serious and the company's negligence was moderate. Given these findings and the other civil penalty criteria, the court assesses a penalty of $1,000 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8723974	9/4/13	56.11001	$807	$500

The court finds that the violation was not serious and the company's negligence was moderate. Given these findings and the other civil penalty criteria, the court assesses a penalty of $500 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8725985	9/4/13	56.12032	$1,304

The court finds that the Secretary did not prove the violation. The citation will be vacated.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY
8725995	9/4/13	56.12032	$1,304

The court finds that the Secretary did not prove the violation. The citation will be vacated.

SETTLED VIOLATIONS

The parties agreed to settle 20 alleged violations. At the close of the hearing counsel for the Secretary read the details of the settlements into the record. Tr. 188-194. The settlements are as follows:

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8723972	9/4/13	56.141323(a)	$1,795	$1,795

There are no modifications to the citation and the penalty assessed is the penalty proposed. Tr. 188.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8725990	9/4/13	56.12032	$1,304	$1,304

There are no modifications to the citation. The penalty assessed is the penalty proposed. Tr. 188.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8725991	9/4/13	56.12004	$1,304	$1,000

The inspector's negligence finding will be modified from "high" to "moderate." Tr. 188.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8723973	9/4/13	56.4104(a)	$807	$807

There are no modifications to the citation. The penalty assessed is the penalty proposed. Tr. 188.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8725992	9/4/13	56.20003(b)	$807	$100

The inspector's gravity finding will be modified from an injury being "reasonably likely" due to the violation, to an injury being "unlikely." The inspector's S&S finding will be deleted. Tr. 189-190.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8730407	9/4/13	56.14107(a)	$3,143	$2,000

The inspector's negligence finding will be modified from "high" to "moderate," Tr. 190.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8723976	9/4/13	56.14100(c)	$807	$807

The inspector's negligence finding will be modified from "high" to "moderate," but the penalty assessed will remain as proposed Tr. 190-191.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8725994	9/4/13	56.12032	$392	$392

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 191.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8725996	9/4/13	56.14132(b)(1)	$2,678	$2,678

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 191.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8725998	9/4/13	56.12032	$1,304	$1,304

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 191.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8723979	9/5/13	56.12032	$3,143	$3,143

The inspector's negligence finding will be modified from "high" to "moderate." The penalty assessed will remain as proposed. Tr. 191.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8723981	9/5/13	56.12034	$425	$100

The inspector's negligence finding will be modified from "high" to "moderate." Tr. 191.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8730415	9/5/13	56.12032	$946	$946

The inspector's negligence finding will be modified from "high" to "moderate." The penalty assessed will remain as proposed. Tr. 192.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8730416	9/5/13	56.12019	$425	$100

The inspector's gravity finding will be modified from the violation being unlikely to result in a "fatality" to the violation being unlikely to result in "lost workdays or restricted duty." Tr. 192.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8726005	9/6/13	56.20003(b)	$362	$362

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 192.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8726006	9/6/13	56.20003(b)	$362	$362

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 192.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8730418	9/6/13	56.12004	$745	$100

The inspector's negligence finding will be modified from "high" to "moderate." Tr. 192.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8730420	9/7/13	56.12004	$634	$634

There are no modifications to the citation. The penalty assessed is the penalty proposed Tr. 192.

CITATION NO.	DATE	30 C.F.R.§	PROPOSED PENALTY	SETTLEMENT AMOUNT
8726007	9/7/13	56.14107(a)	$7,578	$4,735

The inspector's negligence finding will be modified from "high" to "moderate." Tr. 192.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	SETTLEMENT AMOUNT
8726008	9/7/13	56.16012	$138	$138

There are no modifications to the citation. The penalty assessed is the penalty proposed.

Tr. 192.

After the settlements were explained by counsel, they were approved on the record by the court. Tr. 194.

ORDER

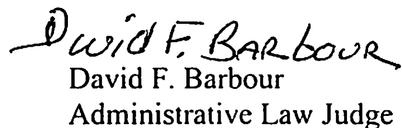
In view of the conclusions, findings, and approval set forth above, within 30 days of the date of this decision the Secretary **IS ORDERED** to:

Modify Citation No. 8723970 by changing the inspector's negligence finding from "high" to "moderate;" and modify Citation No. 8723974 by changing the inspector's gravity finding from "reasonably likely" to "unlikely" and from "lost workdays or restricted duty" to "no lost workdays" and by deleting the inspector's S&S finding.

Further, if he has not already done so, within 30 days of the date of this decision, the Secretary **SHALL** modify Citation No. 8725991 by modifying the inspector's negligence finding from "high" to "moderate;" modify Citation No. 8725992 by changing the inspector's gravity finding from "reasonably likely" to "unlikely" and by deleting the inspector's "S&S" finding; modify Citation No. 8730407 by changing the inspector's negligence finding from "high" to "moderate;" modify Citation No. 8723976 by modifying the inspector's negligence finding from "high" to "moderate;" modify Citation No. 8723979 by changing the inspector's negligence finding from "high" to "moderate;" modify Citation No. 8723981 by changing the inspector's negligence finding from "high" to "moderate;" modify Citation No. 8730415 by changing the inspector's negligence finding from "high" to" moderate;" modify Citation No. 8730416 by changing the inspector's gravity finding from "unlikely" to result in a "fatality" to "unlikely" to result in "lost workdays or restricted duty;" modify Citation No. 8730418 by changing the inspector's negligence finding from "high" to "moderate;" and modify Citation No. 8726007 by changing the inspector's negligence finding from "high" to "moderate."

Citations No. 8725985 and No. 8725995 **ARE VACATED.**

Finally, within 30 days of the date of this decision, the company **SHALL PAY** civil penalties in the amount of $24,307 ($1,500 for the contested violations and $22,807 for the settled violations).[13] Upon **MODIFICATION** of the citations and **PAYMENT** of the penalties, this proceeding **IS DISMISSED.**



David F. Barbour
Administrative Law Judge

[13] Payment shall be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, BOX 790390, ST. LOUIS, MO 63179-0390.

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/db