FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 15, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-641-M
Petitioner,	:	A.C. No. 12-00066-158510
	:	
v.	:	
	:	Essroc Cement
ESSROC CEMENT CORPORATION,	:	
Respondent	:	

DECISION

Appearances: Linda M. Hastings, Esq., Office of the Solicitor, U.S. Department of Labor, Cleveland, Ohio, for Petitioner;
C. Gregory Ruffennach, Esq., Washington, DC, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Essroc Cement Corporation ("Essroc") pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Louisville, Kentucky, and filed post-hearing briefs.

Essroc operates a cement plant in Clark County, Indiana. This facility employed an average of 206 people in 2008. The case involves seven citations issued under section 104(a) of the Mine Act. The Secretary proposes a total civil penalty of $16,021 in this case.

I. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

A. Citation No. 6411412

On June 11, 2008, MSHA Inspector Kenneth Diez issued Citation No. 6411412 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.6101(a) as follows:

> An accumulation of combustible material was found within fifty feet of the explosive material storage facility. Several large pieces of plywood were [lying] on the ground next to ANFO Trailer. The trailer is in a remote area of the mine site and an ignition source was not present making an accident unlikely. Should an ignition source

be introduced into the area it may result in burns and/or smoke inhalation injuries to miners in the area.

(Ex. G-1). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial nature ("S&S") and that the company's negligence was moderate. Section 56.6101(a) provides that "[a]reas surrounding storage facilities for explosive material shall be clear of rubbish . . . for 25 feet in all directions . . . ." The Secretary proposes a penalty of $362.00 for this citation.

Inspector Diez testified that he issued the citation because cardboard trash and plywood were lying near a trailer used for storing explosive materials. (Tr. 17, 18). He did not believe an accident was likely because the trailer was located in a remote location and there was no ignition source nearby. (Tr. 19). He issued the citation because, in the event of a fire in the area, employees could suffer smoke inhalation injuries or burns. *Id.* He determined that the company's negligence was moderate because the condition was open and obvious to anyone making a workplace examination. (Tr. 20) The inspector testified that at the time of the MSHA inspection Ronny Mull, the quarry foreman, did not indicate any mitigating factors were present. *Id.*

David Johnson, quarry mobile equipment superintendent, testified for Essroc. He testified that employees of Orica Explosives deliver the trailers used for storing explosive materials. (Tr. 157). When new explosives are needed, Essroc orders a new trailer from Orica. *Id.* Orica delivers the explosives in a trailer and takes back the empty trailer. (Tr. 157-58). Based on a conversation with Mull, it was Johnson's understanding that, on the day the citation was issued, Orica's employees left material from the empty trailer near the new trailer. (Tr. 158). He also stated that the plant's blaster was busy at the time, but intended to pick up the trash at a later time. *Id.*

The Secretary argues that "[t]he blaster was clearly aware of the violation at the time, but chose to leave the condition and 'come back later.' " (Tr. 158; Sec'y Br. 2). Essroc requests the citation be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 2). Essroc argues that the alleged violation did not present any danger to miners because "an ignition source was not present making an accident unlikely." (Ex. G-1). Essroc also argues it was not negligent in allowing the condition to exist. (Essroc Br. 2). It states that the operator proved that employees of an independent contractor created the condition while Essroc's area supervisor was occupied with other work. *Id.* It relies on *Southern Ohio Coal Co.*, 4 FMSHRC 1459 (Aug. 1982). In that case, the Commission held that negligence of rank-and-file non-supervisory employees cannot be imputed to the operator for penalty assessment purposes. *See Id.* at 1464. Essroc maintains that the first time anyone from the company actually observed the cited condition was during the MSHA inspection. (Essroc Br. 2).

In *Southern Ohio Coal*, the Commission also held "[i]t is well-settled that under the Mine Act, an operator is liable without fault for violations of the Act and mandatory standards committed by its employees." *Id.* at 1462; *e.g.*, *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38-39 (Jan. 1981). Furthermore, the Court of Appeals for the Fourth Circuit has affirmed that coal-mining companies can be held responsible for violations of construction contractors. *Bituminous Coal*

Operators' Ass'n, 547 F.2d 240, 246-47 (1977). The Commission explicitly reaffirmed the decision in *Republic Steel Corp.*, 1 FMSHRC 5, 9 (Apr. 1979).

I find that Essroc is liable for the violation. I also find, however, that Essroc's negligence is low. It did not create the condition and it was in the process of taking steps to correct it. I also find that the record establishes that the violation did not create a serious safety hazard. A penalty of $100.00 is appropriate for this violation.

B. Citation No. 6411414

On June 11, 2008, MSHA Inspector Diez issued Citation No. 6411414 under section 104(a) of the Mine act alleging a violation of 30 C.F.R. § 56.11012 as follows:

> The opening on the south side of the clay apron was not provided any railings, barriers or covers. The opening in the walking surface is located between the drive unit and conveyor structure and is approximately four feet in length and three feet in width. The location of the opening would make an accident unlikely. Should a miner fall in or step into the opening it may result in lacerations, contusions and/or fracture bone injuries.

(Ex. G-2). The inspector determined that an injury was unlikely and that if an injury did occur it would result in lost workdays or restricted duties. He determined that the violation was not S&S and that the company's negligence was low. Section 56.11012 provides that "[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers." The Secretary proposes a penalty of $162.00 for this citation.

Inspector Diez testified that the cited area was on the backside of the clay apron and provided easy and open access for employees. (Tr. 22). The opening was between the clay apron and an equipment guard "with some depth." *Id*. He stated that an injury was unlikely because he did not see any need for an employee to be in the cited area unless the equipment needed maintenance. (Tr. 24, 25). He also found the company's negligence to be low because the condition's location was such that there was a good possibility someone making a workplace examination would not see it. *Id*.

On cross-examination, Inspector Diez testified that MSHA does not have official criteria for determining "near" or "barriers" as used in the relevant standard. (Tr. 68). He also testified that, based on the condition's obviousness, it is reasonable to believe another MSHA inspector would have observed it.

Mark Terry, a maintenance worker and miners' representative for Essroc, testified that the cited area is not easy to access. (Tr. 106). In order to do so, a worker would have to fit between a six to eight inch opening. *Id*. He stated that he has done maintenance work in the cited area and safety precautions, such as placing a board over the hole or using a tie-off, are taken to prevent an accident. (Tr. 106). However, he could not state with certainty that every miner follows the proper

procedure for working in this area. (Tr. 111). Mr. Terry testified that no previous MSHA inspectors have indicated there are insufficient barriers around the hole. (Tr. 107).

Mr. Johnson testified that, based on the measurements he took, he believes there is an adequate barrier separating the walkway from the cited condition. (Tr. 146). A 48-inch-tall guard, a 34-inch-high motor, and a 2-foot-square concrete column protect the hole. (Tr. 146; Ex. R-2, R-3).

Essroc requests that the citation be vacated, or in the alternative that the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 3). Essroc argues the condition was not a violation of 30 C.F.R. § 56.11012 because MSHA failed to prove the cited opening was near a travelway. *Id.* The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. Essroc relies on *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995, 999-1000 (Sept. 2001) to dispute MSHA's conclusion that prior access for maintenance purposes establishes the area as a travelway. (Essroc Br. 4). It also argues that, in light of past non-enforcement and the ambiguity of the words "near" and "barriers" in the cited standard, MSHA's attempted enforcement has denied Essroc of constitutionally mandated fair notice as articulated in *Good Construction*. (Essroc Br. 4).

Alternatively, if the cited area is found to be a travelway, Essroc argues that the alleged violation did not present any danger to miners and it was not negligent in allowing the condition to exist. (Essroc Br. 5) It notes Inspector Diez's statement that "the location of the opening would make an accident unlikely." (Ex. G-2; Essroc Br. 5). Furthermore, because no previous MSHA inspector has indicated the area in question poses a problem, Essroc maintains it was not negligent in allowing the condition to exist. (Essroc Br. 5).

The Secretary defines "travelway" as a "passage, walk, or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. When determining whether an area qualifies as a travelway under the standard, the Commission has held that "the relevant question is whether the areas in question were used, or intended to be used, for walking." *Good Construction*, 23 FMSHRC at 1000. In overturning the judge's decision, the Commission held that "[t]he inference that the areas were of sufficient size to permit actual 'walking' does not answer that question." *Id.* When analyzing this issue the "key phrase . . . is 'regularly used.' " *APAC-Mississippi, Inc.*, 26 FMSHRC 811, 812 (Oct. 2004) (ALJ). The weight of the evidence must establish the area is regularly used and designated for persons to go from one place to another. *See id.* Testimony from workers about the frequency and purpose of use of the area is given strong weight when analyzing this issue. *See, e.g.*, *Oil-Dri Production Company*, 32 FMSHRC 1761, 1762-63 (Nov. 2010) (ALJ); *Beco Construction Co.*, 23 FMSHRC 1182, 1201 (Oct. 2001) (ALJ).

I find that the record in this case does not indicate that the cited area was regularly used or designated as a passage for employees to go from one place to another. It was not shown that employees did not walk by the cited area on a regular basis. As I recently held in *Lehigh Southwest Cement Co.*, 33 FMSHRC ___, slip op. at 15, No. WEST 2009-22-M (Feb. 1, 2011), the definition of "travelway" is rather narrow and the Secretary must establish that the "1walk, way, or area [is] regularly used and designated for persons to go from one place to another." The Secretary has failed

to establish that the cited area is a travelway. Consequently, the citation is vacated.

C. Citation No. 6411417

On June 16, 2008, MSHA Inspector Diez issued Citation No. 6411417 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.4104(a) as follows:

> The containers located on the Triple Gate Floor had an excessive accumulation of oil leakage. Two of the containment vessels are approximately 24" X 24" and the third is 30" wide and 48" long. The containers had from one inch to six inches of oil present at the time of inspection. Waste liquids should not accumulate in quantities that could create a fire hazard under the standard cited. Any leakage or spillage is to be removed in a timely manner under 56.4102. The area appeared to be void of ignition sources at the time, a warning sign was not posted but a fire extinguisher was provided making an accident unlikely. Should an ignition source be introduced a miner may receive burns and/or smoke inhalation injuries.

(Ex. G-3). The inspector determined that an injury was unlikely but that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.4104(a) provides that "[w]aste materials, including liquids, shall not accumulate in quantities that could create a fire hazard." The Secretary proposes a penalty of $362.00 for this citation.

Inspector Diez testified that there were two containers placed under equipment for the purpose of collecting leaking oil. (Tr. 27). He stated that there was an accumulation of oil that was between one and six inches deep in the containers at the time of inspection. (Tr. 28). The inspector further testified that the depth of the oil was the reason for issuing the citation. (Tr. 31). He stated that operators typically have procedures for removing such oil, and this was not being done often enough. (Tr. 32). He also testified that an injury was unlikely due to the lack of an ignition source and high flashpoint of the oil, making it difficult to ignite. (Tr. 28). The inspector believes that, if the oil were ignited, a miner trying to fight the fire might suffer smoke inhalation injuries or burns, likely only affecting one miner. (Tr. 29). The inspector determined that the company's negligence was moderate because anyone making a workplace inspection should have seen the condition. *Id*.

On cross-examination, Inspector Diez testified that there was no regulation preventing an operator from catching hydraulic fluid in basins. (Tr. 71). He stated build-up of hydraulic fluid presents a fire hazard when it becomes excessive; however, MSHA does not have criteria for inspectors to use to determine if fluid build-up has become excessive. (Tr. 72). Rather, it is a subjective determination made on a case-by-case basis. (Tr. 71). The inspector was not able to articulate how a larger accumulation of fluid presents a more significant hazard. (Tr. 73).

Mr. Terry testified that an oiler should inspect and, if needed, empty the cited basins every first shift. (Tr. 104, 105). He testified that previous MSHA inspectors have not indicated the cited

area posed a fire hazard. (Tr. 105). However, Mr. Terry testified that the condition in the containers during previous inspections may have varied from the condition during this inspection. (Tr. 111).

Mr. Johnson testified that the Triple Gate is a hydraulically operated system that is not perfectly sealed. (Tr. 151). This causes hydraulic fluid from the pillow block bearings to leak from the unit. (Tr. 151). Mr. Johnson stated that using basins is probably the best practice to catch the leaking material, as opposed to letting it run onto and be absorbed by the floor. (Tr. 151). This technique is standard industry practice, according to Mr. Johnson. (Tr. 152). The hydraulic fluid's Material Safety Data Sheet ("MSDS") indicates a flash point of 392 degrees Fahrenheit. (Tr. 153; Ex. R-5). Mr. Johnson does not believe the depth of fluid in the basin is relevant when assessing potential fire hazard. (Tr. 154).

The Secretary distinguishes the case at bar from *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 415-16 (Mar. 1996) (ALJ), where a citation for a violation of 30 C.F.R. § 56.4104(a) was vacated. (Sec'y Br. 4). In *Tide Creek*, there was less than two inches of accumulation of motor oil in a container under an oil drum to catch drips or spills. *Id.* at 415-16. She maintains this case is distinguishable because the vessels here were placed under equipment to catch leaking liquid rather than drips or spills. *Id.*

Essroc requests that the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 5, 6). It relies on *Tide Creek* to establish the fluid in the containment vessels did not present a fire hazard in violation of 30 C.F.R. § 56.4104(a). (Essroc Br. 6). At the time of inspection, an ignition source was not present, and the inspector thought the introduction of one was "extremely unlikely." (Ex. G-3; Tr. 73). Essroc also notes the inspector stated "I don't see really a particular hazard being involved here." (Essroc Br. 6; Tr. 73). Essroc avers that the difference between the fluid's flash point, *i.e.* 392 degrees Fahrenheit, and the fluid's ambient temperature, *i.e.* 110 degrees Fahrenheit, "presented no potential for combustion." (Essroc Br. 6).

Essroc also requests that the citation be vacated because the safety standard is so vague that it denies mine operators notice of its requirements. (Essroc Br. 6). Essroc believes this because the practice of using containers to catch hydraulic leaks is not specifically prohibited by MSHA standards, the standard is ambiguous as to what "quantities" of liquid are prohibited, there are no guidelines for determining what quantities are hazardous, and no other MSHA inspectors have determined the use of containment vessels in the area to be a citable hazard. (Essroc Br. 6, 7).

It is well established that 1the Secretary is not required to prove that a violation of a safety standard creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). Section 56.4104(a), however, specifically requires that that Secretary establish a safety hazard. That standard provides that liquids "shall not accumulate in quantities that *could create a fire hazard*." (emphasis added). The question here is whether the Secretary established that the accumulation of hydraulic fluid described in this case could create a fire hazard.

I find that the Secretary did not meet the burden of establishing that the condition created a fire hazard. The flashpoint of hydraulic fluid is quite high and there were no ignition sources in the area. A spark or other similar event would be insufficient to ignite the fluid. The Secretary's use of the word "could" in the standard broadens its scope somewhat, but the standard cannot reasonably be interpreted so broadly that any liquid in any quantity would qualify. Without a realistic possibility of a fire hazard, there is no violation. This citation is vacated.

D. Citation No. 6411419

On June 16, 2008, MSHA Inspector Diez issued Citation No. 6411419 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12032 as follows:

> The door on the 480-volt electrical box was left open and unattended on the portable RC161 Sullair TS-20 Air Compressor. The unit was positioned outside the building housing the Sidewinder Pumps. The unit was energized and the wiring, parts and connection points were exposed [to] possible contact. Footprints were visible in the dust along the compressor and box area at the time of inspection. Should a miner contact the energized parts it may result in a fatal electrical shock.

(Ex. G-4). The inspector determined that an injury was reasonably likely and that if an injury did occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of $5,961.00 for this citation.

Inspector Diez testified that he observed an energized electrical box with an open door. (Tr. 36). The box was in a room housing "side winder pumps." (Tr. 35). The inspector observed that workers traveled in and out of this room, making an accident reasonably likely. (Tr. 37, 38). He testified that the box was at face level, with nothing in front of it, exposing any worker in the area to a potentially fatal shock. (Tr. 29, 40).

On cross-examination, the inspector testified that the footprints in front of the box could have been from a miner or contractor performing repairs on the box, but he was not certain. (Tr. 70). On reexamination, Inspector Diez testified that any repairs to the box would need to be done when the box was de-energized. (Tr. 81). He indicated that once the box was energized, no repairs could be done. *Id*.

Mr. Heathcock testified that there was a serviceman within eyesight of the condition at the time the citation was issued. (Tr. 90). He believes the serviceman was working on a rental compressor that is powered by the open electrical box. *Id*. If the serviceman was working on this piece of equipment, he would need to access the cited box. *Id*. However, Heathcock could not conclusively state that the serviceman had finished his work at the time the citation was issued. (Tr. 93). Although trained and authorized electrical personnel are allowed to work on energized equipment with the appropriate tools, Mr. Heathcock was not sure if this particular serviceman was so authorized. (Tr. 93, 94).

Mr. Terry also testified that there was a repairman in the area of the open box who had been working on the box. (Tr. 97). The plant has a rule that prevents workers other than electricians from working with these types of electrical boxes. (Tr. 98). Mr. Terry testified that it was unlikely any miner would access or interface with this box unless the worker was an electrician specifically asked to do so. He also testified that he does not recall seeing any company employees in the area at the time. (Tr. 99).

Mr. Johnson testified that an employee of a contractor was diagnosing and repairing a fault in the compressor that caused the unit to shut down. (Tr. 149; Ex. R-4). Mr. Johnson was not present at the time the citation was issued. (Tr. 163). His knowledge of the condition is based on conversations with Mr. Heathcock and Mr. Terry, as well as reading the invoice. (Tr. 163; Ex. R-4).

The Secretary argues that a discrete safety hazard was created by this violation and it was reasonably likely a worker passing by would be seriously injured. (Sec'y Br. 6). She states that none of the witnesses presented by Essroc had first hand knowledge of what was done on the Sullair equipment, who opened the electrical box, or why it was open. (Sec'y Br. 6).

Essroc denies that the cited condition constituted a violation of 30 C.F.R. § 56.12032. Essroc requests that the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 7). It argues the evidence presented establishes the electrical box was open during a repair, which is an exception provided for in the safety standard. (Essroc Br. 8; Tr. 90, 97). Essroc contends the service technician was not negligent in leaving the box open while in the area working on the equipment because the cited safety standard does not specify a time during repairs that an electrical box must be closed. (Essroc Br. 9; 30 C.F.R. § 56.12032). Furthermore, Essroc notes that even if the serviceman was negligent, his negligence is not attributable to it as a rank and file employee of an independent contractor. (Essroc Br. 9).

Essroc also denies that the condition was S&S, and argues MSHA did not prove there was a "reasonable likelihood" that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Essroc Br. 8); *National Gypsum Co*., 3 FMSHRC 822, 825 (Apr. 1981); *see, e.g.*, *Richard E. Seiffert Resources*, 23 FMSHRC 426, 431 (Apr. 2001) (ALJ) (holding an open 480 volt panel box not a S&S violation)). Essroc supports this argument by stating the condition was short lived, MSHA did not establish any potential exposure to the open box, and MSHA did not prove the possibility of contact with energized parts. (Essroc Br. 9).

The Commission analyzes S&S issues under a four-part test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. *Id.* Whether a particular violation is S&S depends on the particular facts surrounding the violation. *Cement Division, National Gypsum,* 3 FMSHRC 822, 825 (Apr. 1981).

I find that the Secretary established a violation of the standard. There was no showing that it was necessary for the electrical box to be left open while a compressor was being repaired. I find that the violation was not S&S because it was not reasonably likely that the hazard contributed to by the violation would result in an injury. Although I credit the inspector's testimony that employees can walk through the area, there was no showing that it was reasonably likely that anyone would come in contact with live electrical components. The footprints could have easily been made by the contractor performing the electrical work. Assuming continued mining operations, the door would have been closed within a short period of time. The violation did create a discrete safety hazard, so it was moderately serious. I also find that Essroc's negligence was low. The violation was created by an employee of an independent contractor. A penalty of $600 is appropriate.

E. Citation No. 6411424

On June 17, 2008, MSHA Inspector Diez issued Citation No. 6411424 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.20003(a) as follows:

> The passageway going along the North Reclaim Clinker Conveyor was not being maintained in a clean and orderly condition. The walkway on the west side was covered with piled hardened material, loose large chucks and air hose. The walking surface cited is approximately three feet in width and fifty feet in length. The three steps midway on the walkway are covered with an approximate four inches of hardened material. Miners are in the area regularly and were present at the time of inspection. Miners regularly travel the area for maintenance, repair, cleaning and examination. Should a miner slip, trip and fall it may result in contusions, lacerations, and/or fractured bones.

(Ex. G-5). The inspector determined an injury was reasonably likely and that if an injury did occur it would result in lost workdays or restricted duty. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.20003(a) provides that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of $6,458.00 for this citation.

Inspector Diez testified that he issued the citation because hoses and chunks of material were lying in the walkway along the North Reclaim Clinker Conveyor, creating an irregular walking surface. (Tr. 43, 44). He testified that he observed build-up of hardened material four inches thick

and some chunks of material the size of a football in the walkway. (Tr. 47, 48). Because it is a regularly used travel way, he determined an accident was reasonably likely. (Tr. 49).

On cross-examination, the inspector testified that he did not know how long it would take for four inches of material to build up in the walkway. (Tr. 73). The inspector revealed in his testimony that the football-sized chunks of material could have been created through continuing operations in the area, including clean-up of the walkway. (Tr. 75).

Mr. Terry testified that a worker could use this walkway to access the head wheel or to inspect the conveyor belt. (Tr. 100). However, he stated that if he were doing an inspection on the head wheel he would not use the cited walkway. *Id.* Mr. Terry thought it was more than likely the material came from a feed shoot above the passageway. (Tr. 100, 101). He testified that the build-up of material would take two or three days to occur and the chunks of material could have accumulated in a short period of time if there was a big enough spill. (Tr. 101). Mr. Terry further stated that the spilled material hardens quickly in rainy weather. Unpredictable accumulation and rainy weather can combine to quickly recreate a condition that had recently been cleaned up. (Tr. 114). It is Essroc's policy that workers should not walk through piles of material, and Mr. Terry testified that he personally would not have done so if he had observed a similar condition. (Tr. 101). Typically, the labor crew is responsible for cleaning conditions such as this. (Tr. 102). However, if maintenance personnel needed to access the walkway, they would be responsible for cleaning the condition. Mr. Terry testified that it would likely take a labor crew one and a half to two days to clean the cited condition. (Tr. 102). He testified that clean-up in this area had begun and he was unsure why it had stopped. (Tr. 114).

Travis Hostetler, the hourly lead man for the labor crew at Essroc, testified that a clean-up crew was scheduled to work in the North Reclaim area on the days of June 16, 17, and 18. (Tr. 125). Based on photographs, it was obvious to him clean-up had begun in the area. (Tr. 125, Ex. G-5). While he did not have a specific recollection of why the scheduled clean-up was not completed, he testified that it was likely the crew had been pulled off this job to work on other conditions cited by Inspector Diez. (Tr. 126, 127).

The Secretary argues that a discrete safety hazard was created by this violation because it was reasonably likely a miner working in the area would be injured. (Sec'y Br. 8). She further argues that it is reasonably likely any injuries suffered would be serious. *Id.* Therefore, she argues, it is reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. *Id.*

Essroc argues that MSHA did not prove a violation of 30 C.F.R. § 56.20003(a). (Essroc Br. 10). Essroc requests the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. *Id.* Essroc maintains it met the requirements of the safety standard by keeping the walkway "clean." (Essroc Br. 10; 30 C.F.R. § 56.20003(a)). It states that the MSHA inspector misinterprets the standard as prohibiting spillage. (Essroc Br. 10, 11). Essroc relies on *Placerville Industries, Inc.*, 27 FMSHRC 115 (Feb. 2005) (ALJ) when interpreting the cited standard to mandate cleaning. (Essroc Br. 10). Essroc argues that it was issued the citation as clean-up was underway. *Id.* The inspector testified that cleaning is an ongoing

process, and the cited standard does not specify a time frame for initiating or completing clean-up operations. (Essroc Br. 11; *see* Tr. 48). Based on these facts, Essroc believes its clean-up efforts were consistent with what a reasonably prudent mine operator would do. (Essroc Br. 11). Furthermore, Essroc believes it affirmatively defended the citation by providing uncontroverted evidence the corridor would not be used as a "passageway" until the clean-up process was complete. (Essroc Br. 11-12; Tr. 101-102, 129-130).

Essroc also denies that the condition was S&S, and argues MSHA did not prove there was a "reasonable likelihood" that the hazard contributed to will result in an injury or illness of a reasonably serious nature. (Essroc Br. 12). It notes MSHA presented no direct evidence of exposure to the cited condition. (Essroc Br. 13). Furthermore, the inspector conceded he was uncertain whether he saw anyone in the general vicinity of the corridor before, during, or after the condition was cited. *Id.* Although the "frequency of travel" was crucial to the inspector's gravity determination, Essroc argues this finding was based entirely on the inspector's speculation. *Id.* Furthermore, Essroc maintains it effectively rebutted this inference with testimony that "alternative" routes were available to access the conveyor and the cited condition was not on the normal route. (Essroc Br. 13; Tr. 100, 129-30).

Essroc also argues that it was not negligent in allowing the condition to exist. (Essroc Br. 14). It notes that the inspector's negligence finding is based on his understanding that the material accumulated "over a matter of time," but he was unable to estimate how long the condition existed. (Essroc Br. 14; Tr. 48, 49). Because clean-up in the area had begun, and this clean-up "took a back seat" to addressing other conditions of concern to the inspector, Essroc maintains it was being "diligent," not negligent. (Essroc Br. 15).

I find that the Secretary established a violation of the safety standard. The passageway was covered with material, as shown in the photographs taken by the inspector. (Ex. G-5). This material created a stumbling and tripping hazard. Although the operator apparently was in the process of cleaning up the material, the hazard existed at the time of the inspection. I find that the Secretary did not establish that the violation was S&S, however. There was no showing that it was reasonably likely that the hazard contributed to by the violation would cause an injury. Specifically, it was not established that anyone had walked through the area or that anyone would walk down the passageway. Mr. Terry testified that there were alternative routes to the head wheel and the conveyor belt. (Tr. 100). I find that the Secretary did establish that miners were exposed to the hazard. I find that Essroc's negligence was moderate. A penalty of $1,000 is appropriate.

F. Citation No. 6411426

On June 17, 2008, MSHA Inspector Diez issued Citation No. 6411426 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11002 as follows:

> Handrailing was not provided for the east end of the elevated walkway. The walkway is located in the Core Building on the south end of the Burner Floor. The walkway is access for the #2 Kiln burner discharge end. The open area is at the right hand side of the

> ladder. The area is approximately 40" X 40" and a fall of 4' down to other structure. The tubing across the opening is approximately 20" high off the walking surface. Miners access the platform regularly for repair, maintenance and examination of equipment. Should a miner fall from the area it may result in lacerations, contusions and/or fractured bones.

(Ex. G-6). The inspector determined that an injury was reasonably likely and that if an injury did occur it would result in lost workdays or restricted duty. He determined the violation was S&S and the company's negligence was moderate. Section 56.11002 provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided." The Secretary proposes a penalty of $1,412.00 for this citation.

Inspector Diez testified that there were inadequate handrails protecting an elevated workspace, exposing workers to a four foot fall hazard. (Tr. 53, 57). The inspector determined an accident was reasonably likely because workers make observations in the vicinity of the cited condition. (Tr. 56). He stated the condition was S&S based on how frequent the workspace is accessed. (Tr. 58). On cross-examination, Inspector Diez testified that § 56.11002 would not necessarily apply to the cited area. (Tr. 76). He also stated that there was no one working in the cited area at the time the he observed the condition. (Tr. 77).

Mr. Terry testified that he could not recall any previous MSHA inspectors requiring a handrail to be placed in the cited area. (Tr. 103). Mr. Johnson testified that the cited area is visited very rarely for maintenance purposes. (Tr. 154). The area would generally be accessed on a shutdown during maintenance up to four times per year. He stated that it is very hot up there because it is immediately adjacent to the burner. *Id.*

The Secretary analogizes the case at bar to *Carder Inc.*, 27 FMSHRC 839, 848-50 (Nov. 2005) (ALJ), based on the frequency that miners accessed the cited area, *i.e.* two to four times annually, and the purpose, *i.e.* observation. (Sec'y Br. 9). The Secretary notes that if miners were to access the cited area for observation purposes, this would generally require some movement forward and backward, making the area an elevated walkway. (Sec'y Br. 10).

The Secretary argues that a discrete safety hazard was created by this violation because it was reasonably likely a miner working in the area would be injured. (Sec'y Br. 10). She argues further that it is reasonably likely any injuries suffered would be serious. *Id*. Therefore, she argues, it is reasonably likely that the hazard contributed to by the violation would result in an injury of reasonably serious nature. *Id.*

Essroc requests that the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. (Essroc Br. 16). It argues the cited area is not covered by the safety standard because it is a "working area," not a "walkway." (Essroc Br. 16).

Essroc also argues that the violation was not S&S and it was not negligent in allowing the condition to exist. (Essroc Br. 16, 17). Although the inspector based his S&S determination on "frequency" of exposure, he did not testify how often the area was accessed. (Essroc Br. 16, Tr. 56). To the contrary, Essroc argues that the evidence it presented established the area was accessed "very rarely," thus proving exposure to the condition was minimal. (Essroc Br. 16; Tr. 155). Furthermore, no previous MSHA inspector has cited the condition. (Essroc Br. 16; Tr. 103).

At trial, the Secretary moved to amend the cited standard from section 56.11002 to section 56.11027. (Tr. 9-10). The former section dictates construction standards for elevated walkways, elevated ramps, and stairways. The latter dictates construction standards for working platforms. Counsel for the Secretary did not seek to amend the standard until the day of trial. She also did not bring a copy of section 56.11027 with her to the trial. Instead, she asked that I briefly recess the proceedings so that she could obtain a copy of that safety standard. I denied her that request. Although the Commission has held that, under certain circumstances, the Secretary may seek to amend a citation to allege a violation of a different safety standard than that asserted by the inspector, I find that, in this particular instance, the request was not timely made. More importantly, if the Secretary moves to amend a citation to allege a violation of a different safety standard on the day of the hearing, it is incumbent on her representative to have a copy of the safety standard at issue to read into the record or for the court to review. The Secretary's motion to amend is denied.

I find that the Secretary failed to establish the cited area was a crossover, elevated walkway, elevated ramp, or a stairway under section 56.11002. The photographs reveal that it is questionable whether a handrail would provide any benefit in the area because of the presence of tubing in the cited area. (Ex. G-6; Tr. 155-56). Consequently, the citation is vacated.

G. Citation No. 6411439

On June 24, 2008, MSHA Inspector Diez issued Citation No. 6411439 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(b) as follows:

> The guard was not in place on the #1 Can Elevator drive unit located at the North Plant. The lack of guarding left the moving drive chain and sprockets expose[d] to possible contact. The unit had been under repair and the guard was damaged. The unit was started and in operation while the guard was being repaired in the shop. Construction tape had been placed around the base of the ladder to serve as a warning and it is a remote elevated location making an accident unlikely. Should a miner contact the moving machine parts it may result in disabling injuries to the hand and/or arm.

(Ex. G-7). The inspector determined that an injury was unlikely but that if an injury did occur it would be permanently disabling. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.14112(b) provides that "[g]uards shall be securely in place while machinery is being operated, except when testing or making adjustments which

cannot be performed without removal of the guard." The Secretary proposes a penalty of $1,304.00 for this citation.

Inspector Diez testified that the Number 1 Can Elevator Drive unit was in operation with an unguarded moving drive train and sprocket. (Tr. 61, Ex. G-7). The inspector was informed the guard was being repaired at the time. (Tr. 61). The inspector testified that an injury was unlikely because the unit was located at the top of a building and the area was marked with caution tape. (Tr. 63, Ex. G-7). On cross-examination, Inspector Diez stated that there was caution tape at the base of the ladder leading up to the unguarded unit but this is not a sufficient protection against injury. (Tr. 66). He also testified that he has routinely seen caution tape being pulled down by workers on other inspections. (Tr. 80).

Mr. Terry testified that he saw caution tape on the ladder on the day of the inspection. (Tr. 109). He further testified that he would not cross caution tape unless he was the one who put it up and he was accessing the area to do a repair or if he had express permission from a supervisor or whoever had tagged the area. (Tr. 109, 110).

Mr. Johnson testified that the guard was removed the day prior to the inspection to replace a broken chain. (Tr. 140). The broken chain had also damaged the guard, which had to be taken into the shop for repair. *Id*. Because of the size of the guard, it had to be removed and eventually replaced using a crane. (Tr. 141). Mr. Johnson does not contest the fact that the machine was in operation on June 24 without the chain guard in place. (Tr. 161). He also testified the taped-off ladder was the only way to access the cited condition. (Tr. 142).

The Secretary argues that placing warning tape at the bottom of the ladder is not a defense to the violation because it is not a sufficient safety device to prohibit access to the hazard. (Sec'y Br. 11). This argument is based on the fact Mr. Terry testified warning tape means "to enter with caution" and can be removed with permission from a supervisor who does not have knowledge as to the hazard beyond the tape. (Sec'y Br. 11; Tr. 110, 111).

Essroc argues that the condition was not a violation of 30 C.F.R. § 56.14112(b) and disputes the gravity and negligence findings. (Essroc Br. 17). Essroc requests the citation be vacated or, in the alternative, the findings be modified to indicate no likelihood of injury and no negligence. *Id*. It is Essroc's position that no guard was required under 30 C.F.R. § 56.14107. *Id*. Section 56.14112 does not include a provision that establishes where guards are required.
Climax Molybdenum Company, 30 FMSHRC 886, 891 (Aug. 2008) (ALJ). Instead, section 56.14107 sets forth the guarding requirements. Subpart (b) of section 57.14107 expressly exempts "exposed moving parts [that] are at least seven feet away from walking or working surfaces." 30 C.F.R. § 56.14107(b). Essroc argues that the cited area was between 15 and 35 feet above the nearest walking or working surface. (Essroc Br. 18-19; Tr. 66-67, 141-42). It argues that the record establishes that the elevated platform at the top of the ladder was not a "walking or working surface." (Essroc Br. 19).

Alternatively, Essroc argues it took appropriate precautions in accordance with 30 C.F.R. § 56.20011. (Essroc Br. 17). Section 56.20011 requires an operator to limit access to an area where

"safety hazards exist" with a "barricade." *See* 30 C.F.R. § 56.20011. Essroc believes it provided uncontroverted evidence that caution tape is an effective barricade. (Essroc Br. 20; Tr. 108-09, 130). Essroc notes MSHA's regulations provide a barricade can consist of any "material object, or objects that separates, keeps apart, or demarcates in a conspicuous manner such as cones, a warning sign, or *tape*." 30 C.F.R. § 56.2 (emphasis added) (Essroc Br. 20).

Essroc's third alternative argument is that "attempted enforcement [in this case] is absurd and contrary to fundamental principles of fair notice." (Essroc Br. 17). It argues that prohibiting an operator from using a barricade to temporarily prevent access to areas where moving parts hazards may exist would produce "an absurd result that the presiding judge must avoid." *See Rawl Sales & Processing Co.*, 23 FMSHRC 463, 471 (May 2001) (two Commissioners holding that the plain language of a regulation cannot be enforced where it produces an absurd result); (Essroc Br. 21). Essroc argues MSHA's position is contrary to the purpose of 30 C.F.R. § 56.20011, which allows temporary barricades to protect persons from other, serious, hazardous conditions while the conditions are being corrected. (Essroc Br. 21). In light of this, Essroc argues that it is absurd for MSHA to argue a ladder cannot be taken out of service using caution tape while repairs are underway. (Essroc Br. 22).

One of the key issues is whether the cited elevator drive unit was within seven feet of a walking or working surface. Commission Judge Jerold Feldman faced a similar issue in *Brown Brothers Sand Co.,* 17 FMSHRC 578, 579-80 (Apr. 1995) (ALJ). In that case, a guard for the head pulley at the top of a stacker conveyor was not securely in place. The head pulley had a vertical height of about 43 feet above the ground. Judge Feldman determined that the citation should be vacated. He relied, in part, on *Thompson Brothers Coal Company, Inc.*, 6 FMSHRC 2094, 2097 (Sept. 1984), where the Commission held:

> [T]he most logical construction of [a guarding] standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness . . . . Applying the test requires taking into consideration all relevant exposure and injury variables, *e.g.* accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

The Secretary in Judge Feldman's case argued that there was a violation of section 56.14112(b) because there were no barriers or signs prohibiting employees from walking up to the top of the stacker conveyor. Judge Feldman concluded that the walkway up the stacker conveyor was used exclusively by employees who needed to maintain the head pulley and rollers. As a consequence, he rejected the Secretary's arguments and concluded that the top of the stacker conveyor was not within 7 feet of a walking or working surface.

The guard in this instance is quite large and requires a crane to move it. The guard was removed so that it could be repaired. The chain drive was in use while the guard was being repaired.

For reasons similar to those expressed by Judge Feldman, I find that the unguarded chain drive was more that seven feet from a walking or working surface. The small platform at the top of ladder near the chain drive was accessed solely for the purpose of maintaining the drive unit. The photographs taken by Inspector Diez clearly demonstrate that no employee would ever go up the fixed ladder to that location for any reason other than to maintain the chain drive. Essroc had installed caution tape across the bottom of the ladder to warn employees. I find that this tape complied with the requirements of section 56.20011. Once the guard was repaired, the equipment would have been shut down and locked out and, using a crane, the guard would have been reattached to the drive. The Secretary did not establish a violation and the citation is vacated.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Essroc had about 106 paid violations at the plant during the 24 months preceding the date of this inspection and 44 of these violations were classified as S&S. Essroc is a medium-sized operator, but it is owned by a larger operator (Italcementi Group). The plant employed about 206 people in 2008. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Essroc's ability to continue in business. The gravity and negligence findings are set forth above.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

Citation No.	30 C.F.R. §	Penalty
6411412	56.6101(a)	$100.00
6411414	56.11012	Vacated
6411417	56.4104(a)	Vacated
6411419	56.12032	600.00
6411424	56.20003(a)	1,000.00
6411426	56.11002	Vacated
6411439	56.14112(b)	Vacated
	TOTAL PENALTY	$1,700.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, and **VACATED** as set forth above. Essroc Cement Corporation is **ORDERED TO PAY** the Secretary of Labor the sum of $1,700 within 30 days of the date of this decision.[1] Upon payment of the penalty, these proceedings are **DISMISSED**.

[1] Payment should 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.

Richard W. Manning
Administrative Law Judge

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