FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NORTHERN ILLINOIS SERVICE CO., Respondent.	CIVIL PENALTY PROCEEDINGS: Docket No. LAKE 2013-616-M A.C. No. 11-02963-327093 Docket No. LAKE 2014-147-M A.C. No. 11-02963-338844 Mine: Portable #1 Docket No. LAKE 2014-2-M A.C. No. 11-03104-332298 Mine: Portable #2

DECISION

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

Peter DeBruyne, Esq., Peter DeBruyne, P.C., Rockford, Illinois for Respondent

Before: Judge Barbour

In these consolidated civil penalty cases arising under the Federal Mine Safety and Health Act of 1977 (the "Mine Act" or "Act"), the Secretary of Labor ("Secretary"), on behalf of his Mine Safety and Health Administration ("MSHA"), petitions for the assessment of civil penalties for eight alleged violations of various mandatory safety standards for the nation's surface metal and nonmetal mines (30 C.F.R. Part 56) and for one alleged violation of the training regulations for the nation's surface nonmetal mines (30 C.F.R. Part 46). The allegations are the result of the inspection of two quarries, each owned and operated by Northern Illinois Service Co. ("the company").[1] The Secretary asserts each alleged violation was caused by the company's negligence as specified by MSHA's inspector, was of the degree of gravity specified, and that each alleged violation warrants a civil penalty of $100.

[1] The company is headquartered in Rockford, Illinois. In addition to owning and operating several quarries, the company provides a wide range of demolition, earthwork, and design and build services. www.nothernillinoisservice.com, (last visited May 12, 2015).

After the petitions were filed, the company answered denying its liability. The matter was assigned to the court which ordered the parties to engage in settlement discussions. Shortly thereafter, the parties advised the court that they could not settle any issues, and the matter was heard in Rockford.[2] The Secretary offered the testimony of two witnesses, both MSHA inspectors, and the company called one management official.

LAKE 2014-147-M

CITATION NO.	DATE	30 C.F.R. §
8747007	11/13/2013	56.16005

Robert Bauman, who was the Secretary's only witness in Docket No. LAKE 2014-147-M, has been employed by MSHA as an inspector for over three years (Tr. 20), prior to which he had extensive experience working in the sand and gravel industry. Tr. 18-19. Bauman testified that on November 13, 2013, he traveled to one of the company's quarries to conduct an inspection. At the quarry, which measures approximately one half mile long by one half mile wide, stone is extracted by blasting and is crushed to different sizes to serve various purposes.[3] Tr. 39, 53-54. According to Brian Russell, the quarry foreman, the mine operates intermittently, and in 2013 there were only 52 days when stone was processed. Tr. 55.

After arriving at the mine Bauman went to the scale house trailer where he met Joyce Dagnon, the "scale person." Tr. 22, 41. Bauman also spoke on the telephone with Russell. *Id.* Russell, who described his duties as "[i]nspecting equipment . . . and oversee[ing the] crushing process and [the] load[ing of] trucks" (Tr. 61), told Bauman that he could not be at the quarry during Bauman's inspection because of duties at another facility. Tr. 41. Bauman asked Russell about the condition of the quarry and whether management was repairing or replacing any equipment. Bauman felt it was important to have the information so he would not cite the company for a violation involving equipment that was in the process of being repaired or replaced. Tr. 23-24. According to Bauman, Russell indicated that everything was the same as when the plant last operated on November 1.[4]

Bauman then traveled to the shop. Tr. 25, 30. There, the first person Bauman encountered was a loader operator. Bauman noticed two front end loaders parked on either side of two compressed gas cylinders. Tr. 30-31, 42. The cylinders, each of which was approximately

[2] At the beginning of the hearing, the court entertained arguments on the Secretary's motion to plead alternatively alleged violations of 30 C.F.R. §56.12006 and 30 C.F.R. §56.12018 with regard to Citation No. 8741689 (Docket No. LAKE 2013-616-M). Tr. 14-16. The court granted the motion. Tr. 16-17.

[3] The principal features of the quarry are the scale house trailer, the shop, and the plant area. *See* Resp. Exh. 1; Tr. 52-53. The stone is crushed in the plant area which is near the bottom of the quarry. The primary crusher is located in the plant area along with a feed hopper and a feed conveyor. In addition to being crushed, the stone is screened and sized in the plant area. Then, it is transported by conveyor to where it is stockpiled and loaded onto customers' trucks. The loaded trucks are driven to the scale house trailer and weighed before they are driven from the mine. Tr. 44-45. When Bauman visited the plant area none of the plant equipment was operating. Tr. 41, 45. However, there was a front end loader loading stockpiled product into customers' trucks. Tr. 45.

[4] Bauman understood that operation of the plant depended on whether the company had orders for its products. Tr. 40-41.

four feet tall, were standing upright on the shop's level concrete floor. Tr. 44; Gov't Exh. 2 (LAKE 2014-147-M); *see* Gov't Exh. 3A (LAKE 2014-147-M). Neither cylinder was "secured." [5] Bauman noticed a bungee cord on the floor next to the cylinders. Bauman speculated the cylinders were "probably secured at one point and then someone . . . used them and moved them and forgot to tie them back up." Tr. 27. After Bauman mentioned the cylinders to the loader operator, the operator checked to see if they retained any gas. Both did. Tr. 27-28. Bauman concluded that the unsecured, pressurized cylinders constituted a violation of section 30 C.F.R. §56.16005, which requires compressed gas cylinders to "be secured in a safe manner." Bauman issued a citation to the company. Gov't Exh. 1 (LAKE 2014-147-M).

Bauman found that the unsecured cylinders could result in one person suffering a fatal injury. Gov't Exh. 1(LAKE 2014-147-M); Tr. 37. He stated if a cylinder "tipped over, the cap could come off, and the valve could get injured; and with the release of all that high pressure gas, [the cylinder] could turn . . . into a missile." Tr. 28. However, he did not think such a scenario was likely because there was nothing above the cylinders that might fall and knock them over and/or damage their caps and valves. In addition, the floor upon which the cylinders stood was smooth.[6] Tr. 29

Bauman also concluded that the failure to secure the cylinders was the result of the company's low negligence. He noted that Dagnon said the plant had been shut down since November 1.[7] Because the plant had not operated for almost two weeks, there had been no work place examinations of the shop. In Bauman's opinion management personnel simply "did not realize that [the cylinders] weren't secured." Tr. 30.

The condition was corrected when the loader operator tied up the cylinders. Tr. 27; *See* Gov't Exh. 3B (Lake 2014-147-m).

Brian Russell testified that although he recalled seeing the cylinders, he had no memory of using them or of seeing any one else use them. Tr. 57. Russell did not know why the cylinders were unsecured. *Id.* He added that he was uncertain why the cylinders were at the mine in the first place, and he did not know what they contained. Tr. 59

---

[5] By "secured," Bauman meant that the cylinders were "tied up [and] attached to the wall . . . so they could not fall over." Tr. 26.

[6] By mentioning the smooth nature of the floor Bauman presumably meant that the cylinders were less likely to fall than if they were standing on an uneven floor.

[7] In his contemporaneous notes Bauman reiterated what Dagnon told him. Gov't Exh. 2 (Lake 2014-147-m). Bauman's notes were admitted over the objection of counsel for the company, who lodged continuing objections to the admission of all such notes. Tr. 33-34. The objections were overruled.

THE VIOLATION

Section 56.16005 requires "[c]ompressed and liquid gas cylinders [to] be secured in a safe manner." The cited cylinders were not secured in any manner, safe or otherwise. Inspector Bauman's testimony that he found them standing unsecured and upright was not refuted. Tr.25-26, 44. In fact, Russell essentially agreed that the cylinders were in the condition described and photographed (Gov't Exh. 3A (Lake 2014-147-M)) by Bauman. Tr. 57, 59. Because the cylinders were standing upright without restraints to hold them in place, they were in danger of falling if they were accidentally bumped by equipment or by miners working near the cylinders. The court finds that the violation existed as charged.[8]

GRAVITY

The company did not challenge Bauman's testimony that the unsecured cylinders could result in a fatal injury. Tr. 28, 37. Bauman described how one or both of the cylinders could tip over, how a cap over the top of the gas valve could come off, how a gas valve could be damaged and how a cylinder or cylinders could be propelled missile-like around the shop causing severe damage to anything and anyone it struck. Tr. 28. As Bauman noted, one loader operator was present when he conducted the inspection, and as mining continued from time to time other loader operators would park their equipment in the shop. Tr. 28-29, 37. However, Bauman did not think such an accident was likely and neither does the court. Operation of the plant was infrequent and neither equipment nor miners visited the shop on a regular basis. The court agrees with the inspector that the violation was not serious. Tr. 29.

NEGLIGENCE

Bauman found that the violation was due to the company's low negligence, and the court agrees. All of the testimony confirms that the shop was infrequently visited, that the mine had not functioned in almost two weeks and that, as the inspector noted, work place examinations had not been conducted because no recent work had been undertaken in the shop. Tr. 30. Moreover, it is reasonable to infer, as Bauman did, that the bungee cord on the floor near the cylinders indicates that the cylinders had been secured and that the cause of the violation was inadvertent, not purposeful. Tr. 25.

LAKE 2013-616-M

CITATION NO.	DATE	30 C.F.R. §
8741687	6/5/2013	46.8(a)(2)

MSHA Inspector Wayne Crum testified with regard to the violations alleged in Docket No. LAKE 2013-616-M. On June 5, 2013, at 11:30 a.m., Crum visited the quarry. Tr. 68. Rock

[8] The court rejects the company's assertion that the Secretary did not meet his burden because he failed to show that the unsecured cylinders were used in mine work. Co. Br. 9. The cylinders were located in the shop. The shop was indisputably a part of the mine. The cylinders were required to conform to standards applicable to the mine. Section 56.16005 is one of those standards.

was not being crushed, but the plant's equipment was ready to start.[9] Tr. 101. As Bauman had done, Crum first traveled to the scale house trailer where he spoke with Dagnon. Tr. 68. Crum asked Dagnon who else was at the mine, and she told him that the only other person was Kent Winshop. Winshop was loading customers' trucks. Tr. 68-69, 136. Dagnon also told Crum that the mine had last operated in April. Tr. 70. Further, she told him that during the winter all of the employees had been laid off. Tr. 78, 97.

Crum reviewed the quarry's training records. They indicated that refresher training had been given to miners on January 31, 2012. Section 46.8(a) requires refresher training to be given annually. According to Bauman, this meant that the refresher training for 2013 had to be given on or before January 31, 2013. The records indicated that the required refresher training for 2013 was not given until February 19, 2013, 19 days late. This appeared to Crum to be a violation of section 46.8(a). However, there was a caveat. Crum thought if the quarry's miners had not worked in the first quarter of 2013, then management would not have had to give the refresher training by January 31.[10] Tr. 76-77. Therefore, Crum visited MSHA's web site and retrieved the quarry's production report for the first quarter of 2013. It showed that the company logged 35 hours of quarry work and 11 hours of office work. Tr. 77; Gov't Exh 3D (LAKE 2013-616-M). Although the production report did not indicate when the work was done (Tr. 90-91), the company's Job Labor Journal recorded hours worked at the quarry in January and February and the names of those who worked. The Journal indicated that Dagnon, Russell, and another miner worked at the quarry in January and February. Tr. 104-107; Gov't Exh 12 (LAKE 2013-616-M). Because work was done in January and because refresher training was not given by January 31, 2013, Crum concluded the company violated section 46.8(a)(2). Gov't Exh. 1 (LAKE 2013-616-M).

Crum agreed that the violation was technical. It was just a matter of being 19 days late. Tr. 101. He did not think that the violation was likely to cause an injury. He noted that the miners had been trained by the time he found the violation. Tr. 80. It was, he stated, "a paperwork violation." *Id.*

Further, Crum believed the company was only minimally negligent. It had contracted with an outside company to conduct the training, and Northern Illinois had to dance to its contractor's tune.[11] *Id.*

---

[9] Crum explained that when rock is crushed and sorted depends upon when orders are received. Crum stated, "They produced what they need for the customers, customers come in and get loaded up. If they don't have any more orders, [production] shuts down." Tr. 103.

[10] Crum stated:

> I believe[d] that if they had actually done no work at that mine site during that quarter and no hours were reported . . . they were not required to have . . . annual refresher training by the 31st of the next year if nobody was there.

Tr. 76-77.

[11] Crum recalled Dagnon stating that the company had to send its miners for training, "when the trainer can schedule it." Tr. 89.

THE VIOLATION

The record supports finding that the violation occurred as charged. Crum's testimony that refresher training was given on January 31, 2012, (Tr. 76-77) and not again until February 19, 2013, and the company's records that miners worked at the quarry in January 2013 (*see* Gov't Exh. 12 (LAKE 2013-616-M)) establish the violation. Section 46.8(a)(2) states that once refresher training is given, it must be provided for each miner "no later than 12 months after the previous annual refresher training was completed." As Crum rightly noted, this did not happen. The training should have been given on or before January 31, 2013, not on February 19.

GRAVITY

The inspector believed the violation was "technical," and the court agrees. The court infers from what Dagnon told Crum that the miners were trained as soon as the contractor could schedule the class, that is, on February 19. Tr. 81. The miners went without the refresher training for a short period. Moreover, the mine was operating on a very limited basis in January and February. Gov't Exh. 12.

NEGLIGENCE

The court finds that the company was only marginally culpable. As a small company with few employees, it had to rely on a contractor to provide training, and the court infers from the testimony that the contactor could not give the training in time to comply with the standard. Tr. 81. Crum's "low" negligence finding accurately reflects these facts.

CITATION NO.	DATE	30 C.F.R. §
8741688	6/5/2013	56.12032

Crum traveled to the mine's shop where he found a voltage box with three holes in its bottom. Tr. 110, 139. Crum explained how he found the holes. Upon seeing the box he put his camera under it and took photographs. Tr. 130. When he looked at the photographs he noticed the openings. *Id.* Two of the holes were an inch in diameter and one was 1.75 inches in diameter. Tr. 110. The wires inside the box were energized, and some of the energized wires were located "just inside [the] open holes." Tr. 112; Gov't Exh. 6A (LAKE 2013-616-M), 6B (LAKE 2013-616-M) and 6D (LAKE 2013-616-M). The holes were 39 inches above the shop floor. Tr. 110, 112; *See* Gov't Exh. 5 (LAKE 2013-616-M). The circuits inside the box carried 120 and 480 volts of electricity. 112-113. Crum believed the condition of the box violated section 56.12032 which requires that "inspection and cover plates" on electrical equipment and junction boxes "be kept in place at all times except during testing or repairs." Gov't Exh. 4 (LAKE 2013-616-M). Crum stated:

> Under [section] 56.12032, we are taught at the Mine Academy that the knock-out plugs are considered a cover plate. And if they're large enough and wires are present, they can be touched, [and] that . . . is a violation.

Tr. 123.

Asked if he determined whether any testing or repairs were ongoing, Crum replied:

> Based on the fact the only two persons there were the scale house attendant [(Dagnon)] and the guy loading trucks, I think it's pretty safe to assume there wasn't any testing or repairs going on at the time.

Tr. 125.

As for the company's liability Crum stated, "[M]ine management is the one who is responsible for everything that is on their mine site." Tr. 135, *see also* Tr. 136.

Because the holes were located on the bottom of the box, Crum found the openings were unlikely to lead to an injury. Tr. 113. He could not think of a reason why a miner would put his finger or fingers into the box through the holes. Tr. 129. However, if a miner somehow reached into the box and contacted the box's live circuits, the miner was likely to suffer a permanently disabling electrical injury. *Id.* Crum testified, "[I]f . . . a miner were to be shocked . . . there's potential for second [or] third degree burns to the skin, permanent nerve damage, [and] permanent muscle damage." Tr. 113. He explained that the inner wires were not protectively insulated, that although they had plastic around them, the plastic was not designed to protect a person from shock. Tr. 114. He further observed that only one person at a time would be near enough to the box to contact it. *Id.*

Russell testified that the circuits in the breaker box fed electricity to the shop's garage door openers and electrical outlets. Tr. 140. He explained that a few miners worked in the shop in the vicinity of the box. "There [are] oil canisters and an antifreeze station and an air compressor [approximately six feet from] . . . the . . . box." Tr. 139. But in Russell's opinion, there was no reason for a miner to place his hands close to the holes in the box. In addition, Russell had no knowledge of any company employee creating the holes. Tr. 140, 141.

Crum found that the company was moderately negligent. He stated, "You can't walk by [the box] and see . . . [the holes]. You've actually got to bend down and see that." Tr. 114-115. Nonetheless, in his opinion the company was responsible for carrying out workplace examinations and the holes should have been found and closed. Tr. 115; *see also* Tr. 223.

To abate the condition, the company covered the holes with washers and bolted the washers in place. Tr. 121, Gov't Exh. 6E (LAKE 2013-616-M) , 6F (LAKE 2013-616-M).

THE VIOLATION

The court finds that the violation existed as charged. As the court has previously noted:

> [C]ircumstances can arise in which a cover is technically

> 'kept in place,' . . . 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, 1238-40 (ALJ Zielinski).

National Cement Company of Alabama, 36 FMSHRC ___ , Docket No SE 2014-71-M (February 23, 2015) at 10 n.10.

There is no doubt that the box covering the electrical connections was defective. The photographic evidence offered by the Secretary (Gov't Exhs. 6A (LAKE 2013-616-M),6B (LAKE 2013-616-M), 6D (LAKE 2013-616-M)) corroborates the inspector's testimony regarding the existence of the holes. Tr. 110, 112. The box's outer covering was equivalent to a cover plate and the holes in the box were equivalent to an open cover plate. Since there is no basis to conclude testing or repair of the circuits inside the box was underway or that the box itself was being repaired, the court finds that the presence of the holes violated section 56.12032.[12]

GRAVITY

The inspector correctly concluded the violation was not serious. The location of the holes made it extremely unlikely that the violation would result in injury to a miner. Tr. 113. Crum could not think of a reason why a miner would contact the conductors inside the box through the holes (Tr. 129), and even though miners occasionally worked within six feet of the box, neither could Russell. Tr. 139-140. Based on the record, the court too is unable to conjure a scenario in which a miner would be injured because his finger or fingers found their way through the holes.

NEGLIGENCE

While it may well be that the company had no idea who knocked out the three small plates in the bottom of the box, the company bears the ultimate responsibility for violations occurring at its work sites. *See* Tr. 115. Miners occasionally worked in the shop, and the shop was subject to the company's work place examinations. Tr. 139. As Crum stated, the holes should have been detected and closed. Tr. 115. However, the location of the holes rendered them out of sight and made it unlikely they would be found during a usual work place examination. Crum only found them because he used a camera and held it under the box. Therefore, the court concludes that the location of the violation mitigated the company's negligence, and that the company's lack of care was low.

CITATION NO.	DATE	30 C.F.R. §
8741689	6/5/2013	56.12006

[12] The court does not agree with the company's statement that in order to "assert a violation" the Secretary should have established when the holes were made in the box. Co. Br. 14. It is the existence of the holes, not when they were made, that is crucial to the violation.

Crum testified that he issued Citation 8741689 when he found that the No. 1 and No. 3 circuit breakers in a 120/280 volt breaker box were not labeled.[13] Tr. 143; Gov't Exh. 9A (Lake 2013-616-M), 9B (Lake 2013-616-M), 9C (Lake 2013-616-M). The box was located in the shop. Tr. 143 The breakers controlled the power to electrical outlets located to the right of the box. Crum testified that the breakers for the outlets were closed, which meant that the outlets were energized. *Id* In addition to the breakers for the outlets, the box also contained two separate sets of beakers, each set consisting of three breakers fused together by a bar. One of the sets controlled a band saw. This set was labeled "band saw." Gov't Exh. 9B (LAKE 2013-616-M). The other set controlled all of the breakers in the box. This set was labeled "Main." Gov't Exhs. 9A (LAKE 2013-616-M), 9B (LAKE 2013-616-M).

Crum stated that by looking at the unlabeled breakers there was no way to know which circuits the breakers controlled. Tr. 144, *see* Gov't Exhs. 9A, 9B. Therefore, he cited the company for a violation of section 56.12006 because the standard requires "[d]istribution boxes . . . [to] be labeled to show which circuit each device controls." 30 C.F.R. §56.12006. According to Crum the cited breaker box was a "distribution box" because "it has a main source of power coming into it; and from that point, it distributes the power to various different pieces of equipment and outlets." Tr. 145. Despite the fact that a "distribution box" is defined in the regulations as "a portable apparatus" (30 C.F. R. §56.2) and despite the fact that the cited breaker box was not portable, Crum cited the box anyway under section 56.12006. He stated, "[T]hat's what our office management informs us to do when we find unlabeled breaker boxes." Tr. 155.

Crum did not believe the failure to label the breakers was likely to result in an injury. Tr. 147. He understood from Dagnon and Wishop that electrical work at the mine was usually done by certified electrical contractors who were trained to work on such circuits. In addition, the contractors wore protective equipment. Tr. 147. Given the expertise of the contractors, Crum did not feel that a contract employee "would become electrocuted by the situation." Tr. 148. Further reducing the likelihood of an injury was the fact that miners who used the shop in which the breaker box was located did not normally travel or work near the box. Tr. 160, 161. Crum noted that although two front end loaders were parked in the shop, they were both parked 30 feet from the box. Tr. 160. However, Crum was adamant that if there was a malfunction that required a circuit to be locked out, a miner would not know which of the unlabeled breakers to open in order to disrupt power to the affected circuit. Tr. 157. This could lead to a serious shock injury and second and third degree burn injuries. Tr. 148. Disabling neuro-muscular injuries also could result. *Id.*

Crum found that the company's negligence was moderate. The lack of labels should have been found and corrected during a work place examination or during the yearly continuity resistance test. Tr. 149. Crum examined company records to determine when the company last checked the continuity and resistance of the electrical circuits. The records indicated that the last examination before Crum's inspection took place on May 6, 2013. The examination was conducted by Russell. Tr. 151-152. *See also* Gov't Exh. 10 (LAKE 2013-616-M) at 3. Russell agreed he should have realized the circuits were not labeled. He stated that when he conducted the continuity examination he did not open the box door. Tr. 165. However, he emphasized that

[13] A list for labeling the circuits appeared on the inside of the circuit breaker box door. The list was not completed for the No. 1 and No. 3 breakers. Tr. 152-153; Gov't Exh 9B (Lake 2013-616-M), 9C (Lake 2013-616-M).

the hazard resulting from failing to label the breakers was minimal. To his knowledge the outlets had not been used in the company's mining operations for seven years. Tr. 160-161, 163-164.

THE VIOLATION

The company argues, the court thinks correctly, that the record does not support finding a violation. Co. Br. 17-18. It is true that there were two breakers in the cited box which were "not labeled to show which circuit each device control[led]." 30 C.F.R. § 56.12006. But it is also true that section 56.12006 applies to "distribution boxes" and that the Secretary has chosen to define a "distribution box" as

> [A] portable apparatus with an enclosure through which an electric circuit is carried to one or more cables from a single incoming feed line, each cable circuit being protected through individual overcurrent protective devices.
>
> 30 C.F.R. §56.2

The cited box does not come within the definition. Crum agreed that the box was not portable. Tr. 144, 155. "Portable" is defined as "capable of being carried or moved with ease" (*The American Heritage Dictionary of the English Language,* Fourth Edition (2009) at 1367), and in addition to Crum's admission, there is nothing in the record to indicate the cited box was "capable of being carried or moved with ease."

No doubt sensing that the citation as initially written was in trouble, the Secretary moved for and was granted permission to amend the citation to allege alternatively a violation of 30 C.F.R. §56.12018, a standard requiring that "[p]rincipal power switches . . . be labeled to show which units they control unless identification can be made readily by location." Tr. 14-17; *see* n.2. *infra*. But here too the record does not support finding a violation.

> Counsel for the company: [C]ould this violation also be listed under [Section] 56.12018?
> Inspector Crum: I don't believe so.
> Counsel for the company: And why don't you believe so?
> Inspector Crum: [Section] 12018 states . . . the principal power switches shall be labeled. If you look at [Gov't Exh. 9A,] on the upper side of the main breaker box, those three breakers are connected. That is the principal power switch, and it is labeled.
>
> Tr. 146.

Later in his testimony, Inspector Crum reiterated his position.

> Counsel for the company: And you don't consider it a violation [of section 56.12018] because this thing was labeled?

Inspector Crum: Yes. The principal power switch . . . in that box was labeled.

Tr. 156.

Everyone agreed that the two breakers for the electrical outlets were unlabeled power switches. The only question is whether the switches were "principal power switches" within the meaning of the standard. Crum did not think so (Tr. 156), and neither does the court. Part 56 of the Secretary's regulations does not contain a definition for the term "principal power switch." However, when used as an adjective, the word "principal" connotes something that is "chief" or "leading." *See* Houghton Mifflin Harcourt, *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1395. Clearly, as Crum, recognized, the chief or leading power switch in the box was the switch composed of the three fused breakers that could be thrown to turn off the power to all of the switches in the box, and, as Crum noted, it was labeled, "Main." Tr. 146; Gov't Exh. 9A (LAKE 2013-616-M). The citation will be vacated at the close of this decision.

LAKE 2014-2-M

CITATION NO.	DATE	30 C.F.R. §
8741713	7/30/13	56.12004

On July 30, 2013, Crum traveled to another of the company's quarries. Tr. 169. He arrived at 8:00 a.m. and went directly to the scale house trailer where he introduced himself to the scale house attendant, Ann Black. Tr. 170. He also spoke with Russell by telephone. Russell, who served as the foreman of the quarry, told Crum he could not join Crum for the inspection. As a result, Crum was accompanied by front end loader operator, Timothy Thistle. Tr. 170-171. Crum began his inspection at the crushing plant. The conveyors were not running (Tr. 171), but the plant was "set up [and] ready to go." Tr. 172. Crum asked Thistle if everything at the plant was the same as when it last ran, and Thistle replied that the only change was that the generator had broken and parts to repair it were on order. *Id.* Because the generator was "out," the conveyor belts were not energized. *Id.*

While looking at electrical cords that ran beside the conveyor belt, Crum saw that one of the cords, a cord carrying 480 volts, had a three and seven eights inch long cut in its protective cover.[14] Inside the cord were four insulated copper conductors. Tr.177. The cut in the cover exposed the cable's white inner insulation. [15] Tr. 174-175; Gov't Exhs. 3A (LAKE 2014-2-M), 3B (LAKE 2014-2-M), 3C (LAKE 2014-2-M).

Crum asked Thistle if he knew how the cord had been damaged. Thistle did not know. Tr. 193. Based on his mining experience Crum speculated that the damage could have been caused by rocks falling off the conveyor and hitting the cord, by a front end loader hitting the

[14] Crum knew the precise length of the cut because he measured it. Tr. 182.

[15] The record is not clear concerning what the inner white insulation protected. Although Crum initially stated that he believed the white material insulated one of the cable's inner copper conductors, he agreed that the white material could have insulated all of the inner conductors. Tr. 189, 190, 195. Russell held the latter view. Tr. 202-203.

cord as the loader cleaned up spilled material along the side of the conveyor,[16] or by the cord being dragged across rocks when the cable first was installed or later was moved. Tr. 183-184, 200.

Russell did not think mechanical equipment was a likely cause. He testified that such equipment worked either near the head pulley or the tail pulley, and the cut was in the center of the conveyor, about 30 to 40 feet from either pulley. The closest any equipment came to the damaged area of the cord was 10 feet. Tr. 205. He also maintained that rocks were unlikely to fall off of the conveyor at its center. Tr. 204, 212. In Russell's opinion the cut most likely occurred on July 18, 12 days before the citation was issued, when the conveyor belt ripped and was replaced. At that time the electrical cords were dropped on the ground and dragged. Russell stated that it was "more than likely" that the cut occurred during the process. Tr. 205-206, 209-210. Russell added that between July 18 and July 30, the belt was not operating because no mining was done at the quarry. Tr. 207, 209.

Section 56.12004 requires "[e]lectrical conductors exposed to mechanical damage [to] be protected." The cut in the cord indicated to Crum that "mechanical damage had taken place . . . and damaged the outer insulation." Tr. 200. Crum therefore issued a citation charging the company with violating the regulation. Tr. 174; Gov't Exh. 2 (LAKE 2014-2-M).

Crum stated that numerous electrical accidents are associated with damaged electrical cords, and that he pays particular attention to such cords during his inspections. Tr. 175. However, Crum did not think that the violation was serious. He determined that when the conveyor was operating no miners were on foot near the damaged cord. He testified, "When [the conveyor] . . . run[s], everybody's in a piece of machinery like a loader, so there's really not a high degree of risk or exposure in and around that plant." Tr. 175. In addition, the copper of the cord's interior conductors was not showing, and the area around the damaged cord was not wet. Tr. 177. Nonetheless, if a miner was injured as a result of the exposed interior conductors, the result was likely to be permanently disabling, even fatal. *Id.*

Crum found that condition of the cable was due to the company's moderate negligence. The damage should have been noticed and corrected during a required workplace examination. Tr. 179.

The condition was abated by taping the cable. Tr. 181; Gov't Exh 3D (Lake 2014-2-M).

THE VIOLATION

The court concludes the violation occurred as charged. Section 56.12004 mandates in part that, "Electrical conductors exposed to mechanical damage shall be protected." Tr. 190-191. There is no dispute the outer insulation of the cited electrical cord was damaged. Both the testimony and the demonstrative evidence support finding that the cord had a nearly four inch long gash in its cover and that the paper or fiber insulation protecting at least one if not all of the cord's four interior conductors was visible through the tear. Tr. 174-175, 189, 190, 195, 202-203; Gov't Exhs. 3A (LAKE 2014-2-M), 3C (LAKE 2014-2-M). The breach lessened the protection

[16] Crum agreed, however, that no cleanup equipment was in the area of the conveyor. Tr. 192-193.

afforded the cord's inner conductors by eliminating part of the protective covering between the conductors and the surrounding mining environment. This loss of protection "exposed" the inner conductors within the meaning of the standard. The company's contention that the actual copper wires had to be exposed misreads the standard. Co. Br. 21. Lessening protection of the inner conductors through damage to the cord's outer jacket means that the inner conductors were "exposed" within the meaning of the standard whether or not copper wire was visible.

A more fundamental question is whether the inner conductors were "exposed to **mechanical** [(emphasis supplied)] damage," and the court finds that they were. 30 C.F.R. § 56.12004. First, the court notes that Russell did not testify rocks **never** (emphasis supplied) fell from the belt in the area where the cut occurred, and in fact the court concludes that spillage from the belt in the area of the defect was inevitable. It is simply in the nature of a conveyor belt that some spillage occurs along the entire length of the belt. As mining continues and the spillage reaches a point where it has to be cleaned, the cleanup is accomplished either by a machine or by hand, and these methods subject the conductors to potential "mechanical damage" within the meaning of the standard. This is because although "mechanical damage" means damage produced by a machine, it also means damage produced by physical forces, which can include damage produced by hand. *The American Heritage Dictionary of the English Language, Fourth Edition* (2009) at 1087. Further, as Russell testified, the cord was subject to mechanical damage when the belt was replaced. Tr. 205-206, 209-210. Dropping the cord to the ground and dragging it, whether by machine or manually, subjected the cord to forces and conditions (e.g., rocks) that could damage the cord's conductors. For these reasons, the court concludes Crum was right in citing the company for a violation of section 56.12004.

GRAVITY

The court also concludes that Crum was right in finding that the violation was unlikely to cause an injury. The court accepts Russell's testimony that the cord was dropped to the floor on July 18, 12 days before the citation was issued, and that the mine did not operate between then and the date of the inspection. Tr. 206, 207, 209. Therefore, miners were not exposed to the violation between the time it most likely occurred and when it was cited. Further, as Crum testified, miners did not frequently access the area where the torn cord was located (Tr. 175), and when mining continued there would have been little exposure to the violation. In addition, the interior copper wires of the conductors were not laid bare. Tr. 177. For these reasons the court finds that the likelihood the violation could result in the electrocution or the serious injury of a miner was very remote. The court agrees with Crum that the violation was not serious.

NEGLIGENCE

Crum found that the company was moderately negligent. While the court accepts that the company was under a duty to find and repair the tear in the cord, the court is persuaded that the numerous cords adjacent to the defective cord, the small length of the tear, and the distance from which the tear would most likely be viewed by any passing management official or agent made the tear very difficult to find. In this regard, the court finds Government Exhibit 3B (Lake 2014-2-M) to be persuasive. The photograph shows that the cited cord was one of a number of cords (the court counts at least seven) hung together along the conveyor. In the photograph, which was

taken 15 feet from the cited cord - a reasonable distance from which to assume a work place examination of the cords would be conducted - it is nearly impossible to see the torn area of the cable. The violation was easy to overlook, and the court finds that the company's negligence was low. Moreover, since the court believes that the tear most likely occurred on July 18, 12 days before the citation was issued, and since it accepts Russell's testimony that the mine did not operate between then and the date of the inspection (Tr. 206, 207, 209), the court notes that there would have been no required work place examinations after the violation occurred that would have revealed the violation, a condition that further reduces the company's culpability.

CITATION NO.	DATE	30 C.F.R. §
8741714	7/30/2013	56.12032

Crum testified that as the inspection continued, he examined the start/stop box for the primary crusher. He found the box had a hole in its bottom. In addition, one of the box's interior cords was located about two inches from the hole. Tr. 215, 219, 220; Gov't Exhs 6A (LAKE 2014-2-M), 6B (LAKE 2014-2-M). Crum believed that the cord was a component of the start/stop switch and that it carried 480 volts of electricity. Tr. 216, 220. The bottom of the box was 35 inches off the ground. Tr. 227. Crum explained that the plant's primary crusher is powered by electricity coming from a generator that is located at the quarry. After the generator is activated someone goes to the start/stop box to throw the switch and start the primary crusher. *Id.* The box is outside. Tr. 218.

Although Crum believed the presence of the hole violated section 56.12032, which requires "[i]nspection and cover plates [to] be kept in place at all times except during inspection and repairs," he did not think the violation was likely to injure a miner. He noted that the hole was small in size and was inaccessibly located. He stated, "I felt that it was very unlikely for a miner to get inside that open hole with any part of [his] body to contact the inner conductor." Tr. 217. In fact, Crum could think of no reason why a miner would stick his finger in the hole Tr. 227-228. Although Crum noted that the hole could allow corrosive elements into the box and that this could cause the protective insulation around the inner conductors to crack (Tr. 222), Crum found that all of the cables inside the box were properly insulated. Tr. 228. There were no bare conductors. Finally Crum observed that the closest any mechanical equipment operators got to the box was 10 to 12 feet. Tr. 231. He also explained that only one person at a time would be exposed to the hazard. Tr. 218. Despite these factors, Crum recognized that if contact occurred, a miner could suffer second or third degree burns and/or disabling nerve and muscle damage. Tr. 217.

Because the hole was in the bottom of the box, because the hole was small, and because the box was located in an area few miners visited, Crum believed the negligence of the company in failing to detect and close the hole was "low." Tr. 218, 223. In addition, he noted that the crusher was operated infrequently. Tr. 224.

THE VIOLATION

The court concludes that the violation occurred as charged. The company did not dispute that the hole described and photographed by Crum existed at the bottom of the crusher's

start/stop box. Tr. 215, 219, 220 Gov't Exhs. 6A (LAKE 2014-2-M), 6B (LAKE 2014-2-M). The court finds that the Secretary established the box covering the electrical components to the primary crusher's start/stop switch was defective. The box was "functionally equivalent to an open cover" and therefore was in violation of section 56.12032. *See National Cement*, 36 FMSHRC ___, Docket No. SE 2014-71-M (February 23, 2015) at 10 n.10.

GRAVITY

All of the evidence points to the conclusion that Crum's gravity findings were proper. Given the small size of the hole, the hole's location (on the underside of the box, 35 inches above the ground), and the fact that few miners accessed the area where the box was located (Tr. 227, 230-231), the court agrees with Crum that it was indeed unlikely that a miner would contact any of the box's interior conductors. Tr. 217. Even if a miner somehow contacted a conductor, the record establishes that at the time the violation was cited, all of the interior cords were properly insulated. Tr. 228. Therefore, while it is possible, as Crum testified, that the violation could have resulted in a miner suffering serious burns or disabling neuro-muscular damage (Tr. 217), the likelihood of such injuries was so remote the court concludes that the violation was not serious.

NEGLIGENCE

The court further concludes that Crum correctly found that the company's negligence was low. Unless a person purposefully looked for the hole, it was entirely out of sight and, as noted, the box was located in an area visited by few miners. Tr. 218, 223-224. Moreover, use of the start/stop box was intermittent because mining was intermittent, which means that the box was not examined on a regular basis by management. Tr. 224. These mitigating factors minimize the level of the company's negligence.

CITATION NO.	DATE	30 C.F.R. §
8741715	7/30/2013	56.12018

As the inspection continued, Crum and Thistle entered a trailer housing one of the quarry's generators. Tr. 235, 256. On the wall of the trailer Crum saw at least eight boxes each of which contained a power switch.[17] Tr. 239. Crum testified that although seven of the switches were properly labeled, one was not. Tr. 235, 237, 239; *see* Gov't Exh. 9A (LAKE 2014-2-M). Crum believed that without a label miners could not know the equipment the unlabeled switch controlled. Tr. 239. Crum also noted the presence of a pipe that contained the unlabeled switch's electrical conductors and that ran from the bottom of the box either through the floor or through the wall of the trailer; Crum could not recall which. There was no way to tell where the pipe led. Tr. 248-249. However, Crum subsequently determined that the unlabeled switch was used to start the under screen conveyor. Tr. 236, 258.

Section 56.12018 requires "[p]rincipal power switches to be labeled to show which units they control unless identification can be made readily by location." In Crum's opinion the location of the box and its conduit did not indicate what the switch controlled. Tr. 248-249. Further, Crum believed the switch was a "principal power switch" within the meaning of the

[17] Russell maintained that there are actually 12 to 15 power switch boxes on the wall. Tr. 267.

standard because it was the only switch that "power[ed] up" the under screen conveyor. Tr. 259. He described the switch as, "the first principal power switch" for the conveyor.[18] *Id.* He therefore concluded that as a "principal power switch" that could not be identified by location, the switch should have been labeled. Because it was not, Crum charged the company with a violation of section 56.12018.[19] The company quickly corrected the condition by labeling the switch. Tr. 237, 245 Gov't 9B (LAKE 2014-2-M), *see also* Gov't Exh. 7 at 2 (LAKE 2014-2-M).

Crum recalled that the power to the box was off when he conducted the inspection (Tr. 255), and he concluded the fact that the switch was not labeled was unlikely to cause an injury. He noted that all of the other power switches were properly labeled, and he stated, "The people . . . at the mine . . . had a pretty good . . . understanding . . . [as to] what that switch controlled even though you couldn't make identification readily by being inside the trailer." Tr. 242. However, he believed that it was at least theoretically possible for a miner to suffer a serious shock injury because the switch was not labeled, an injury that could include second and third degree burns and nerve and/or muscle damage. He envisioned such an accident happening if work was done on the circuit or on the equipment the switch controlled and the power to the circuit was left on by mistake. If that happened, a miner who contacted the energized parts of the circuit or equipment could be seriously injured or killed.[20] Tr. 243.

Crum found the violation was due to the company's "moderate" negligence. Tr. 243. He stated:

> [O]nce you walked inside the trailer, it [was] pretty obvious . . . [the switch] was not labeled. All of the other ones were labeled very well, [and they were] very easy to read. So I couldn't make it low [negligence,] and I didn't feel it was . . . high

---

[18] On cross examination it became clear that Crum's understanding of the term "principal power switch" was less than precise. When asked if there was a difference between a "principal power switch" and a "power switch," he stated that he had "no idea." Tr. 251. When asked about the difference between a "principal power switch" and a "circuit breaker," he replied, "I don't know. [It d]epends on who you talk to." Tr. 253. Although he stated he was "sure" the National Electrical Code ("NEC.") defined the term "principal power switch," he agreed that he did not consult the NEC definition before he issued Citation No. 8741714 (Tr. 254), and neither party pointed the court to a NEC definition of "principal power switch."

[19] Crum stated that before he cited the company he and Thistle looked on the ground to determine if a label had been attached to the box but had fallen off. Tr. 240. No label was found. At first Crum mistakenly cited the company for a violation of 30 C.F.R. §56.12008, a standard pertaining to the insulation of power wires and cables. Gov't Exh. 7at 1 (LAKE 2014-2-M). The citation subsequently was modified to allege a violation of section 56.12018, the standard he originally intended to cite. Tr. 236-249; *see also* Gov't Exh. 7at 2 (LAKE 2014-2-M).

[20] Crum put it this way:

> The only situation that I believe . . . could happen is if they were going to work on whatever the switch controlled; and not being labeled, they inadvertently locked out the wrong piece of equipment and then went out there . . . and got electrocuted.

Tr. 243.

negligence.

Tr. 244.

He further observed that the condition had not been noted on the workplace examination reports. Tr. 244.

Russell agreed that the cited switch controlled power to the under screen conveyor, but he stated that the conveyor had not been used for three or four years before Crum's inspection because the company had discontinued making the particular product the conveyor transported. Tr. 262. As a result, the switch had been in an "off" position for three or four years although power continued to flow to the box. *Id.* He also testified that when work was done on equipment controlled by switches in the trailer, the company hired an electrical contractor. Tr. 263.

Russell noted the presence of a single switch, a main switch, that controlled power to all of the boxes on the wall. The main switch was located inside the trailer, 10 to 15 feet from the boxes. Tr. 263-264. If a miner wanted to cut power to all of the boxes, the miner used the single or main switch. Tr. 264. This switch was used every morning to direct power to the individual boxes and to shut off power every night. Tr. 264-265, 269. In Russell's opinion the main switch was the "principal power switch." Tr. 266. Russell was asked if MSHA' s inspectors had previously cited the subject box because the switch lacked a label, and he replied, "Not to my knowledge." Tr. 265.

THE VIOLATION

The court finds a violation. There is no question the location of the switch did not identify the recipient of its power, the under screen conveyor. The court notes Crum's testimony that the conduit from the box disappeared either through the floor or through the wall of the trailer was not challenged by the company. Tr. 248-249. Therefore, the court agrees with Crum and concludes there was no way to tell visually where the switch's conduits led, and no way to determine visually the units the switches controlled. The standard requires principal power switches to be labeled.[21] Everyone agrees that the cited equipment was a "power switch" that turned power on and off to the under screen conveyor. Everyone also agrees that the switch was not labeled. The only unresolved question is whether the cited switch was a "principal power switch" within the meaning of the standard, and the court finds that it was. As the court noted above, Part 56 of the Secretary's regulations does not contain a definition for the term "principal power switch." None the less, the commonly accepted meaning of the word "principal" when used as an adjective connotes something that is "chief" or "leading." (*See* discussion regarding Citation No. 8741689 *infra.*) Here, the unlabeled switch was the box's only switch. *See* Gov't Exh. 9A (LAKE 2014-2-M). It was a unit unto itself. When looking at the box there was no

[21] The standard is written in the plural -- i.e., "switches" and "units." The company finds significance in the choice of the word "units" and argues that a "principal power switch" must control more than one "unit." The court does not agree. The court finds the drafters' choice of the word "units" to be the grammatical result of writing the standard in the plural rather than the singular, and it concludes the drafters' syntax does not foreclose application of the standard to a "unit," that is to a switch that controls power to a single circuit and/or to a single piece of equipment. Co. Br. 27.

question but that the single switch was the principal power switch of the unit. As such, it should have been labeled. It was not, and the court finds that the company violated section 56.12018.

The court hastens to note that the existence of one principal power switch in an electrical system does not foreclose the existence of others. For example, had the main switch for all of the boxes been cited for lacking a label, the court in all likelihood would have found an additional violation of the standard because the main switch was the leading or chief switch for all of the electrical components served by all of the boxes.

GRAVITY

Crum found that the violation was unlikely to lead to a permanently disabling injury, and the court agrees. Gov't Exh. 7 (Lake 2014-2-M). The danger was that miners or contractors working on the circuit to the under screen conveyor or working on the conveyor itself would think that electricity to the circuit or the conveyor was disconnected when in fact it was not. Crum believed if such a mistake happened, it could result in a serious shock injury to a miner. Tr. 242-243. The court goes further and finds it also could lead to dismemberment if the conveyor was started by mistake while a miner was working on it. However, the court concludes the chance of such injuries was so remote that the violation was not serious. The court accepts Crum's testimony that miners "had a pretty good" understanding of what the switches controlled. Tr. 255. The court also accepts Russell's testimony that the company contracted out work on the circuits to a professional electrical firm. Both factors reduced the possibility of an injury causing mistake. More to the point, Russell's testimony established the conveyor belt that the switch controlled had not been in service for three or four years, and although power continued to flow to the box during those years, the chance of the switch being used was negligible and would remain so until the company again produced product conveyed by the under screen belt. Tr. 262.

NEGLIGENCE

Crum found that the company's negligence was moderate. Gov't Exh. 7 (LAKE 2014-2-M). The court finds that it was low. Granted, as Crum testified, it was "pretty . . . obvious" the switch was not labeled. Tr. 244. Granted too, the condition was not noted on the examination forms for the trailer. Tr. 244. The fact that the company knew the switch was not in use and had not been for three or four years and the fact that the chance of any injury arising from the lack of labeling was very low understandably diminished the urgency of the company finding and correcting the violation and, in the court's view, significantly mitigated the company's negligence.

CITATION NO.	DATE	30 C.F.R. §
8741716	7/30/2013	56.12002

Shortly after citing the company for the violation at the generator trailer, Crum traveled again to the scale house trailer. Outside the trailer and along one of its sides Crum noticed two

110 volt electrical GFCI (Ground Fault Circuit Interrupter) outlets.[22] Tr. 287. The GFCI outlets were designed to de-energize equipment if a fault occurred in the electrical circuit to the equipment. Tr. 274. Crum determined the GFCI systems were working and power was flowing to the outlets. Tr. 274. However, Crum could see by looking at the outlets that each was missing a waterproof cover. Tr. 278; *See* Gov't Exh. 12A (LAKE 2014-2-M), 12B (LAKE 2014-2-M), 12E (LAKE 2014-2-M). Thinking the covers might have fallen off, Crum looked for, but found no covers. Tr. 298. Because section 56.12002 requires electrical equipment and circuits to be of "approved design and construction and [to be] properly installed" and because the outlets lacked waterproof covers, Crum believed the outlets violated section 56.12002. Tr. 175 Crum also believed the outlets originally had waterproof covers. He noted hinges to which the waterproof covers could have been attached and flanges over which the covers could have closed. Tr. 279; Gov't Exh. 12E (LAKE 2014-2-M). Crum acknowledged that section 56.12002 does not specifically require outdoor outlets to have covers, but he stated the regulation "says [the outlets] must be maintained and installed correctly." Tr. 282. He testified that he relied on the fact that the NEC "indicates that all outdoor, outside outlets must have a weatherproof cover." Tr. 281.

The following day the conditions were remedied when covers were placed on the outlets so that the outlets were no longer open to the elements. Tr. 276, 277; Gov't Exhs. 12 C (Lake 2014-2-M), 12D (Lake 2014-2-M).

In Crum's opinion, the lack of covers was unlikely to cause injuries. Each outlet was designed to trip if a fault occurred in its circuit, and the GFIC devices were functioning properly. Tr. 297. As a result, Crum did not believe that "person[s] would . . . [be] electrocuted" due to the lack of proper covers. Tr. 285. In addition, he noted that the outlets were not used during normal mining operations. Tr. 285-286. However, if the GFIC devices failed, an injury in the form of first or second degree burns was possible, and the injured miner most likely would miss workdays and/or have his duties restricted. Tr. 287.

Crum found that the company was moderately negligent in allowing the conditions to exist. Tr. 287; Gov't Exh . 10 at 1. The lack of covers was "open and obvious," and the fact the covers were missing was not noted on the trailer's workplace examination forms. Tr. 287.

On cross examination Crum clarified the basis for citing the condition under section 56.12002. He stated that he considered each outlet to be both "electric equipment" and a "circuit." A circuit, he said, is "anything that carries electricity." Tr. 290. He acknowledged the standard requires equipment and circuits to be provided with "switches or other controls," and he stated that the "outside outlet was not provided with all the controls that are required by the [NEC,] which include the weatherproof cover." Tr. 291-292. Thus, the lack of waterproof covers violated the standard. Tr. 292. He reiterated that in order to determine whether there is a violation of section 56.12002, an inspector must "reference [the NEC] to determine what's approved design and construction." Tr. 293.

[22] GFCI outlets are outlets for circuits containing GFCI devices. A GFCI device shuts off an electrical circuit when it detects that current is flowing along an unintended path. GFCI outlets are used to reduce the risk of shock and fire.

Although Russell acknowledged the existence of the outlets alongside the trailer, he maintained the outlets had not been used in "[he did not] know how long." Tr. 299. He felt certain that in the past six or seven years he never used the outlets. Tr. 299. He further testified that the closest a miner got to the outlets was 10 feet, and that to his knowledge the company never was cited for the lack of waterproof covers. Tr. 300.

THE VIOLATION

In pertinent part section 56.12002 requires "[e]lectric equipment and circuits [to] be provided with properly installed switches or other controls . . . of approved design and construction." The first question is whether the cited outlets constituted "electric equipment" and/or electric "circuits" within the meaning of the standard. Crum believed that the outlets constituted both equipment and circuits (Tr. 290), and the court concludes that he was right. The outlets were components of an electrical network that formed a looping path for electricity to travel to and from equipment that was plugged into the outlets. As such they were electric "equipment" and parts of a "circuit," that is, parts of the loop giving a closed path to electricity. Under the standard, such equipment and circuits are required to be provided with "switches or other controls." An electric switch is a component that can break an electric circuit. The outlets were not switches. The term "other controls" when used in the standard, refers to components other than switches that can interrupt or regulate the flow of electric current. The outlets controlled the flow of current, in that electric equipment had to be plugged into the outlets to complete the circuit. In that sense the outlets were "controls" other than switches. Thus, the outlets came within the standard.

The parties agree the outlets themselves were "properly installed," so the only other question is whether the outlets were "of approved design and construction." The definitions for Part 56 do not include the phrase "of approved design and construction" and section 56.12002 does not specific what the phrase means. The court concludes that like many generally worded standards, section 56.12002 is subject to a "reasonably prudent person" test, which means that the court must determine "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific . . . requirement[s] [(*i.e.* the need for waterproof covers)] of the standard." *Ideal Cement*, 22 FMSHRC 1342, 1345 (Aug. 1996). Here the Secretary's case fails.

The reasonably prudent person standard is objective. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (August 1966). It can be met in numerous ways, but the sum total of the evidence must lead to the conclusion a reasonably prudent person given all of the surrounding circumstances would have recognized the need for waterproof covers. There was no testimony offered by the Secretary as to the practice in the mining industry or in any other industry with regard to requiring waterproof covers on outdoor GFCI outlets. Crum's identification of hinges and flanges where covers might once have been attached can be inferred as evidence of a practice to provide outside outlets with covers, but it equally can be inferred as evidence of a practice to remove them. The record does not indicate which, if either, is correct. Further, there was no documentary evidence offered regarding MSHA's instructions to operators and/or inspectors concerning the covers. Rather, Crum testified that when determining whether waterproof covers are required he "[had] to reference" the NEC. Tr. 293. Certainly, in

considering whether the reasonably prudent person test is met, accepted safety standards in the field may be considered. However, the inspector never identified the provision of the code that "indicates" the covers are required, nor did the Secretary either at trial or in his brief. The inspector's assertion alone does not constitute relevant evidence as to what a reasonably prudent person would conclude. Thus, in the end, the only objective factor the court has before it when determining whether the reasonably prudent person test has been met is the inspector's testimony that the lack of covers posed a hazard. Tr. 286-287. Such testimony is relevant when considering whether a reasonable prudent person would have recognized the need for waterproof covers, but it alone is not sufficient to meet the reasonably prudent person test. Many things at a mine may pose a hazard but not necessarily come within a particular standard.

The court will vacate the citation at the close of this decision.

CITATION NO.	DATE	30 C.F.R. §
8741717	7/30/2013	56.12018

Shortly after inspecting the outdoor outlets, Crum entered the scale house trailer and inspected an electrical box that housed several circuit breakers.[23] Crum noted that two of the breakers in the box, breaker No. 11 and breaker No. 12, were not labeled. Tr. 302. Using an outlet tester, Crum determined the two unlabeled breakers controlled the flow of electricity to the two outside outlets that he cited for lacking waterproof covers. Tr. 306. The wall of the trailer separated the outside outlets from the breaker box. The electric line to the outlets ran from the breaker box through the wall and to the outlets. Therefore, according to Crum, there was no way to tell by looking at the unlabeled breakers the circuits they controlled. Tr. 307. In addition, the unlabeled breakers were not locked out. Tr. 311.

Crum believed the lack of labels on the two breakers violated the requirement of section 56.12018 that "principal power switches . . . be labeled to show which units they control, unless identification can be made readily by location." [24] Crum agreed that the term "principal power switches" is not defined in Part 56 or elsewhere in the regulations. Tr. 316. However, in Crum's opinion, breakers No. 11 and No. 12 were "principal power switches" because they were "the only thing that controlled the power to [the] two outlets." Tr. 308. Crum agreed that there was a main breaker at the top of the box that controlled all of the breakers. As he recalled, the main

---

[23] The box contained two panels of six breakers and at the top in the middle of the box and separate and distinct from the two panels was a single breaker. Russell called it "the main breaker." Tr. 321. The main breaker controlled all of the other breakers in the box. Tr. 307; *see* Gov't Exhs. 15A (LAKE 2014-2-M), 15B (LAKE 2014-2-M).

[24] Contrary to his usual practice, Crum did not take photographs of the unlabeled breakers. Tr. 313. He stated:

> I forgot. . . . I should have; I know that. But we were trying to figure out exactly [what] those [breakers] controlled; and by the time I figured it out, they went ahead and labeled them, and I failed to take pictures of the condition.

Tr. 313.

breaker was labeled "main switch," but it was not specifically labeled to show that it controlled the circuits to the outlets. Tr. 311.

Russell testified that it was reasonable to think that the main breaker controlled power to all of the box's circuits. Tr. 321. He noted, as had Crum, that the main breaker was labeled to show it controlled all of the breakers in box. Tr. 323. Further, to his knowledge the company never had been cited for anything relating to the subject breaker box. Tr. 322.

Crum did not think the lack of labeling was likely to lead to an injury because the GFCI systems were operating properly. He stated, "Even if a ground fault . . . occur[red] or somebody were to get into that circuit, the GFCI would trip." Tr. 310. However, if the system failed, a miner could receive a 110-volt shock and first or second degree burns were possible, as well as muscle sprains and joint contractions. *Id.*

Crum found that the company's negligence was "low." He stated that the condition had existed for a long time, that the box had been subject to several MSHA inspections, and that the lack of labeling never had been cited. Because the condition had not been cited, he did not think the miners or mine management recognized the condition as a hazard. Tr. 310-311.

THE VIOLATION

There is no question that the breakers controlling power to the outdoor outlets were not labeled. Crum's testimony to this effect (Tr. 302) was not challenged by the company. Indeed, Russell agreed with Crum. Tr. 307. The fundamental question is whether the unlabeled switches were "[p]rincipal power switches" within the meaning of section 56.12018. As the court noted *infra* the word "principal" connotes a chief or leading power switch. Here, the unlabeled breakers were the leading switches to turn power on and off to the outlets. Tr. 311. However, like the breaker box in Citation No. 8741689 (Gov't Exh. 8 (LAKE 2014-616-M)) the cited breaker box was a single unit and the unit's chief or leading switch was its main switch, a switch everyone agrees was labeled. The court cannot logically distinguish the breaker box cited in Citation No. 8741689, a box the inspector agreed did not violate section 56.12018, from the subject breaker box. Both boxes had a chief or leading main switch that was labeled. Yet in one instance (Citation No. 8741689) the inspector found the box came within the standard (Tr. 156) while in the subject instance he found the box did not. Tr. 311. The agency cannot have it both ways. Its position with regard to the subject box would require all breakers in a breaker box to be labeled, something the standard decidedly does not mandate. In the court's opinion both boxes were units whose principal power switches were labeled. Therefore, the court will vacate Citation No. 8741717 at the close of this decision.

OTHER CIVIL PENALTY CRITERIA

The company abated the violations within the time set by the inspector and in so doing it exhibited its good faith. The company agrees that any penalties assessed for the violations will not affect its ability to continue in business. Tr. 325. The Secretary agrees that the mine has a "very small" history of previous violations (Tr. 35; Gov't Exh. 18) and that the mine is "relatively small." Tr. 35.

ASSESSMENT OF PENALTIES

LAKE 2014-147-M

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8747007	11/13/13	56.16005	$100	$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of $100 for the violation.

LAKE 2013-616-M

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741687	06/05/13	46.8(a)(2)	$100	$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and other civil penalty criteria, the court assesses a civil penalty of $100 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741688	06/05/13	56.12032	$100	$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of $100 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741689	06/05/13	56.12006	$100	$0

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

LAKE 2014-2-M

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741713	07/30/13	56.12004	$100	$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of $100 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741714	07/30/13	56.12032	$100	$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of $100 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741715	07/30/13	56.12018	$100	$100

The court finds that the violation was not serious and that it was due to the company's low negligence. Given these findings and the other civil penalty criteria, the court assesses a civil penalty of $100 for the violation.

CITATION NO.	DATE	30 C.F.R. §	PROPOSED PENALTY	ASSESSMENT
8741716	07/30/13	56.12002	$100	$0

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	ASSESSMENT
8741717	07/30/13	56.12018	$100	$0

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

ORDER

In view of the findings and conclusions set forth above Citation No. 8741688, Citation No. 8741713, and Citation No. 8741715 **ARE MODIFIED** to reflect the company's low negligence. In addition, Citation No. 8741689, Citation No. 8741716 and Citation No. 8741717 **ARE VACATED.** Within 30 days of the date of this decision the company **SHALL PAY** civil penalties in the amount of $600.[25] Upon payment of the penalties, these proceedings are **DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Lauren Polk, Esq., U.S. Department of Labor, Office of the Solicitor, 1244 Speer Blvd., Suite 216, Denver, CO 80204-3516

Peter DeBruyne, Esq., Peter DeBruyne, P.C., 838 North Main Street, Rockford, IL 61103

/db

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