FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2009-293-M
Petitioner	:	A.C. No. 22-00035-167206
	:	
	:	Docket No. SE 2009-639-M
v.	:	A.C. No. 22-00035-186663
	:	
OIL-DRI PRODUCTION COMPANY,	:	Ripley Mine & Mill

DECISION

Appearances: Lydia A. Jones, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Larry R. Evans, Safety & Health Manager, Oil-Dri Corporation of America, Ochlocknee, Georgia, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Oil-Dri Production Company ("Oil-Dri") 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 Memphis, Tennessee, and presented closing arguments.

Oil-Dri operates a clay mine and mill in Tippah County, Mississippi. This facility employed an average of 60 people in 2008. The citations at issue in these cases were all issued at the mill, which is often referred to as the "plant" in this decision. These cases involve 17 citations issued under section 104(a) of the Mine Act. The parties settled nine of the citations prior to the hearing, as discussed in more detail below. At the hearing, the representative for Oil-Dri agreed that it was not contesting the gravity or negligence of any of the citations but only the fact of violation and whether the violation was of a significant and substantial nature ("S&S"). (Tr. 6-7, 176).

I. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

A. Citation No. 7751806

On July 30, 2008, MSHA Inspector Tim Schmidt issued Citation No. 7751806 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11012 as follows:

> No railing was provided for the elevated travel way near the platform for the tail pulley of the takeaway belt. Miners travel to the platform approximately once a year to perform maintenance. This condition exposes miners to a fall of 4 feet to a concrete surface should they slip and fall from the unprotected opening.

(Ex. G-2). 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 56.11012 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 $100.00 for this citation.

Inspector Schmidt testified that he issued the citation because there was no railing for an elevated travelway near the bottom of the ladder-way leading to a work platform. The ladder-way, which was constructed of fixed rails and was part of the structure supporting the work platform, was adjacent to a retaining wall with a four foot drop-off. This ladder-way provided access to the platform. (Tr. 16; Ex. G-3). He did not believe that an accident was likely because he was advised that miners would generally approach the ladder-way from a direction that was not near the unprotected edge. (Tr. 17). He issued the citation because a miner approaching the ladder-way to go up on the platform could walk next to the unprotected drop-off. (Tr. 19). At the time Schmidt conducted his inspection, the cited area consisted of uneven ground, which he believed presented a tripping hazard. On cross-examination, Inspector Schmidt admitted that he was advised that employees do not walk near the unprotected area. (Tr. 54-55).

Lance White, an inspector-trainee, accompanied Inspector Schmidt. He testified that there was uneven ground, loose, unconsolidated rock, and vegetation along the travelway adjacent to the retaining wall. (Tr. 75). It is his understanding that miners only needed to get to the platform to perform maintenance on the tail pulley about once a year, but that they might need to access the platform more frequently if mechanical problems occur. (Tr. 76).

Steve Gibens, packing and processing manager at the mill, testified for Oil-Dri. He stated that employees who work in the processing plant never travel in the cited area. (Tr. 122). Grease hoses are provided so that components can be greased without climbing up the ladder-way to the platform. The only employees who work on the platform are from the maintenance department. They must work on the platform to replace the belt. (Tr. 122). Steven Barnes is a journeyman

mechanic, miners' representative, and treasurer of the local union. (Tr. 159). He said that mechanics perform maintenance on the belt and tail pulley from the work platform. He testified that mechanics access the platform from the road rather that from the area where the citation was issued. (Tr. 160).

The Secretary argues that Inspector Schmidt took into consideration the fact that the cited travelway was not frequently used when he determined that an accident or injury was unlikely and that the violation was not S&S. (Tr. 176). She states that the area cited by the inspector was a travelway even though it was infrequently used. She relies, in part, on *Nolichuckey Sand Company, Inc.*, 22 FMSHRC 1057, 1059-61 (Sept. 2000). In that case, the Commission held that a judge's decision upholding MSHA's treatment of a maintenance platform as a "travelway" under section 56.14109 was consistent with the plain meaning of that term. Oil-Dri argues that the area cited by Inspector Schmidt was not a travelway as that term is defined by MSHA. The platform was "not approached" from the direction that would put employees near the hazardous area. (Tr. 185).

In section 56.2, the Secretary defines the term "travelway" as a "passage, walk, or way regularly used and designated for persons to go from one place to another." The issue in this case is whether the area cited by the inspector was "regularly used *and* designated" for persons to go from one place to another.[1] Here Oil-Dri is contending that the alleged travelway was neither regularly used nor designated for persons to go from one place to another.

I find that the area cited by Inspector Schmidt was not a passage, walk, or way regularly used by persons to go from one place to another. I credit the testimony of Gibens and Barnes on this issue. They stated that when mechanics need to access the work platform for maintenance, they approach the work platform from the road. Mechanics do not travel by the cited area when approaching the work platform in this manner. No other employees go up on the work platform. In addition, the area cited was not designated for persons to get from one area to another. Consequently, this citation is vacated.

B. <u>Citation No. 6068216</u>

On July 30, 2008, MSHA Inspector Schmidt issued Citation No. 6068216 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a) as follows:

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[1] In *Nolichuckey Sand Co.*, the Commission applied a different definition of "travelway" because the Secretary has defined that term differently as applied to "Subpart M – Machinery and Equipment." In Subpart M, at section 56.14000, the Secretary defined "travelway" as a "passage, walk, or way regularly used *or* designated for persons to go from one place to another." *See also* 22 FMSHRC at 1060. I must assume that the Secretary intended that these two definitions to have different meanings; otherwise the definition at section 56.14000 serves no purpose since the definition at section 56.2 applies to all safety standards in Part 56.

> Guards were not provided for the trunnion and truss roller on the new Ag kiln. An area guard was in place but individual moving parts were not guarded. This condition is a hazard to miners should they travel inside the area guard and become entangled in the moving machine parts. Miners travel in the area once a month to do maintenance.

(Ex. G-5). The inspector determined that an injury was unlikely but that if an injury did occur it would be of a permanently disabling nature. He determined that the violation was not S&S and that the company's negligence was moderate. Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of $117.00 for this citation.

Inspector Schmidt testified that the cited area was guarded by what he referred to as an "area guard." (Tr. 21). This guard acts as a barrier to prevent employees from getting close to the kiln, but maintenance personnel had to pass through a gate in the guard to perform their work from time to time. He testified that, for an area guard to be acceptable, the gate for the guard must be locked to prevent entry and the gate must be equipped with an automatic switching device that will de-energize the equipment inside the gate. (Tr. 21, 57). He stated that equipment inside the area guard was not individually guarded to prevent miners from becoming entangled in the moving parts. Inspector Schmidt also testified that he was told that miners must enter the area behind the guard about once a month to perform maintenance. (Tr. 24, 68). The inspector stated that the photographs he took during the inspection show the moving machine parts that are required to be individually guarded under the safety standard. (Tr. 25- 26; Exs. G-7, G-8, and G-9).

Mr. Gibens testified that the guards that were present around the kiln would prevent anyone from getting close to any machinery. (Tr. 124). No employee would be required to be in the area while the plant was operating. If any maintenance were required, mechanics would lock out and tag out the equipment before going inside the guards to the kiln. (Tr. 124, 142, 157, 161). He further testified that other inspectors have inspected this same area of the plant and have not issued citations under MSHA's guarding standard. (Tr. 124-25, 142-43). Mr. Gibens does not believe that the cited condition created a hazard to miners and MSHA has never designated it as a hazard in the past. (Tr. 125).

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded gear without first shutting it down. In such an

instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by moving machine parts at the Ripley Mine and Mill is not a defense because there is a history of such injuries at mines, quarries, and mills throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

I find that the Secretary established a violation. The existing guarding was more like a fence than a guard for moving parts. Area or perimeter guarding does not comply with the safety standard. *See, e.g. Walker Stone Company, Inc.*, 16 FMSHRC 337, 357 (Feb. 1994) (ALJ). Miners must enter the area about once a month to perform routine maintenance. These miners would be exposed to gears, rollers, and other moving parts. Individually guarding the trunnion and truss roller protects a miner who, through a lapse of judgment, enters the area without shutting down the operations. A penalty of $117.00 is appropriate.

C. Citation No. 6068218

On July 31, 2008, MSHA Inspector Schmidt issued Citation No. 6068218 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11001 as follows:

> Safe access was not provided to the ladders to the cooler tank belt and new Ag scrubber platform in the RVM cooler area. Standing water and several inches [of] mud, with footprints and forklift tracks, were in a wide area, exposing the miners to slips, trips, and falls.

(Ex. G-10). The inspector determined that an injury was reasonably likely and that if an injury were to 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 high. Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of $1,304.00 for this citation.

Inspector Schmidt testified that there was standing water and mud in one of the main milling areas of the plant. (Tr. 27; Ex. G-12, G-13). Miners had to walk through this area to access machinery and equipment. There were footprints showing that miners had walked through the slick, wet area. The footprints primarily went to and from ladder-ways and equipment in the area. The inspector testified that the violation created a slip-and-fall hazard to miners traveling in the area. (Tr. 28). If a miner were to fall, he would likely suffer strains, sprains, contusions, or broken bones. (Tr. 28, 32). Inspector Trainee White's testimony supports Inspector Schmidt's testimony. (Tr. 79-82).

Inspector Schmidt determined that the violation was S&S because the violation existed over a large area and there were numerous footprints through the mud. (Tr. 30, 53). The area was about 10 by 15 yards in size. The mud was two to three inches deep in some areas. (Tr. 30; Ex. G-12). He determined that the negligence was high because it was obvious that the mud had been there for some time and the operator had been cited numerous times for violations of the safety standard. (Tr. 30, 33, 60, 68).

Mr. Gibens testified that the cited area is the low spot in the plant. When it rains, water gathers in that area. (Tr. 127). There is a sump in the area to drain the water. If mud collects in the area, it is washed out with a hose. (Tr. 128, 144-46). It had been raining heavily in the days preceding this inspection. (Tr. 157). Mr. Barnes testified that the area is cleaned up once or twice a week. (Tr. 162). The surface below the mud and water was concrete. (Tr. 163). The area is accessed daily. (Tr. 171).

I find that the Secretary established a violation of the safety standard. Miners traveled through the area on a daily basis. The mud and water made the area hazardous with the result that safe access was not provided to working places. Oi-Dri argues that the condition should have been cited under the housekeeping standard at section 56.20003. While it is true that Inspector Schmidt could have cited that standard, he chose to cite section 56.11001 and I find that the conditions he observed violated section 56.11001.

I also find that the Secretary established that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div.,Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary of Labor*, 861

F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel*, 6 FMSHRC at 1574. The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

As discussed above, I find that a violation of the cited mandatory safety standard did occur. Further, I find that a discrete safety hazard contributed to by the violation existed. I also find that the Secretary met her burden with regard to the third element of the *Mathies* test. There existed a reasonable likelihood that the hazard contributed to by the violation would result in an injury, assuming continued mining operations. I credit the testimony of Inspector Schmidt as to the conditions that existed at the time of his inspection. There was standing water and a considerable amount of accumulated mud in an area that is frequently traveled. The concrete walking surface was very slippery. A miner could easily slip and fall. The injuries sustained would range from strains and sprains to broken bones. These types of injuries are of a reasonably serious nature and meet the fourth element of the *Mathies* test. A penalty of $1,304.00 is appropriate.

D. <u>Citation No. 6068226</u>

On July 31, 2008, MSHA Inspector Schmidt issued Citation No. 6068226 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14132(b)(2) as follows:

> The backup alarm on the Nissan 50 Optimum forklift was not audible above the surrounding noise. The forklift is used throughout the entire plant for maintenance work. This condition

exposes miners operating in or around the forklift to the hazard of not knowing of the forklift's intended rearward movement.

(Ex. G-14). The inspector determined that an injury was unlikely but that if an injury did occur it would be of a permanently disabling nature. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[a]larms shall be audible above the surrounding noise level." The Secretary proposes a penalty of $100.00 for this citation.

Inspector Schmidt testified that the backup alarm on the cited forklift could not be heard above the ambient noise level. (Tr. 35). He testified that the forklift is required to be operated around some of the noisiest equipment in the plant such as blowers and dryers. He said that when the backup alarm was tested in his presence, he could not hear it. (Tr. 36, 61). Someone working near the forklift could suffer serious injuries if he could not hear the alarm and the forklift struck him. The inspector was advised that, when the forklift was examined by the equipment operator at the start of the shift, he could hear the backup alarm. The inspector believes that it was tested in an area where the ambient noise level was not as great. Inspector Schmidt determined that such an accident was unlikely, because the forklift was equipped with a strobe light that flashes whenever it is operating. *Id.*

Inspector Trainee White testified that some of the machinery used in the plant is loud and earplugs are required in some of those areas. (Tr. 83). The backup alarm could be heard in quiet areas, but not in the noisier areas. White testified that he could not hear the backup alarm when it was tested until he walked quite close to it. (Tr. 83, 89-90).

Mr. Gibens testified that he was with Inspector Schmidt when the backup alarm was tested and he was able to hear it. (Tr. 129-30). He said that the inspector was standing a little further away from the forklift at the time. (Tr. 146). Mr. Barnes also testified that he could hear the alarm when it was tested. (Tr. 163). He said he was standing behind the forklift. Oil-Dri abated the condition by installing a new backup alarm.

I find that the Secretary established a violation. I credit the testimony of Schmidt and White that the backup alarm could not be heard above the ambient noise level when it was tested, unless you were standing right next to the forklift. The fact that the forklift was equipped with a strobe light does not eliminate the hazard because it flashes whenever the forklift is operating and not just when it is put into reverse. The citation and penalty are affirmed.

E. Citation No. 6068238

On August 2, 2008, MSHA Inspector Schmidt issued Citation No. 6068238 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11012 as follows:

> Three chained areas of the top rail of the railing around the stack testing platform were not in place. One chain was broken and another taped to the post. Contractors travel to the area once every two years to perform testing. This condition exposes miners to the hazard of a fall of approximately 50 feet.

(Ex. G-16). The inspector determined that an injury was unlikely but that if an injury did occur it would be fatal. He determined that the violation was not S&S and that the company's negligence was low. The Secretary proposes a penalty of $100.00 for this citation.

Inspector Schmidt testified that there was an elevated platform around the smoke stacks for the plant. (Tr. 38; Ex. G-). The platform had a railing around it, but some sections of the top railing were missing. In the areas with the missing railing, chains had been installed. One chain was not attached at one end because the clasp was broken and another chain was secured to the upright with duct tape. There were three areas that did not have a top railing around the platform. (Tr. 38-39; Exs. G-18, G-19, G-20). The platform was about 50 feet above the ground level. Oil-Dri representatives told the inspector that the platform is only used by a contractor who comes in every two years to test for emissions from the smoke stacks. (Tr. 39). This platform provided the only access to the stacks. There were no barriers to prevent Oil-Dri employees from going up on the platform. (Tr. 42). The middle rail was present in all areas. The inspector determined that an accident was unlikely. He also determined that Oil-Dri's negligence was low because the platform is infrequently used. (Tr. 42, 62). Preshift examinations of the platform were not required because it is not a working place. (Tr. 62). The citation was abated by securing the chains over the opening.

Mr. Gibens testified that the contractor had to remove the top rail in the three cited locations in order to perform the stack testing. (Tr. 130). The testing equipment hangs off the side in those locations. (Tr. 147). The chains were not replaced when the testing work was completed. (Tr. 147). The contractor's employees wear fall protection when they are up on the platform. *Id.* Gibens testified that he has worked at the plant for 27 years and he has never been up on this platform because Oil-Dri employees have no need to go up there. There is no equipment or machinery there. Mr. Barnes also testified that Oil-Dri's maintenance employees do not go up on this platform. (Tr. 164).

Oil-Dri maintains that the cited platform is not a travelway, as that term is used in the safety standards. (Tr. 187). I find that a work platform can be considered to be a travelway. *Nolichuckey Sand* , 22 FMSHRC at 1059-61. As stated above, a walkway is defined as a "passage, walk, or way regularly used and designated for persons to go from one place to another." I find that the cited platform is "designated" for persons to go from one place to another. The contractor employees must walk along the platform to do their testing at the three locations on the platform. Whether the platform is "regularly used" is a more difficult question. The evidence demonstrates that Oil-Dri employees do not use the platform. Nevertheless, I find that the employees of a contractor regularly walk along the platform to test for emissions.

Although these people do not walk on the platform on a frequent basis, they do so on a regular basis.[2] Every two years the contractor performs emissions testing so that the facility can maintain its state license. I find that the Secretary established a violation. In the future, Oil-Dri need only make sure that the contractor replaces the chains before its employees leave the platform. A penalty of $100.00 is appropriate.

F. Citation No. 6068239

On July 31, 2008, MSHA Inspector Schmidt issued Citation No. 6068239 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.12047 as follows:

> Seven guy wires on three different power poles were not insulated according to the National Electrical Code. Guy wires were attached to the poles above the level of energized high voltage conductors. The guy wires did not have insulators and were not grounded to the pole.

(Ex. G-21). The inspector determined that an injury was unlikely but that if an injury were to occur it would be fatal. He determined that the violation was not S&S and that the company's negligence was moderate. The safety standard provides that "[g]uy wires of poles supporting high-voltage transmission lines shall meet the requirements for grounding or insulator protection of the National Electrical Code . . . ." The Secretary proposes a penalty of $224.00 for this citation.

Inspector Schmidt testified that the cited power poles had guy wires that helped support the poles. (Tr. 44). The reason that guy wires must be insulated or grounded is so that, in the event of an accident, the guy wires do not become energized. The inspector testified that he did not observe a grounding wire or insulators for the guy wires on the power poles in question. (Tr. 44-45; Exs. G-23, G-24, & G-25). He said that either of these safety components can "typically" be seen from the ground. (Tr. 44). Given the conditions he observed, he believed that if one of guy wires were to break, it could become energized and electrocute someone. A guy wire could break if a vehicle struck it. The poles were near the plant parking area and they were within 15 feet of traveled roadways. (Tr. 46). Miners have been killed at other mines when guy wires have broken. The testimony of Inspector Trainee White is consistent with Inspector Schmidt's testimony. (Tr. 85-87, 90).

Schmidt testified that he discussed this citation with company representatives at the time he issued it. Someone called the power company and was advised by Danny Caples that the guy wires on power poles in the area of the mine were not insulated or grounded. (Tr. 47; Ex. G-22). The citation was terminated by Inspector Morrison after the guy wires were insulated to abate the

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[2] The term "regular" can be defined as "recurring or functioning at fixed or uniform intervals." *Webster's New Collegiate Dictionary* 966 (1979).

condition. Photographs taken by Inspector Morrison show insulators that were added to the guy wires. (Tr. 50; Ex. G-26 & G-27).

On cross-examination, Inspector Schmidt admitted that a grounding wire, colloquially referred to as a "butt ground," ran down the power poles. (Tr. 64; Exs. G-23, G-24 & G-25). Schmidt said that he did not see any wires connecting the guy wires to the butt ground wires on the power poles. (Tr. 66, 69-70).

Mr. Gibens admitted that the guy wires were not insulated. (Tr. 131). Gibens testified that when a service technician from the power company came to the mine to abate the condition, he told mine personnel that the guy wires were already grounded. (Tr. 132, 148). The technician came a few days after the inspection. Gibens testified that Oil-Dri went ahead and had the insulators installed because the power company already had a work order to complete this work. For some of the poles, the power company electrician simply made the wires connecting the guy wires to the butt ground more visible to someone standing on the ground. (Tr. 133, 150). Barnes testified that the wires connecting the guy wires to the butt ground were very difficult to see from ground level. (Tr. 172-73).

The parties do not dispute the fact that the National Electrical Code requires that guy wires be insulated or grounded on poles supporting high-voltage transmission lines. Oil-Dri does not dispute that the power lines in question were high-voltage transmission lines. Oil-Dri also admits that the guy wires were not insulated. The Secretary argues that the guy wires were not grounded at the time of Inspector Schmidt's inspection. Oil-Dri put on evidence to show that, although the company did not know it at the time of the inspection, the guy wires were grounded. It offered hearsay evidence that when the local power company sent an electrician to abate the violation, the electrician told company representatives that the guy wires were already grounded. Oil-Dri maintains that it had insulators installed because the power company's electrician was already at the site to install insulators. It argues that, in at least one instance, the electrician simply moved the existing ground wire to make it more visible from the ground level.

There are significant conflicts in the testimony on this citation. On one hand, I can understand that it would be difficult to see whether a guy wire is properly grounded by simply looking up at the pole while standing on the ground. On the other hand, at the time of the inspection, a representative of the power company advised Oil-Dri that the guy wires were not grounded or insulated at the plant. The evidence that the power company's electrician said that the guy wires were already grounded when he came to abate the cited condition is hearsay. Although this is a close case, I credit the testimony of the two inspectors that the guy wires were not grounded to the butt wire. The citation is affirmed and a penalty of $224.00 is appropriate.

G. Citation No. 6513295

On April 29, 2009, MSHA Inspector Harold J. Wilkes issued Citation No. 6513295 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 46.12(a)(2) as follows:

> The mine operator failed to provide information to [an] independent contractor of [its] obligations to comply with [MSHA] regulations. Each production operator must provide information to each independent contractor who employs a person at the mine in site-specific mine hazards and the obligation to comply with [MSHA] regulations.

(Ex. G-29). The inspector determined that there was no likelihood of an injury or illness. He determined that the violation was not S&S and that the company's negligence was moderate. Section 46.12(a)(2) provides that "[e]ach production-operator must provide information to each independent contractor who employs a person at the mine on site-specific mine hazards and the obligation of the contractor to comply with our regulations, including the requirements of this part." The Secretary proposes a penalty of $100.00 for this citation.

Inspector Wilkes testified that during his inspection of the plant he encountered contractors performing construction work at a building known as the perimeter building. (Tr. 96). The contractor, Steel-Con, was installing siding on the recently constructed building. This building was behind the main plant and was between the shipping and maintenance buildings. There were seven Steel-Con employees at the mine that day. The inspector talked to Brent Ross, the project supervisor for Steel-Con, and was advised that he was not aware that Steel-Con's employees needed to have Part 46 new miner training. (Tr. 97, 106). Mr. Ross stated that his crew did receive site-specific hazard awareness training from Oil-Dri. Inspector Wilkes testified that when he talked to Oil-Dri managers, he was told that, because the contractor's employees would not be exposed to any mine hazards, the company determined that site-specific hazard training was all that was necessary. (Tr. 98).

Inspector Wilkes determined that Steel-Con's employees would be exposed to a number of mine hazards. The contractor employees had to cross an active railroad track to get from the parking lot to their work site.[3] To get to their parts and tools trailer, the contractor employees had to walk across an open area in between some of the buildings at the plant where mobile equipment is operated and customer trucks travel. (Tr. 99; Exs. G-31 & G-32). These employees also worked near operating conveyor belts carrying Oil-Dri's product. (Tr. 101). He testified that, if the employees of Steel-Con had received new miner training, they would have been made aware of the hazards present in the plant environment. (Tr. 102- 05; Ex. G-33). Steel-Con had been working at the site for about two months. The employees of the contractor who had built the perimeter building had been provided with new miner training and some of those employees were still working at the site. (Tr. 107).

Mr. Gibens testified that site-specific safety awareness training is given to all contractor employees by Oil-Dri. (Tr. 134). These employees are also given a tour of the facility. Oil-Dri

[3] The contractor employees were instructed to use a parking lot that was away from the other work areas at the plant.

notifies contractors of its obligation to comply with MSHA regulations and safety standards on the requisitions it issues. *Id.* The requisition that was used to contract with Steel-Con states:

> Supplier shall be in compliance with all MSHA regulations & Oil-Dri policies at all times while on the job site. The Project Manager will advise of requirements and administer site-specific hazard training.

(Tr. 134-35 ; Ex. R-M).

The Secretary argues that mine operators are obligated to inform all independent contractors of their training obligations under the Mine Act and MSHA regulations. (Tr. 181). The Secretary contends that, given the nature of the work being performed by Steel-Con, Oil-Dri was obligated to advise Steel-Con that their employees would be required to have new miner training before they could start their work.[4] She maintains that, as a general matter, because construction workers will potentially be exposed to mining hazards, they are required to have new miner training. She contends that it is clear from the evidence that Steel-Con's employees were exposed to mining hazards. She relies, in part, on my decision in *Spencer Quarries, Inc.,* 32 FMSHRC 644, 648-50 (June 2010) (ALJ). In that decision, the operator admitted that it did not advise a construction contractor that new miner training was required for its employees. *Id.*

Oil-Dri argues that it provided the required site-specific hazard training to the employees of Steel-Con. (Tr. 188). The company also advised Steel-Con on the requisition form that it had to comply with all MSHA regulations. (Ex. R-M). Prior to the start of work, Oil-Dri determined that new miner training was not required for Steel-Con's employees.

I find that the Secretary established that the employees of Steel-Con were exposed to the hazards of the mining operations. The plant is, of course, part of the mine as that term is defined in section 3(h)(1) of the Mine Act. 30 U.S.C. § 803(h)(1). The preponderance of the evidence shows that the employees were exposed to numerous hazards that were present at the plant. I credit the testimony of Inspector Wilkes in this regard. Although many of the hazards that Steel-Con's employees faced were similar to hazards they would face on other construction projects, the mining environment presents challenges that may not be present at other jobs.

I also find that Steel-Con's employees were required to be provided with new miner training. Subsection (b) of section 46.12 makes clear that the independent contractor is primarily responsible for making sure that its employees have all the necessary MSHA-required training. Section 46.5 provides that each "new miner" must receive training in a number of subjects as specified in the regulation. The term "miner" is defined to include employees of independent

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[4] Inspector Wilkes issued a section 104(g) order of withdrawal to Steel-Con for its failure to provide new miner training to its employees. (Tr. 109).

contractors "who are engaged in mining operations" and construction workers who are "exposed to hazards of mining operations." 30 C.F.R. § 46.2(g)(1).[5]

The issue with respect to this citation is what sort of notice must the production operator provide to the independent contractor under section 46.12(a)(2). The regulation simply states, as relevant here, that each production operator must "provide information to each independent contractor" on the "obligation of the contractor to comply with" MSHA's regulations including the requirements of part 46. Thus, the regulation merely requires the production operator to "provide information" to the independent contractor.

Oil-Dri contends that it provided all necessary information on the requisition form that was used to engage the services of Steel-Con. That form contained what appears to be boiler-plate language that states that the contractor shall be "in compliance with all MSHA regulations." (Ex. R-M). The language goes on to state that the "project manager will advise of requirements and administer site-specific hazard training."

This appears to be a case of first impression. My decision in *Spencer Quarries* did not address this issue. I find that the language in the requisition form did not provide sufficient information to Steel-Con regarding its obligation to comply with MSHA's training regulations. Simply putting stock language on a form advising all contractors that they must comply with all MSHA regulations is insufficient. Most construction contractors are familiar with the safety regulations of the Occupational Safety and Health Administration, which are similar to MSHA's safety standards for surface metal and nonmetal operations. It is unlikely, however, that these contractors will know much about the detailed training requirements that MSHA has promulgated. Indeed, in *Spencer Quarries*, the construction contractor had no knowledge of MSHA's training requirements when it was constructing a building at the quarry. 32 FMSHRC at 650. I hold that the responsibility of a production operator to notify an independent contractor performing work at the mine of its obligation to comply with MSHA's training regulations cannot be carried out by simply putting language in a standard form stating that MSHA regulations must be followed. It must affirmatively advise the contractor of its duty to have its employees trained in accordance with the requirements set forth in MSHA's regulations.[6] Indeed, the language in Oil-Dri's form states that its project manager will advise the contractor of these requirements.

In this instance, Oil-Dri unilaterally determined that new miner training was not required for Steel-Con's employees. The company's safety manager and the plant manager discussed the matter before making this determination and apparently Mr. Ross of Steel-Con was told that

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[5] The definition excludes, in subsection (2), such people as vendors, delivery workers, and over-the-road truck drivers.

[6] The contractor does not necessarily have to provide the training. It can reach an agreement with the production operator to provide new miner training for its employees.

training beyond hazard awareness training was not required. (Tr. 106, 152, 188). Based on the above, the violation alleged in this citation is affirmed and I find that a penalty of $100.00 is appropriate.

H. Citation No. 6513296

On April 29, 2009, MSHA Inspector Wilkes issued Citation No. 6513296 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(b) as follows:

> The tail roller guard on the north side of the truck load-out belt conveyor was damaged exposing the moving machine parts. The guard had been pulled up [in the area] where the grease line came up from the fitting on the bearing. This condition exposed persons working on three shifts . . . . The area has low overhead clearance and is in a narrow place between two belt conveyors.

(Ex. G-34). The Inspector determined that an injury was reasonably likely and that if an injury were to occur it would be of a permanently disabling nature. He determined that the violation was 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 $8,209.00 for this citation.

Inspector Wilkes testified that during his inspection he walked by the tail roller of the truck load-out belt. (Tr. 110). This belt carries the product from the plant to bins that are used to store the product for loading into trucks for shipment to customers. The guard for the tail roller was damaged in that the guard had been pulled up, thereby exposing moving parts. Another section of the guard had come loose and swung down, thereby exposing more of the moving parts. *Id.* The inspector testified that this condition exposed miners to the hazard of becoming entangled in the moving machine parts, which could result in the amputation of a hand or arm.

He testified that a person has to bend over to walk through the area. Because the tail roller is adjacent to another piece of machinery, the area was also narrow. (Tr. 111). In addition, there were accumulations of product on the ground in the area. (Tr. 111; Ex. G-36, G-37). Given these environmental conditions, he determined that the violation was serious and S&S. The inspector believed that it was reasonably likely that someone would slip, trip, or lose his balance in the area and get his hand caught in the moving machine parts. (Tr. 112). Employees would be required to go into the area to grease the tail rollers, to clean up the accumulated material, and to perform preventive maintenance. He observed footprints in the accumulated material. Maintenance Supervisor Billy Jordan, who was with Inspector Wilkes, told the inspector that he did not know that the guard was damaged. *Id.* Inspector Wilkes said that the exposed moving parts were less than waist high. (Tr. 113). The condition was abated when the operator constructed and installed a new guard. (Tr. 114; Ex. G-37).

Mr. Gibens testified that the photograph taken by Inspector Wilkes shows the area between the truck load-out belt and the hopper car belt. (Tr. 137). Gibens was not at the plant on the day of the inspection, but he examined the area after the citation was issued. He estimated that the hole in the guard that the inspector cited was about seven inches long and an inch and one half wide. (Tr. 138). He testified that the accumulations were cleaned up using a fire hose because the area is too tight to do any shoveling. The person using the hose stands outside the cited area when he cleans up accumulations next to this belt. (Tr. 139). Mr. Barnes confirmed the testimony of Gibens. (Tr. 166).

I find that the Secretary established a violation of the safety standard. It is not disputed that the guard for the tail pulley on the truck load-out belt was not securely in place. The primary issue is whether the violation was S&S. Oil-Dri maintains that miners were not exposed to the hazard because, when the bearings were greased, a grease line was used. It also argues that machinery was locked out whenever maintenance was performed. Finally, it contends that the area was cleaned from a different location using a high-pressure hose. I find that a preponderance of the evidence establishes that the violation was S&S. The grease line was immediately adjacent to the damaged area of the guard. (Ex. G-36). The conditions in that confined area were such that it was reasonably likely that a miner would stumble or lose his balance while using the grease line. His hand, arm, or clothing could easily become entangled in the moving machine parts. I find that the Secretary established all four elements of the Commission's *Mathies* S&S test.

The Secretary proposed a penalty of $8,209.00 for this citation. The proposed penalty is substantially higher than the proposed penalty for S&S Citation No. 6068218 issued on July 31, 2008, primarily because of the Secretary's manner of calculating penalty points for citations issued per inspection day and repeat citations issued per inspection day. Information at MSHA's website shows that nine citations were issued to Oil-Dri in December 2008, but that these citations have all been contested by Oil-Dri. I find that a penalty of $5,000.00 is appropriate for this violation.

II. SETTLED CITATIONS

Prior to the hearing, the parties agreed to settle the remaining citations in these cases. In SE 2009-293-M, by order dated August 13, 2010, I approved the parties' joint motion to approve partial settlement. The parties agreed that one citation should be vacated and I ordered Oil-Dri to pay the Secretary a total penalty of $341.00 for the remaining two citations included in the motion. Docket No. SE 2009-639-M was originally assigned to Judge William Moran. On July 27, 2010, the parties filed a joint motion to approve partial settlement with Judge Moran. This motion has not yet been ruled on. The Secretary agrees to vacate Citation No. 6513287. The parties agree that Citation Nos. 6513289, 6513290, 6513291, 6513293, and 6513297 should be affirmed and that Oil-Dri should pay a total penalty of $1,608.00 for the violations. I have considered the representations and documentation presented and I conclude that the proposed

settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The joint motion to approve partial settlement in SE 2009-639-M is **GRANTED**.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Oil-Dri had about 14 paid violations at the Ripley Mine and Mill during the 15 months preceding August 4, 2008, and about 14 paid violations during the 15 months preceding April 29, 2009.[7] Oil-Dri is a medium-sized operator. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Oil-Dri's ability to continue in business. I have not entered gravity and negligence findings because the representative for Oil-Dri agreed not to contest the MSHA inspectors' determinations. Consequently, I affirm the gravity and negligence determinations set forth in the citations.

IV. 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
SE 2009-293-M		
7751806	56.11012	Vacated
6068216	56.14107(a)	$117.00
6068218	56.11001	1,304.00
6068226	56.14132(b)(2)	100.00
6068238	56.11012	100.00
6068239	56.12047	224.00
SE 2009-639-M		
6513295	46.12(a)(2)	100.00
6513296	56.14112(b)	5,000.00
Settled Citations	Various	1,608.00
	TOTAL PENALTY	$8,553.00

[7] These numbers are based on information at MSHA's website. Citations that were contested by Oil-Dri are not included in these figures including the citations that were contested in these two cases.

For the reasons set forth above, Citation No. 7751806 is **VACATED** and the other citations listed above are **AFFIRMED**. Oil-Dri Production Company is **ORDERED TO PAY** the Secretary of Labor the sum of $8,553.00 within 40 days of the date of this decision.[8] Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM

[8] 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.