FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/FAX 303-844-5268

February 1, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2009-22-M
Petitioner	:	A.C. No. 04-00196-163109
	:	
v.	:	Docket No. WEST 2009-101-M
	:	A.C. No. 04-00196-166068
LEHIGH SOUTHWEST CEMENT CO.,	:	
Respondent	:	Tehachapi Plant

DECISION

Appearances: Andrew J. Schultz, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, for Petitioner;
Brian Bigley, Safety Manager, Lehigh Southwest Cement Company, Tehachapi, California, and Tim King, Safety Coordinator, Lehigh Southwest Cement Company, Redding, California, 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 Lehigh Southwest Cement Company ("Lehigh") 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 Bakersfield, California, and filed post-hearing briefs.

Lehigh operates a limestone quarry and cement plant in Kern County, California. This facility employed an average 126 people in 2008. These cases involve ten citations issued under section 104(a) of the Mine Act and two orders issued under section 104(d). The Secretary proposes a total civil penalty of $43,356 in these cases.

I. DISCUSSION WITH FINDINGS OF FACT CONCLUSIONS OF LAW

A. Order No. 6440388

On June 26, 2008, MSHA Inspector David Reynolds issued Order No. 6440388 under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 56.17001, as follows:

> The lights located inside the quarry locker room were not being maintained. One of the lights was missing a light bulb and the other

> light failed to function when tested. This condition was reported to the quarry supervisor and had been written up in the quarry message board for over a week. Bret Marrow, quarry supervisor, stated that he was aware of this condition and failed to correct the hazard. This condition creates a trip and fall hazard that could result in an injury. The quarry operates a night shift and this locker room is accessed on all shifts.

(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 of a significant and substantial nature ("S&S") and that the company's negligence was high. Section 56.17001 provides that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairs, switch panels, loading and dumping sites, and work areas." The Secretary proposes a penalty of $4,000 for this order.

Inspector Reynolds testified that the room in question was a combination break room and locker room. He noticed that there was a notice on a white board at the quarry that the lights were not working in the break room. When he tried to turn on the lights at the entrance to the room, nothing happened. (Tr. 15). He said that there were two ceiling fixtures in the room. There was some ambient light from a television that was on in the room. (Tr. 15, 21). There were also some windows, but they did not let in much light. There were chairs, a recliner, and benches in the room that created a trip hazard. The quarry supervisor told him that he was aware that the lights were out, but he did not feel it was a priority item to get corrected. (Tr. 16).

Inspector Reynolds determined that the cited condition violated the safety standard because miners change their clothes in the room between shifts, take breaks in the room, and store their work clothes and hard hats in the room. He considered the room to be a work area at the mine because miners use it to put on work clothes and safety equipment. (Tr. 34-35). At the time the order was issued, the quarry operated an evening shift that ended after dark. (Tr. 18). The inspector did not use a meter to measure the amount of light in the room and he does not believe that MSHA has issued any guidelines concerning the amount of light that is required. (Tr. 36). There was also an electrical panel in this room. (Tr. 21). The inspector believed that it was unlikely that the violation would contribute to an injury. He believed that the operator's negligence was high, however, because management was aware of the condition. Reynolds' supervisor accompanied him during this inspection, and Reynolds testified that a miner told the supervisor that the message about the lights in the break room had been on the white board for weeks. (Tr. 19). The message was then erased and then rewritten a few days later, according to this miner. A few miners also told Inspector Reynolds that the lights had been out for several days. (Tr. 40). Based on what was written on the white board, he assumed that the lights had been out for about two weeks. *Id.*

The inspector determined that the violation was the result of the operator's unwarrantable failure because management knew about the condition and did nothing to fix it despite the fact that there are electricians employed by the operator. (Tr. 19). Safety Supervisor Brian Bigley told Inspector Reynolds that the miners who use the break room could have easily gotten a fresh light bulb if they wanted more light in the break room. (Tr. 19). The inspector believed, although he was

not present at the time, that in addition to new light bulbs, at least one light fixture needed to be repaired by an electrician. (Tr. 20).

Brian Bigley testified that the room cited by the inspector was not a work area but was a break room. (Tr. 60). There are a few chairs, a recliner, and a picnic table in the room. Miners want the room dark when they take their breaks and often unscrew the light bulbs so that the lights cannot be turned on and wake them. (Tr. 61). Bigley testified that there was plenty of light in the room to see. An open doorway to an adjacent lighted room and an outside door with a window allow light to enter the room. Bigley testified: "I wouldn't want to read a book in that room, but for the purpose of that room, basically watching TV and sleeping, lighting is just about perfect for them." *Id*.

Both Inspector Reynolds and Brian Bigley took photos of the break room. The inspector's photos were taken with a flash but Bigley did not use a flash in most of his photos. He testified that photo 39 was taken with ambient light and photo 40 was taken with a flash. (Tr. 62; Exs. R-39 & R-40). Both photos are of an NFL calendar that is taped to a locker. Bigley testified that mine management generally gives miners "pretty lenient free run" in the break rooms "in order to make it comfortable for them." (Tr. 63). Bigley testified that he talked to the miner who spoke with the inspector about the white board. The miner told Bigley that the message said "[n]eed light bulbs." (Tr. 64). Bigley testified that he has seen miners unscrew the light bulbs slightly when they want it dark and tighten them back in when they want more light.

Bigley testified that another citation was issued because the cover of the junction box for one of the light fixtures was not secure. Once that condition was fixed, new light bulbs were installed in the two ceiling fixtures. (Tr. 65-66). Bigley testified that no auxiliary lighting was brought in by the electricians to do this repair work because there was enough light in the room for them to safely work. *Id*.

The Secretary argues that the order should be affirmed as written by Inspector Reynolds. Lehigh management knew about the violative condition for some time and did not take reasonable steps to correct it. Lehigh argues that the order should be vacated because (1) the safety standard does not apply to the break room because it is not a "work area" as that term is used in the standard; and (2) the lighting in the room was more than adequate for the room. The subjective opinion of an MSHA inspector is insufficient to establish a violation. Inspector Reynolds did not use a meter to measure the amount of light in the room.

I find that this order should be vacated. The safety standard requires that "[i]llumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairs, switch panels, loading and dumping sites, and work areas." Although the cited area may not be a "work area," I find that it was a "surface structure" as that term is used in the safety standard. Sufficient illumination must be provided in all surface structures. The question is whether the illumination was sufficient to "provide safe working conditions." I hold that one must take into consideration the work being performed in the cited area when analyzing whether the Secretary established a violation. *Capitol Aggregates, Inc*., 3 FMSHRC 1338 (June 1981). The room cited by Inspector Reynolds primarily functioned as a break room for the miners rather than as

a working area. I credit the testimony of Bigley that miners often unscrew the light bulbs in the room so that the room is not too bright. Natural light enters the room from a doorway and windows. The television also provides some light. The photographs show that the room is not so dark that it presented a significant hazard to miners, especially considering the purpose of the room. The plant is located in a desert climate that is very hot and dry in the summer. The inspector did not see the conditions in the room at night and I cannot speculate as to whether the conditions would violate the safety standard after the sun sets. *See W.S. Frey Company, Inc.*, 16 FMSHRC 975, 1008-09 (April 1994) (ALJ). This order is vacated.

B. Order No. 6440389

On June 26, 2008, MSHA Inspector Reynolds issued Order No. 6440389 under section 104(d)(2) of the Mine Act alleging a violation of 30 C.F.R. § 56.20011, as follows:

> The entrance to the level #-1 bench located in the quarry was not barricaded and posted to prevent entry. The bench is located next to the haulage road where mobile equipment travels. The unprotected bench was approximately 250-ft across and was 40-ft to the working level below. This condition creates a hazard to the miners traveling in this area.

(Ex. G-3). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was high. Section 56.20011 provides, in part, that "[a]reas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded or warning signs shall be posted at all approaches." The Secretary proposes a penalty of $17,301 for this order.

Inspector Reynolds testified that he inspected a bench where miners had previously been working. (Tr. 22). There was no berm on the "open face of the bench." *Id.* He was advised that work had been performed on the bench earlier in the shift and he observed fresh tire tracks in the area. Some of the tracks were very close to the edge of the bench. The drop-off to the next level was about 35 to 40 feet. There was nothing to prevent anyone from entering the bench and the inspector believes that there were maintenance personnel in the area at the time of his inspection. He did not observe any equipment near the edge of the bench. (Tr. 44). Inspector Reynolds believed that there was a significant risk that someone operating a vehicle or other mining equipment could get too close to the edge and fall down to the next level. There were no signs or barricades warning miners of the danger. (Tr. 25).

Reynolds further testified that it is not a common practice in the mining industry to leave benches open. Lehigh had been cited for the same type of violation in the recent past. (Tr. 26). The hazard was not obvious. Given the topography of the area, it is not easy to see the edge of the bench and the conditions change as mining progresses. A heavier truck could get close enough to the edge of the bench that the ground could give way even if the truck were not right at the edge. (Tr. 28).

Inspector Reynolds determined that the violation was S&S because it was only "a matter of time before somebody . . . either drove off that [edge] or got out on loose ground or weak ground and the possibility was there for an injury." (Tr. 30). The negligence was high because the mine had been cited for a similar violation on March 13, 2008. The supervisor advised Reynolds that he was not aware that the area had been "left unattended." (Tr. 32).

Mr. Bigley testified that the hazard would be obvious to anyone who works at the quarry. (Tr. 66). Miners are well aware that, during the process of mining, Lehigh is "tearing the mountain down" and that there will be drop-offs on benches. *Id.* Nobody, including contractors, is allowed to travel to the benches without authority from the quarry manager. Contractors are escorted to the bench by an experienced person. Nobody drives close to the edge of the bench and the miners have a "mental map" of the benches as mining progresses. (Tr. 70). Miners are frequently trained to be aware of this hazard. Warning miners that there is an edge to a bench is like "warning someone that there might be water in the ocean." (Tr. 71). Installing signs will not improve safety at the quarry. (Tr. 82). If any unauthorized person drove up to a bench, the quarry manager or his designee would call the vehicle on the radio and ask what he was doing there. Work is not performed on the benches after dark because there is no lighting on the benches.

The Secretary argues that there were no warning signs or barricades for the cited bench. The hazard was not obvious because it was difficult to see the edge of the bench due to the topography. The area was open and accessible to all vehicles. It is not a common practice in the industry to leave benches open. The violation was S&S because it was reasonably likely that the lack of a barricade or warning sign would cause someone to drive off the bench or get too close to the edge. The violation was the result of Lehigh's high negligence because it had been recently cited for a similar violation.

Lehigh argues that the hazard was immediately obvious to anyone in the mining industry, including its own employees. The unsubstantiated opinion of the inspector is insufficient to enter a finding that the hazard was anything but obvious. In addition, warning signs were posted at the mine warning anyone that hazards were present at the mine. Lehigh's negligence was not high because the miners were all well trained and the supervisor was not aware that the bench posed a hazard. Finally, the likelihood of an injury was quite low.

I find that the Secretary established a violation but that she did not establish that the violation was S&S or the result of the unwarrantable failure of Lehigh to comply with the safety standard. I find that a safety hazard existed on the cited bench that was not immediately obvious to employees. I credit the testimony of Mr. Bigley that employees do not randomly enter the bench and that those employees who need to work on the bench are generally aware of the edge. It must be kept in mind, however, that 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 enter the bench to perform minor maintenance on a piece of equipment without paying close enough attention to his

surroundings. A warning sign may help him remember to be more aware of the edge of the bench. "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 agree that putting up a warning sign or barricade is not foolproof, but it may prevent someone from placing himself in danger.

The second sentence of the safety standard provides that "[w]arning signs shall be readily visible, legible, and display the nature of the hazard and any protective action required." The signs referenced at the hearing by Lehigh are legible but they do not in any way display the nature of the hazard. They are general warning signs telling people that the area of the quarry is restricted and that mine hazards are present. (Ex. R-17, R-18).

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).

I find that the violation was not S&S. The evidence establishes that it was highly unlikely that anyone would get close to the edge of the bench. Inspector Reynolds admitted that the tracks he observed that were close to the edge, including the tracks which seemingly went over the edge of the bench, could have been made before the most recent blast and excavation of the material. (Tr. 50, 55). There is no proof that anyone has driven or will drive a vehicle near the edge of the bench. It is significant that Inspector Reynolds was particularly concerned that a miner could enter the bench without authorization in order to take a break or hide from his supervisor. I credit the testimony of Bigley that the benches are closely monitored by quarry management, that Lehigh has administrative controls in place to keep people away from benches when work is not being performed, and that Lehigh frequently trains its employees on the hazards present. It was not reasonably likely that anyone would sustain an injury as a result of this violation.

I also find that Lehigh's negligence was moderate and was not the result of Lehigh's unwarrantable failure to comply with the standard. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.,* 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC at 353.

Although the quarry had been cited at least once in the past for a similar violation, the violation had not existed for a significant length of time, the violation did not pose a high degree of danger, the violation was not obvious, and the quarry supervisor was apparently unaware of the condition. I find that the conduct of Lehigh's managers did not rise to the level of reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care.

For the reasons set forth above, Order No. 6440389 is modified to a section 104(a) citation with moderate negligence and moderate gravity. A penalty of $5,000 is appropriate.

C. Citation No. 6440386

On June 26, 2008, MSHA Inspector Reynolds issued Citation No. 6440386 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11002, as follows:

> The walkway and access to the stairs leading down to the quarry maintenance shop was missing a section of the hand railing, measuring 11-ft on the right side. The drop off was estimated to be approximately 20 to 30-ft.

(Ex. G-1). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be permanently disabling. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.11002 provides, in part, that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails and maintained in good condition." The Secretary proposes a penalty of $2,106 for this citation.

Inspector Reynolds testified that there was an area where employees park their cars and just beyond that area there was a drop-off of about 20 to 30 feet. (Tr. 93). There is a stairway leading down this hill to the maintenance shop. This stairway was equipped with handrails but the area on the edge of the drop-off was not protected at all. (Tr. 93-94; Ex. G-1). He testified that miners regularly walked along this edge between the parked vehicles and the edge. This area was a regularly-used walkway between the maintenance shop and the mine offices. (Tr. 84). The violation was S&S because it was reasonably likely that someone would fall off the edge and sustain a reasonably serious injury.

Lehigh contends that, because the cited area was not a crossover, elevated walkway, elevated ramp, or a stairway, the safety standard did not apply. The cited area was simply flat ground located along one side of the parking lot. The application of section 56.11002 to this area unreasonably extends the meaning of the terms in the standard beyond their ordinary meaning. The walkway was not elevated as that term is reasonably used. The safety standard states that the elevated walkway must be of "substantial construction." Because the cited area is flat ground, how can it be of substantial construction? The cited area was not a structure. It was an area that was used for the parking lot.

I find that the safety standard does not apply to the cited area and that the citation should be vacated. As stated above, the safety standard provides that crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction and provided with handrails and maintained in good condition. The cited area was not a crossover, stairway, or an elevated ramp. The stairway that led down to the shop from the parking lot was of substantial construction. This stairway met all the requirements of the safety standard. People often walked along the edge of the parking lot to get between the maintenance shop and the mine office via these stairs. This area was at the top of a hill so there was a drop-off along the shortest path between these two points. I find it was not an elevated walkway, as that term is used in the safety standard. It is interesting to note that

the title for the safety standard is "Handrails and Toeboards" and that the standard requires that toeboards be provided when necessary. This language makes clear that the standard was designed to apply to structural walkways that are elevated above the ground level. Although the parking lot was created by Lehigh at some time in the past, it was not an elevated walkway as that term can reasonably be understood in the standard. "Elevated" can be defined as "raised esp. above the ground or other surface." *Webster's New Collegiate Dictionary* (1979) at 365. The cited area was the ground. This citation is vacated.

D. Citation No. 6440390

On June 26, 2008, MSHA Inspector Reynolds issued Citation No. 6440390 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.3200, as follows:

> The highwall located in the quarry at level #-2 had loose rock and unconsolidated material at the top of the face. This level had been worked earlier in the shift and was left unattended without warning signs and barriers being posted warning of the hazard.

(Ex. G-4). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.3200 provides, in part, that "[g]round conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area." The Secretary proposes a penalty of $4,689 for this citation.

Inspector Reynolds testified that the highwall at the level #2 bench had loose, unconsolidated material that posed a risk to miners working below the highwall. (Tr. 98). Bigley acknowledged that the area was being scaled down on the morning of the inspection but that the area had been left unattended. (Tr. 216). The violation was S&S because the failure to install a barrier against entry to the area under the highwall could contribute to a serious injury. A loader was parked in the area, but it was 10 to 20 feet back from the highwall. (Tr. 145). The area was barricaded to terminate the citation.

Lehigh argues that there was no showing that Inspector Reynolds has any particular expertise in highwall safety. He did not testify as to the structural components of the highwall, fault fracture patterns, or the propensity for face slumping. (Lehigh Br. 8). Lehigh offered evidence that two competent miners with over 50 years of experience between them had performed a workplace examination of the area and determined that no hazard existed. The objective evidence does not support the citation. In the event that it is found that the conditions created a hazard, Lehigh was in the process of taking down any rock that posed a hazard. Finally, there was no showing that unauthorized personnel would enter the area.

I find that the Secretary established a violation. Inspector Reynolds testified that there were several large rocks on top of the highwall that posed a danger of falling. (Tr. 98). The safety standard provides that "[g]round conditions that create a hazard to persons shall be taken down or supported *before other work or travel is permitted in the affected area*." (Emphasis added)." The

second part of the safety standard provides that "[u]ntil the corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry." I credit the testimony of Inspector Reynolds as to the condition of the highwall. He worked in mines between 1991 and 1998. He started working for MSHA in 2000. (Tr. 11). He estimated that he has inspected quarries 150 to 200 times.

The position of Lehigh is somewhat contradictory. One the one hand, Bigley testified that two of its employees inspected the quarry highwalls and determined that no hazard existed. (Tr. 188-89). These employees had 30 years and 20 years experience working in the quarry and Lehigh contends that I should credit their experience and judgment over that of the inspector who had less quarry experience. Thus, it argues that the cited area had been examined and that the highwall was safe. On the other hand, in its brief, Lehigh states that the "conditions were in the process of being taken down, per the standard, at the time of the inspection." (Lehigh Br. 8). It further states that the "[o]ngoing work in the area was being done for the exact purpose of taking down the face wall and reducing the hazard, which is specifically allowable in the standard." *Id*. I hold that, if the work of making the highwall safe for miners had not been completed, then posting or barricading was necessary until that work was finished.

I find that the violation was not S&S, however. The affected area was not large and I find that the evidence establishes that it was not reasonably likely that anyone would enter the hazardous area until the work of scaling highwall was completed. Lehigh's negligence was moderate. A penalty of $2,000 is appropriate.

E. Citation No. 6440392

On June 26, 2008, MSHA Inspector Reynolds issued Citation No. 6440392 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.3200, as follows:

> The old roadway below the working level #-2 located in the quarry was not posted or barriers put in place to prevent entry. This roadway was littered with large boulders and materials from the upper level and the roadway was completely buried at the far end. There were tire tracks on this roadway indicating that the roadway had been recently traveled.

(Ex. G-5). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. The Secretary proposes a penalty of $4,689 for this citation.

Inspector Reynolds testified that the roadway below the second level had a lot of rock in it. (Tr. 101). The photos taken by the inspector show loose, unconsolidated rock above the roadway and rocks on the roadway itself. (Ex. G-5). He further testified that there were fresh tracks on the roadway suggesting that mobile equipment had been on the roadway. (Tr. 102). The inspector determined that the violation was S&S because an equipment operator may have been pushing rocks

over the edge of the bench above the roadway, exposing anyone on the roadway to the hazard. (Tr. 104). There were no warning signs in the affected area.

Lehigh argues that the cited roadway was in an abandoned portion of the mine property and that there was no work-related reason for miners to ever enter the area. The road does not go anywhere and there were plants growing in the road, which demonstrates the lack of use. (Tr. 194-95; Ex. R-23). There were rocks along the side of the road that acted as a berm and would tend to block rocks from falling onto the road. (Tr. 193-94; Ex. G-24). The quarry is in a rainless desert with the result that tire tracks can last a long time.

Lehigh also argues that the Secretary's only evidence is the inspector's opinion that a hazard existed. It points to two decisions of the Commission's judges to support its contention that the Secretary "must do more than offer an opinion of a non-expert inspector." (Lehigh Br. 9). In *Shine Quarry, Inc.*, 17 FMSHRC 1397 (Aug. 1995) (ALJ), former Commission Judge Amchan vacated a citation alleging a violation of section 56.3200 for loose rock along a highwall. There were muck piles under the highwall that the operator alleged kept persons away from the highwall. The judge held that, "[i]n view of what appears to be an honest difference of opinion as to the safety of Respondent's quarry, the Secretary must do more than present the opinion of a non-expert inspector to meet its burden of proof under a general standard such as section 56.3200." *Shine Quarry* at 1401. In *Edward Kraemer & Sons, Inc.,* 11 FMSHRC 1058 (June 1989) (ALJ), another Commission judge determined that the only evidence of record with regard to the existence of a violation consisted of the inspector's testimony that he "observed loose unconsolidated material" on the highwall. *Kraemer* at 1059. The judge determined that, because this testimony did not provide any further detail as to the nature of the violation, it was "woefully inadequate to establish Petitioner's burden of proving the existence" of the violation. *Id.*

Although I do not disagree with the analysis of the judges in those cases, I find that they do not apply here. There was no question that the roadway was open to traffic. It was not posted with a warning against entry and a barrier was not installed to impede unauthorized entry. The notes of Inspector Reynolds state that "large boulders and material littered this roadway." (Ex. G-5). This fact would tend to limit the ability of equipment to navigate the road. I credit the testimony of Mr. Bigley that the roadway is not normally used. Nevertheless, the roadway was not blocked off with the result that equipment could travel down the road. The area above the road contained boulders that could easily fall onto the roadway. I credit the inspector's testimony in this regard, which is supported by the photographs that he took. (Ex. G-5). Inspector Reynolds testified that rock is sometimes pushed over the side from the top above the road. (Tr. 103-04).

I find that the violation was not S&S because it was not reasonably likely that anyone would be injured by the cited conditions. The roadway was normally not used. It was a dead end that, according to the inspector, went about 400 to 500 feet before it became impassable. (Tr. 103). For the same reasons, the violation was not serious. Finally, I find that Lehigh's negligence was low. The violation was not obvious because the company assumed, with good reason, that because the road was no longer regularly used it did not have to be maintained in the same condition as a regularly-traveled roadway. Lehigh maintained that it would have taken down any unsupported rock if it decided that it needed to use the roadway again. A penalty of $2,000 is appropriate.

F. Citation No. 6440394

On June 30, 2008, MSHA Inspector Reynolds issued Citation No. 6440394 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14112(a)(1), as follows:

> The guard located on the self-cleaning tail pulley of the B2-100 road rock stacker was not being maintained. The guard was damaged on the right side at the corner where it connects to the conveyor structure, exposing an area [that was] 4-inches high and 10-inches long . . . .

(Ex. G-6). The inspector determined that an injury was unlikely but that if an injury were to 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(a)(1) provides that "[g]uards shall be constructed and maintained to – withstand the vibration, shock, and wear to which they will be subjected during normal operations." The Secretary proposes a penalty of $540 for this citation.

The Secretary argues that there is no dispute that the guard was damaged and that the tail pulley was exposed. (Tr. 106; Ex. G-6). The exposed area was large enough for someone's hand to fit through. The belt was not running at the time he issued the citation. (Tr. 107). The opening was about knee high. (Tr. 109). He was concerned that someone's hand or clothing could get caught in the self-cleaning tail pulley. The inspector determined that it was unlikely that anyone would be injured by the violation.

Brian Bigley testified that an hourly employee damaged the guard earlier in the shift with a Bobcat. (Tr. 195). The inspector's notes state that both management and an hourly employee told him that the guard had been damaged earlier in that shift. (Tr. 153).

This citation is vacated. The Secretary did not establish that the guard was not constructed or maintained to withstand the vibration, shock, and wear to which it was subjected during normal operations. The belt was not operating and an employee hit it with the tongue of his Bobcat during cleaning operations. This was not a normal occurrence. Any guard will become bent if someone hits it with mobile equipment.

G. Citation No. 6440395

On July 1, 2008, MSHA Inspector Reynolds issued Citation No. 6440395 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.4102, as follows:

> The hydraulic pump rake drive located on the reclaimer deck had a spillage of hydraulic fluid on top of the pump tank and an accumulation of fluid on the walkway.

(Ex. G-7). The inspector determined that an injury was unlikely but that if an injury were to 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 low. Section 56.4102 provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." The Secretary proposes a penalty of $162 for this citation.

The Secretary argues that there is no dispute that hydraulic fluid had leaked from a pump onto the deck near the reclaimer. (Tr. 110). The inspector was unable to determine if the fluid was present because of leakage or whether the fluid had been spilled. This hydraulic fluid would contribute to a fire hazard. If there were a fire in the area, the hydraulic fluid could help spread the fire. (Tr. 112). He determined that the violation was not S&S and that the gravity was low. He also determined that the company's negligence was low because the oil looked fresh. The inspector believes that hydraulic fluid is highly flammable. (Tr. 113). He did not know the flashpoint for hydraulic fluid. Lehigh argues that the hydraulic fluid was not tested for combustibility and the Secretary only offered the inspector's opinion that the material was combustible.

I find that the citation should be vacated. The Secretary defines "combustible liquids" as "liquids having a flash point at or above 100° F." The Secretary defines "flammable liquids" as a liquid that has a flash point below 100° F." Thus, almost any liquid is covered by the standard except water. The safety standard requires that flammable and combustible liquid spillage or leakage be "removed in a timely manner." In *Lopke Quarries*, 23 FMSHRC 705, 715 (July 2001), the Commission stated that "[w]hether [an] operator fail[s] to correct [a] defect in a timely manner depends entirely on when the defect occurred and when the operator knew or should have known of its existence." In *Lopke*, the Commission affirmed the administrative law judge's finding that no evidence existed to determine whether a defect had been corrected in a timely manner. *Id*. Inspector Reynolds testified that he "couldn't determine when [the spillage] had occurred." (Tr. 113). He went on to say that "[h]ad that oil been there for a long period of time, it would have soaked into the [fine powder on the floor] pretty fast." For this reason, he did not believe that a "supervisor would have known [about the spill] unless there was a problem there." If the hydraulic fluid spill had not existed very long and, as a result, it was unlikely that management would have known about it, then it cannot be said that management failed to remove it in a timely manner. For these reasons, I vacate the citation.

H. Citation No. 6440396

On July 1, 2008, MSHA Inspector Reynolds issued Citation No. 6440396 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.11012, as follows:

> The feed chute located on the reclaimer inside the clinker dome was not adequately guarded to prevent persons from falling into the chute. The chute is at ground level and the opening measured 30-feet across. There were three chains attached to either side of the opening and the lower chain was broken.

(Ex. G-8). The inspector determined that an injury was reasonably likely and that if an injury were to occur it would be fatal. He determined that the violation was S&S and that the company's negligence was moderate. Section 56.11012 provides, in part, 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 $5,961 for this citation.

Inspector Reynolds issued this citation because he determined that the feed chute on the reclaimer operating inside the clinker dome was missing part of its chain guard to help prevent a person from falling into the feed chute. (Tr. 114-15). The chute had been modified to allow for manual feeding of the chute in the event the reclaimer broke down. He believed that the ground around the opening was unstable and someone could easily slip and fall. (Tr. 116). An employee could be in the area to lubricate the pivot area or to check to see how full the chute is. (Tr. 117). He considered the area to be a travelway because it was "one way that they can travel to get to the one side from the other to the reclaimer." (Tr. 157-58). He said that he did not know of any other way to walk around the reclaimer. (Tr. 162-3). He did not believe that the existing chains placed across the area would prevent anyone from falling through the opening. (Tr. 159; Ex. G-8 photos). Inspector Reynolds was concerned that the loader operator would get out of his equipment and look into the opening to see how much material was there. (Tr. 161).

Mr. Bigley testified that the only reason to be near the feed chute is to check on the "auto lubers" that are installed on the stacker pivot. (Tr. 196). The "auto lubers" are devices that automatically lubricate equipment. He testified that the employees who service the auto lubers do not have to walk by the opening. (*Id.*; Ex. R-50 & 51). Bigley said that the area around the cited opening is not a travelway. He also testified that, during a previous inspection, another MSHA inspector told him that a guard was not required in that location because it was not a travelway. (Tr. 198). A different MSHA inspector recommended that chains be installed across the opening and Lehigh complied with his request. *Id*. The loader operator who dumps material down the opening is never close enough to the opening to create a hazard. He does not get out of the loader and walk around in the area. *Id*. The loader operator does not have to look down into the opening to see how much material is there. There are automatic sensing devices that provide a warning if material is hung up or if too much material is present. (Tr. 199). No employee ever hand-shovels material into the opening.

Most of the material that is processed at the clinker dome is automatically fed through the system using the reclaimer. Only a small portion of the total material processed is fed into the chute with the use of the loader. (Tr. 200-02). There is clearly an opening in the cited area. (Ex. G-8 photos). The opening was not protected by railings, barriers, or covers. *Id*. The only question is whether the opening was near a travelway. 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." This is a rather narrow definition. The walk, way, or area must be regularly used and designated for persons to go from one place to another. I find that, based on the evidence presented, the cited area does not qualify as a travelway. The evidence establishes that miners do not regularly walk the area. I credit the testimony of Mr. Bigley on this issue. My finding is consistent with decisions of other administrative law judges. *See Blue Circle, Inc.*, 10 FMSHRC 990, 1010-13 (Aug. 1988) (ALJ); *APAC - Mississippi, Inc.*, 26 FMSHRC 811, 812 (Oct. 2004) (ALJ). Consequently, this citation is vacated. It must be stated, however, that the opening at issue in this case would present a rather serious hazard to an employee who walked near the opening. If miners do begin walking around or

near the cited opening either to get from one place to another or for any other purpose, then the requirements of this safety standard would apply and a railing, barrier, or cover would be required.

I. Citation No. 6440397

On July 1, 2008, MSHA Inspector Reynolds issued Citation No. 6440397 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b), as follows:

> The brake lights located on the Komatsu WA-600 front end loader working inside the clinker dome were not being maintained. The brake lights failed to function when tested.

(Ex. G-9). The inspector determined that an injury was unlikely but that if an injury were to 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 56.14100(b) provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent creation of a hazard to persons." The Secretary proposes a penalty of $362 for this citation.

The Secretary contends that the front-end loader operated both inside the clinker dome and outside the dome near other vehicle traffic. (Tr. 121). The brake lights are standard equipment on the loader and are necessary to alert other vehicles that the loader is stopping. The defect was not corrected in a timely manner. The loader operator told the inspector that he knew that the brake lights were not working that day, yet he chose to operate the equipment rather than have the defect repaired.

Lehigh first argues that the Secretary failed to provide any evidence that the cited standard requires that brake lights be in working order. Lehigh maintains that the Secretary did not produce sufficient evidence to sustain this citation in part because the inspector did not take any photographs of the condition. Lehigh also argues that the brake lights were stuck in the "on" position so that the loader's brake lights were continuously operating. (Tr. 203). As a consequence, if another vehicle came up behind the loader, the operator would naturally be very careful because he would believe that the operator of the loader was slowing down. As a consequence, a safety defect was not present. Finally, there is no showing that this condition was not corrected in a timely manner. The loader operator was operating in an area without other vehicles so he chose to wait until the end of the shift to have the condition corrected. Other vehicles would have been parked by that time and the condition would not have presented a hazard.

It is well established that an agency's interpretation of its own regulations should be given "deference . . . unless it is plainly wrong," as long as it is "logically consistent with the language of the regulation and . . . serves a permissible regulatory function." *General Electric Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995) (citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977). The Secretary has consistently interpreted the safety standard to require brake lights on mobile equipment and the Commission's judges have affirmed this interpretation.

An inspector is not required to take photographs to establish a violation. There is no dispute that the brake lights were not functioning properly. I find that failure of brake lights to work properly is a defect that affects safety, even if the lights become stuck in an on position. If someone in another vehicle is following a loader with brake lights, he will likely rely on the lights to warn him to stop. The driver of a vehicle following a loader with brake lights that are always on may become complacent and not notice that the loader is stopping because the brake lights are always on. Thus, inoperable brake lights are a defect that affects safety.

The chief issue is whether this defect was "corrected in a timely manner to prevent creation of a hazard to persons." Inspector Reynolds testified that the loader operator told him that he knew that the brake lights were not working that day. (Tr. 122). I credit this testimony. I find that the Secretary established a violation.

I find that the violation was not serious. The loader was operating in the clinker dome where other vehicles do not normally operate. Lehigh's negligence was moderate. A penalty of $362 is appropriate.

J. Citation No. 6440408

On July 10, 2008, MSHA Inspector Reynolds issued Citation No. 6440408 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14107(a), as follows:

> The guard located on the G-2-239 cooling fan #5 was not adequate to prevent persons from contacting the moving machine parts. The back side of the guard when it fits around the motor drive shaft had an opening measuring 3 X 5 inches, and the pulley drive end had an opening around the shaft measuring 4 X 6 inches. These conditions created an entanglement hazard to the miner accessing this cooling fan.

(Ex. G-10). 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 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parties that can cause injury." The Secretary proposes a penalty of $2,976 for this citation.

Inspector Reynolds testified that he issued this citation because a portion of the guard was missing around the motor drive shaft of the cooling fan. (Tr. 124). The missing guard exposed the keyed shaft that the pulley is attached to. An exposed keyed shaft can grab someone's loose clothing and pull that person into the moving machine parts. The unguarded area was large enough for a person to stick his hand in and there was a place where lubrication was applied in the vicinity. (Tr. 125-26, 172).

Mr. Bigley testified that Lehigh uses a heat gun to make sure that the bearings on the cooling fan are not overheating. (Tr. 205). An employee can take this temperature from a distance of ten feet. Lubrication is provided by an "auto luber" so there is no need for any employee to get close to the cited opening in the guard. *Id*. When the auto luber is replaced or when any maintenance is performed in the area, the unit is shut down and locked out. He further testified that a person would "have to be a contortionist" to get his hand into the opening cited by Inspector Reynolds. (Tr. 206). Bigley admitted that he has disciplined employees for working on equipment without locking it out first. (Tr. 229).

Lehigh argues that there was no work-related reason for any employee to be near the cited opening. The existing guard provided sufficient protection for miners who might be in the area. The mere fact that it was physically possible for someone to force his hand through the opening is not sufficient to establish a violation. If a violation is found it should be designated as non-S&S because it was unlikely that anyone would be injured by the condition. Finally, Lehigh argues that since the condition has existed for 25 years, its negligence was low. Many MSHA inspectors have inspected the area and a citation has never been issued for the cited condition.

I find that the Secretary established a violation. I find that the openings were sufficiently large for a miner to accidentally get his hand in and contact moving machine parts. As stated above, the Commission interprets the guarding standard to take into consideration "ordinary human carelessness." *Thompson Bros. Coal*, 6 FMSHRC at 2097. Lehigh has disciplined miners for failing to abide by its requirement that equipment be shut down and locked out before work is done.

I find that the chance of a miner inadvertently coming in contact with the motor drive shaft or other moving parts, while not impossible, was extremely unlikely. I credit the testimony of Mr. Bigley that there was no reason for Lehigh's employees to get near the cited area. I find that the violation was not S&S because it was unlikely that the violation would contribute to an injury. I find that Lehigh's negligence was low because this condition has existed for a long time and it was reasonable for the company to believe that it was complying with the safety standard. A penalty of $1,000 is appropriate.

K. Citation No. 6440417

On July 16, 2008, MSHA Inspector Reynolds issued Citation No. 6440417 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.4102, as follows:

> The lube and pump building located between the coal mill and the raw mill has an oil leak that had spilled onto the travelway on the north side of the building. This spillage was approximately 36 X 42 inch area. This condition creates a fire hazard to the miners accessing this building.

(Ex. G-11). 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. The Secretary proposes a penalty of $285 for this citation.

Inspector Reynolds issued this citation because he found spilled hydraulic fluid in the lube and pump building. (Tr. 128). Reynolds stated that the spilled material was the same as he cited in Citation No. 6440395, discussed above. He further testified that the condition of the spill area demonstrated that this was a recurring spill or leak rather than a one time event. (Tr. 130). He believed that the hydraulic oil had "wicked into" the wall. (Ex G-11, photos). Lehigh makes the same arguments as it did with respect to Citation No. 6440395.

As stated above, the safety standard provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." MSHA defines virtually any liquid, except water, as being either flammable or combustible. The Secretary defines "combustible liquids" as "liquids having a flash point at or above 100° F." The Secretary defines "flammable liquids" as a liquid that has a "flash below point 100° F." Thus, hydraulic fluid is one of the two. The standard requires timely cleanup. I credit the testimony of Inspector Reynolds, as supported by the photographs, that hydraulic fluid has leaked at this location more than once. It is difficult to determine how long this particular spill had been present. It does not appear from the photographs that the most recent spill had "wicked up" into the surface of the walls.

The issue with respect to this citation is whether the Secretary established that Lehigh failed to clean up the leakage of the hydraulic fluid in a timely manner. As stated above, it cannot be determined when the spill occurred or when it should have been spotted by Lehigh. The fact that hydraulic fluid had seeped into the area in the past does not establish a violation. I find that it cannot be determined that Lehigh failed to clean up the fluid in a timely manner. The citation is vacated.

L. Citation No. 6440418

On July 16, 2008, MSHA Inspector Reynolds issued Citation No. 6440418 under section 104(a) of the Mine Act alleging a violation of 30 C.F.R. § 56.14100(b), as follows:

> The windshield wipers located on the Chevrolet flat bed truck #409 were not being maintained. The wiper on the driver's side was missing. This condition creates a visibility hazard to the driver of this mobile equipment.

(Ex. G-12). 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. The Secretary proposes a penalty of $285 for this citation.

The Secretary maintains that there is no dispute that the wiper blade was missing as set forth in the citation. Inspector Reynolds testified that rust on the end where a wiper blade would attach

indicates that the wiper had been missing for a long time. (Tr. 132). The missing wiper blade affected safety and was in violation of the standard.

Lehigh contends that the alleged defect did not affect safety. The Secretary failed to produce any evidence of a requirement that off-road vehicles be equipped with windshield wipers. The inspector testified that the windshield was clean and free of any obstructions to visibility. (Tr. 175). At the time of the inspection, the weather was hot and dry. The truck was not operating and there was no hazard presented by the cited condition. When the truck was used, the driver would have alternate methods of cleaning the windshield.

I find that the Secretary established a violation of this standard. Quarries and cement plants are inherently dusty and it takes only a little moisture to cause the dust to stick to the windshield and obscure the operator's vision. (Tr. 131-32). Water trucks operate to control the dust at this facility and these trucks spray water on everything in their path. I credit the testimony of the inspector that this condition had existed for a long time. As a consequence, although the truck was not operating at the time of the inspection, I find that the evidence shows that it is highly unlikely that a wiper blade would have been installed before the truck was put back into service. A pre-operational exam would not have uncovered the defect because the operator did not consider the condition to present a hazard.

I find that the defect affected safety because the driver's field of vision could easily become obscured by dust sticking to the windshield. Although the quarry is in a desert, a little moisture would create a mess on the windshield. This condition could develop very quickly and the truck driver could run into another vehicle or a stationary object before he had a chance to stop the truck to clean the windshield off with a rag. Other Commission administrative law judges have affirmed citations for this same condition.

I find that the violation was neither serious nor S&S. Lehigh's negligence was moderate because it had operated the truck without wipers for some time. A penalty of $285.00 is appropriate for this violation.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. Lehigh had over 100 paid violations at the Tehachapi Plant during the 24 months preceding the dates of these inspections. Lehigh is a medium-sized operator, but it is owned by a large operator (Heidelberg Cement AG). The Tehachapi Plant employed about 126 people in 2008. The violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Lehigh's ability to continue in business. The gravity and negligence findings are set forth above.

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/Order No.	30 C.F.R. §	Penalty
WEST 2009-22-M		
6440386	56.11002	Vacated
6440390	56.3200	$2,000.00
6440392	56.3200	2,000.00
6440394	56.14112(a)(1)	Vacated
6440395	56.4102	Vacated
6440396	56.11012	Vacated
6440397	56.14100(b)	362.00
6440408	56.14107(a)	1,000.00
6440417	56.4102	Vacated
6440418	56.14100(b)	285.00
WEST 2009-101-M		
6440388	56.17001	Vacated
6440389	56.20011	5,000.00
	TOTAL PENALTY	$10,647.00

For the reasons set forth above, the citations are **AFFIRMED**, **MODIFIED**, and **VACATED** as set forth above. Lehigh Southwest Cement Company is **ORDERED TO PAY** the Secretary of Labor the sum of $10,647.00 within 40 days of the date of this decision.[1] Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Andrew Schultz, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704 (Certified Mail)

Brian Bigley, Safety Manager, Lehigh Southwest Cement Company, 13573 Tehachapi Blvd, Tehachapi, CA 93561 (Certified Mail)

Tom King, Safety Coordinator, Lehigh Southwest Cement Company, 15390 Wonderland Blvd., Redding, CA 96003 (First Class Mail)

RWM

[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.