

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 NEW JERSEY AVENUE, N.W., SUITE 9500  
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| LTM INCORPORATED -      | : | CONTEST PROCEEDINGS               |
| KNIFE RIVER MATERIALS,  | : |                                   |
| Contestant              | : |                                   |
|                         | : | Docket No. WEST 2008-1268-RM      |
| v.                      | : | Citation No. 6398748 - 06/11/2008 |
|                         | : |                                   |
| SECRETARY OF LABOR,     | : | Docket No. WEST 2008-1269-RM      |
| MINE SAFETY AND HEALTH  | : | Citation No. 6398749 - 06/11/2008 |
| ADMINISTRATION,( MSHA), | : |                                   |
| Respondent              | : | Docket No. WEST 2008-1270-RM      |
|                         | : | Citation No. 6398750 - 06/11/2008 |
|                         | : |                                   |
|                         | : | Docket No. WEST 2008-1271-RM      |
|                         | : | Citation No. 6398751 - 06/11/2008 |
|                         | : |                                   |
|                         | : | Docket No. WEST 2008-1275-RM      |
|                         | : | Citation No. 6398756 - 06/11/2008 |
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|                         | : | Docket No. WEST 2008-1272-RM      |
|                         | : | Citation No. 6398752 - 06/11/2008 |
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|                         | : | Docket No. WEST 2008-1273-RM      |
|                         | : | Citation No. 6398753 - 06/11/2008 |
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|                         | : | Docket No. WEST 2008-1274-RM      |
|                         | : | Citation No. 6398755 - 06/11/2008 |
|                         | : |                                   |
|                         | : | Docket No. WEST 2008-1276-RM      |
|                         | : | Citation No. 6398757 - 06/11/2008 |
|                         | : |                                   |
|                         | : | Mine: Mobile Crusher #1           |
|                         | : | Mine ID: 35-02906                 |
|                         | : |                                   |
| SECRETARY OF LABOR,     | : | CIVIL PENALTY PROCEEDINGS         |
| MINE SAFETY AND HEALTH  | : |                                   |
| ADMINISTRATION, (MSHA), | : | Docket No. WEST 2009-6-M          |
| Petitioner              | : | A.C. No. 35-02906-161438-01       |
|                         | : |                                   |
| v.                      | : |                                   |
| LTM INCORPORATED -      | : | Docket No. WEST 2009-7-M          |
| KNIFE RIVER MATERIALS,  | : | A.C. No. 35-02906-161438-02       |
| Respondent              | : |                                   |
|                         | : | Mine: Mobile Crusher #1           |

## DECISION

Appearances: Evan H. Nordby, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington, on behalf of Petitioner;  
Chris Lawrence, Central Point, Oregon, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalties filed pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege that LTM, Incorporated, doing business as Knife River Materials, is liable for 12 violations of the Act and the Secretary's Safety and Health Standards for Surface Metal and Nonmetal Mines.<sup>1</sup> A hearing was held in Eugene, Oregon, and the parties submitted briefs following receipt of the transcript. The Secretary proposes civil penalties totaling \$1,872.00 for the violations. For the reasons set forth below, I find that LTM committed three of the alleged violations and impose civil penalties totaling \$300.00.<sup>2</sup>

### Findings of Fact - Conclusions of Law

LTM operates several sand and gravel mines in the Oregon area. In June of 2008, one of its operations, Mobile Crusher #1 ("MC-1"), was located near Coos Bay, Oregon, in an area known as the Davis Slough. MC-1 consists of a feeder-hopper, crushers and screens, and conveyors that move material between the various pieces of equipment. As its name implies, MC-1 is a mobile facility. Its major components are mounted on rubber-tired trailers, which are stabilized by jacks and blocks in locations where it is placed into operation. Located adjacent to MC-1 was another facility known as the "truck dump stacker" ("TDS"). The TDS was a permanent facility, designed to create a stockpile of material trucked to the site.<sup>3</sup> The TDS had been locked out of service, and was not operating when the contested citations were issued.

On June 11, 2008, Bryan Chaix, an inspector employed by the Secretary's Mine Safety and Health Administration, conducted an inspection of LTM's equipment located at the Davis

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<sup>1</sup> 30 C.F.R. Part 56.

<sup>2</sup> LTM withdrew its contest of Citation No. 6398766, which alleged that miners' training records were incomplete. LTM will be ordered to pay the \$100.00 civil penalty proposed for that violation.

<sup>3</sup> When operational, the TDS could efficiently off-load trucks and produce a stockpile. Raw material would be dumped from the trucks into a grizzly, run through a hopper and fed onto a long conveyor inclined upward at an angle of approximately 14 degrees. The base of the TDS was elevated, and the head pulley of the conveyor was 30-40 feet above the surface where the stockpile was built. The TDS is depicted in a photograph that was taken at an unknown point in time when it was idle and there was no stockpile. Ex. R-11 at 8.

Slough.<sup>4</sup> Chaix had joined MSHA in April 2007, underwent training, and became an authorized representative of the Secretary approximately 10-12 months later. Consequently, he had limited experience as an inspector at the time of the inspection. Chaix had previously worked in several capacities in the mining field. His most pertinent employment experience was as a conveyor mechanic, a position he held for approximately six months prior to joining MSHA. Tr. 215. He holds a college degree in art, with a specialization in metalsmithing, blacksmithing, and tool and die production technology. Tr. 16.

Based upon his “observations and information provided to him,” Chaix concluded that the TDS was an operational part of MC-1, and was subject to inspection despite the fact that it was not in operation. Tr. 25. In the course of the inspection, Chaix issued four citations for conditions on the TDS and eight citations for conditions on MC-1. LTM timely contested the citations and the subsequently assessed civil penalties. In addition to challenging the merits of the citations, LTM contends that the TDS was not used or available for use, that it should not have been inspected, and that citations issued for conditions at that facility should be vacated.

### The Truck Dump Stacker

In general, whether equipment and facilities must be maintained in compliance with safety standards, and whether they are subject to inspection by MSHA, is determined by their availability for use by miners. In *Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843 (Apr. 1981), the Commission held that the fact that the equipment was located in a normal work area, was capable of being used, and had not been removed from service, meant that it had been “used” within the meaning of the standard there at issue. The “available for use” test also governs the applicability of most safety standards to mobile equipment. Only if the equipment has been effectively taken out of service, e.g., locked out and tagged out, can such equipment avoid inspection and the citation of conditions that violate safety standards. *Allen Lee Good*, 23 FMSHRC 995, 997 (Sept. 2001) (“As long as the cited equipment is not tagged out of operation and parked for repairs [the safety standard] applies, whether or not the equipment is to be used during the shift.”); *Eastern Associated Coal*, 1 FMSHRC 1473, 1474 (Oct. 1979) (placing a warning tag on equipment that remained operational in a working area was not sufficient to abate a violation because the tag could have been ignored). The same considerations should apply to the TDS.

At first blush, one might assume that the TDS was an operational part of MC-1. Chaix concluded as much shortly after he arrived on the site. As he explained, the TDS made stockpiles and the rest of the equipment consumed stockpiles. Tr. 223. However, the TDS was locked out and tagged out, and it was apparent that a large stockpile of raw material that had been built for feeding into MC-1 had not been made by the TDS.

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<sup>4</sup> The Act requires that surface mines be inspected twice per year. 30 U.S.C. 813(a). Regular inspections are referred to as E01 inspections. Inspections of intermittent operations, such as MC-1, may be less frequent, depending upon the amount of time the facility is operated.

It is not disputed that the TDS had been locked out and tagged out at the time of the inspection. Its main power switch was in the “off” position, and a lock had been inserted through the switch handle. Ex. R-5. A tag on the switch read “Danger - Do Not Operate,” and instructed that the lock could be removed only by Skip Borstad,<sup>5</sup> the person who had placed it there and whose name was on the back of the tag.<sup>6</sup>

Photographs taken by Chaix, establish that, with one possible exception, LTM had not used the TDS to build the stockpile of raw material for MC-1. A photograph taken by Chaix shows the discharge end of the TDS conveyor and a portion of a very large stockpile. Ex. G-12/2.<sup>7</sup> A large pile of material, well removed from and higher than the conveyor, shown on the left of the photograph, could not have been made by the stationary conveyor of the TDS. Tr. 425-26. It was built by a loader, using raw material that had been trucked to the site. Tr. 375-76. As the stockpile grew, the material was graded into a ramp that the loader used to increase its size. A small pile of material in the vicinity of the end of the conveyor arguably could have been made by the TDS.

Despite the fact that the TDS was deenergized and the vast majority of the stockpile had clearly not been built with the TDS, Chaix concluded that it should be inspected. It is evident that Chaix initially assumed that the TDS was an operational part of the MC-1 facility. While inspecting the TDS he believed his assumption was confirmed, and he concluded that the TDS had been operated in April. The two most significant factors upon which he based his conclusion were a statement by the MC-1 operator that he interpreted as an admission that the TDS had been operated in April, and the small pile of material in proximity to the TDS conveyor.

On close examination, however, none of the factors relied on to sustain the TDS citations, whether considered separately or together, establish that the TDS was operated in April, or was available for use at the time of the inspection.

## The Admission

Brian West worked in Knife River’s coast operations for five years. He testified that the TDS was locked and tagged out when he became LTM’s aggregate manager in June of 2007. Tr. 480. It was old and worn out, particularly the hopper, and the repairs necessary to make it dependably operational were not deemed worth the investment. It had not been operated while he was in charge of the facility and, to his knowledge, had not been operated in the two years

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<sup>5</sup> Borstad, was a safety specialist. He had passed away subsequent to the June 2008 inspection, and his lock remained in place at the time of the hearing some two years later. Tr. 356-59.

<sup>6</sup> Chaix was concerned about the adequacy of the information on the tag. Tr. 224, 238-50. However, it appears to have been appropriate.

<sup>7</sup> The number following the backslash, when citing to a photographic exhibit, reflects the page number of the exhibit, e.g., Ex. G-12/2 refers to page 2 of Government Exhibit 12.

before he became aggregate manager. West did not know where the key to the lock was, and he had not attempted to replace the lock, because he had no intention of operating the stacker. Tr. 524, 545.

When Chaix was re-called as a witness to rebut LTM's evidence regarding the unavailability of the TDS, the first point addressed was the alleged admission, which occurred essentially at the beginning of the inspection. When Chaix arrived at the site, at approximately 8:00 a.m., he proceeded to what he thought was the office, but was informed that it was an office for a "hot plant" which was under OSHA jurisdiction. He then went to the area of MC-1 and sought out the person in charge. The operator of MC-1, Mike McDonald, identified himself as that person. Tr. 21-22. Chaix reviewed records and offered McDonald an opportunity for a pre-inspection conference. Curiously, the fact that the TDS was not operating does not appear to have been a topic of the pre-inspection discussion. There is no mention of it in Chaix's field notes, and Chaix did not recall any conversation concerning whether the TDS was part of the MC-1 operation. Tr. 223; Ex. R-1 at 55-75.

Chaix preferred to follow the flow of material when inspecting a facility, and he and McDonald proceeded to the area of the stockpile of raw material that would be fed into MC-1. Tr. 23-24. The stockpile had been built in the same general area that material discharged from the TDS would have been deposited. As evidenced by photographs taken by Chaix, his observations of the stockpile were made from the base of the TDS conveyor. Ex. G-12. One of the first things Chaix observed at that location was a fire extinguisher that bore a tag with a notation that it had been inspected in April 2008. He testified that the April 2008 date on the fire extinguisher tag "aroused [his] attention." Tr. 610. When asked why he did not issue a citation because the fire extinguisher had not been inspected in May, he explained it was "because [he] was told that [April] was the last time that it was in operation."<sup>8</sup> Tr. 611.

Chaix's testimony about his interaction with McDonald was vague with regard to the alleged admission. Tr. 25-26, 610-11. The statement was not made in response to a direct inquiry about when the TDS had last been operated. Rather, it was made in an exchange regarding the April 2008 inspection notation on the fire extinguisher's tag, and the absence of a notation for May.<sup>9</sup> There is no evidence as to exactly what was said by either party. Chaix was

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<sup>8</sup> Fire extinguishers are required to be examined monthly. 30 C.F.R. § 56.4201. West testified that LTM's policy is to inspect all fire extinguishers monthly, whether or not the facility is in use, and that he continues to inspect the fire extinguisher at the TDS. Tr. 352-53. West was not asked about the absence of a notation of an inspection in May. Chaix concluded that, since the TDS had not been operated after any failure to perform an examination in May, that no miners had been exposed to a hazard by the failure, and did not issue a citation. Tr. 611. The Secretary notes in her reply brief that the transcript, at page 610, line 25 to page 611, line 1, should reflect that the question Chaix was responding to was "Why did you *not* issue a citation on the fire extinguisher?" Sec'y. Reply Br. at 2 n 2. I agree, and the transcript is so amended.

<sup>9</sup> Respondent argues that, based upon the time that Chaix arrived and the times that various events occurred, McDonald could not have been with Chaix when the alleged admission was made. Resp. Br. at 4-5. For the reasons advanced by the Secretary in her reply brief, I reject

obviously interested in why the fire extinguisher had not been inspected in May. McDonald may have said something to the effect that the TDS had not been run since, or after, April, and may have been stating simply that the TDS had not been operated in May. Chaix may have misinterpreted such a statement by erroneously inferring that the TDS had been operated in April, but not since then.

It is remarkable that Chaix did not record McDonald's statement in his field notes, either when it was made or when LTM's challenge to the TDS citations was made clear six days later. Chaix's notes reflect that at a June 17, 2008, close-out conference, LTM advised that it intended to contest the TDS citations because the equipment was locked out. Chaix's response, as recorded in his notes, read only, "(pile under stacker evidence of use)." Ex. R-1 at 72. Chaix knew that the TDS was not in operation and, if he did not know from his pre-inspection discussions, he soon discovered that its main electrical panel was locked out and tagged out. If one believed, as Chaix did, that the TDS had been operated in the recent past despite being locked and tagged out, evidence to that effect would be important for a number of reasons, and an admission by the facility's operator that it had been run recently would seem especially important. Yet, the supposed admission is not even alluded to in Chaix's notes, and his recollection of it at the time of the hearing was obviously not clear.

I place no weight on the alleged admission.

### The Stockpile

The contour of the stockpile in the area of the TDS conveyor is not strong evidence that the TDS was operated, or when or under what circumstances it may have been operated. Photographs taken by Chaix show a pile of material near the end of the TDS conveyor. From some of the photographs one could conclude that the pile had been made by the TDS, although it looks to be slightly to the left of the conveyor.<sup>10</sup> Ex. G-12/1, G-12/4. Another photograph, however, shows that the pile is relatively small compared to the main stockpile created by the loader, and appears to be well left of where it should have been if it had been created by the TDS conveyor. Ex. G-12/2. The road that the trucks used to access the site, the place where the trucks dumped their loads, and the place that the loader operated were on the side of the stockpile opposite the TDS. Tr. 375-76. Chaix did not travel around the stockpile to observe the other side. Tr. 84. He took no photographs from other perspectives, or at least none were introduced into evidence, that could have clarified the contours of the stockpile and the ramp(s) used to build it – photographs that may have shed considerable light on the origin of the smaller pile of material.

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LTM's argument and find that McDonald was present and participated in an exchange with Chaix. Sec'y. Reply Br. at 2.

<sup>10</sup> West agreed that, as depicted in one photograph, the top of the small pile "appear[ed] to be" under the top of the TDS head pulley. Tr. 480; Ex. G-12/5. LTM contends in its brief that the pile is to the left of where it should have been if it had been made by the TDS. Resp. Br. at 6.

## Other Factors

The Secretary points to the fact that continuity and resistance testing was done on the TDS on June 1, 2007, and argues that the testing evidences an intent to use the equipment. She argues in her reply brief that “Respondent offers no explanation for the up-to-date electrical grounding continuity testing” that had been performed on the TDS in June 2007. Sec’y. Reply Br. at 2-3. However, it is questionable that the testing was up-to-date, and the records of electrical testing were, apparently, consistent with LTM’s position. Continuity and resistance of electrical grounding systems must be tested “immediately after installation . . . and annually thereafter.” 30 C.F.R. § 56.12028. Chaix’s field notes reflect that he reviewed records prior to starting the inspection and noted that a new cone crusher had been set up “last month” and that ground and continuity testing had been done on MC-1 after the set-up on May 29, 2008. Ex. R-1 at 55. When he returned to the mine on June 17 to continue the inspection and conduct a close-out conference, he again noted that testing had been done on MC-1 on May 29, but also noted that there was no record of testing of the TDS, and that the last record of testing for the TDS was dated June 1, 2007. Ex. R-1 at 68. If the TDS was last tested on June 1, 2007, it is questionable that the testing was up-to-date at the time of the June 11, 2008, inspection. Moreover, while testing in June 2007 would have been inconsistent with an intention to abandon the TDS *at that time*, failure to test the TDS on May 29, 2008, allowing more than a year to pass since the last test, was consistent with an intention to abandon the TDS, at least as of May 2008.

The Secretary also points to various conditions that she contends are shown in photographs taken during the inspection and argues that they indicate recent use of the TDS. The conditions include surfaces on components of the equipment that she contends show less corrosion than would be expected if simply allowed to weather for a significant period of time in the atmosphere near the Oregon coast, and items like a replaced bearing cap that she contends show that the TDS was serviced in the recent past. LTM disputes the conclusions drawn by the Secretary and counters that other conditions, such as plant growth, show non-use.

The Secretary’s arguments are based upon testimony by Chaix, wherein he offered his opinion that certain surfaces depicted in photographs appeared to be polished, when he would “expect over time [that they would] show rust based on the humidity and precipitation in the area.” Tr. 611-12. However, it is not at all clear that the areas identified in photographs are polished surfaces. For example, an area described as polished on a troughing roller appears to be similar in appearance to nearby surfaces that were stationary and could not be polished. Tr. 612-13; Ex. G-3/5. West disagreed that the photograph showed a polished surface, but agreed that there did not appear to be rust anywhere in the photograph. Tr. 540-41. LTM points out that at least one other photograph arguably shows a polished surface on the head pulley of the TDS conveyor, which from all appearances had not been used in many months. Ex. R-11/8. The Secretary attempts to buttress Chaix’s testimony by referring to his experience with “metallurgy.” Sec’y. Br. at 4. As LTM argues, that is a bit of an overstatement. Chaix’s degree was in art, with some specialization in “metalsmithing.” The extent to which his mining experience or his education or experience in art/metalsmithing included exposure to rates of corrosion of metals in outdoor settings is unknown. None of the “other factors” relied upon by the Secretary are

reflected in Chaix's field notes as evidence of recent use.<sup>11</sup> His testimony on those subjects apparently represents an attempt to interpret photographs taken during the inspection and draw conclusions about usage of the equipment from appearances of surfaces and the amount of corrosion present. The rates of plant growth and the chemical makeup of the materials and rates of corrosion are unknown, despite Chaix's volunteered opinions about likely metal composition.<sup>12</sup>

The difficulty with the Secretary's "other factors" argument is that there is virtually no evidence to establish the reliability of basing estimates of how long a machine has been idle on photographic depictions of machine components of unknown chemical composition, assuming that the appearances of surfaces could be accurately assessed from the photographs, which is doubtful. I find none of the supposed conditions urged by the Secretary or LTM to be sufficiently probative or reliable to establish either that the TDS was or was not operated within any given time frame.

The Secretary argues that the TDS could be operated at virtually any time simply by removing the lock and throwing the switch and, if it was operated shortly before the inspection, then it was available to miners. She further argues that allowing mine operators to avoid inspections by locking and tagging equipment when not in use would require MSHA to "catch" a facility in operation, a position rejected by the Commission. The Secretary's concerns are valid. If LTM actually operated the TDS periodically, allowing it to avoid MSHA inspections by locking it out when not in use could deprive miners of the Act's protections. However, the Secretary did not establish that LTM did so, and much of the available evidence is to the contrary.<sup>13</sup>

The size and contour of the stockpile confirms LTM's assertion that it used a loader, not the TDS, to build the stockpile. The TDS had been locked and tagged out of operation for many months. MSHA had last inspected the Davis Slough facility in March of 2008. At that time, the

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<sup>11</sup> Chaix's recollection of particular aspects of the two-year-old inspection was, understandably, not crystal clear. For example, without consulting his field notes, he was reluctant to answer questions about where he first went during the inspection and when one of LTM's representatives joined him. Tr. 213-17.

<sup>12</sup> In its brief, LTM proffers information on the composition of materials and their capacity to resist corrosion. Resp. Br. at 7. The Secretary points out that that information is not properly part of the hearing record, and should be disregarded. Sec'y. Reply Br. at 3-4. The information was not offered at the hearing, is not part of the hearing record, and was not considered in deciding the issues.

<sup>13</sup> Chaix's notes do not reflect that he engaged LTM in a discussion about operation of the TDS, or that he attempted to learn the location of the lock's key and whether it was available to MC-1 operators like McDonald, or whether operation of the TDS was or would have been reflected on shift reports or other records. West testified that Chaix asked him when the TDS had last been operated. He replied that he did not know, and that it had not been operated since he became aggregate manager. Tr. 544. Chaix did not record the interchange and, apparently, disbelieved West.



inspector determined not to inspect the TDS because it was not operational and had been locked and tagged out. Tr. 378. West testified that LTM did not have a policy or practice of locking equipment out when not in use. Tr. 482. LTM's intention to abandon the TDS is evidenced, as noted above, by its decision not to perform continuity and resistance testing on the TDS when such testing was performed on MC-1 on May 29, 2008. As noted *infra*, a color-coding system designating proper access points, caution areas, and guards was employed at the MC-1 facility. It was not used at the TDS because of LTM's intention not to use that facility. Tr. 437-38; Ex. R-9/1, R-9/4. LTM's post-inspection actions were consistent with its position. Even though it would have been free to operate the TDS once the violations were terminated on June 30, 2008, it did not do so.<sup>14</sup> West testified that the TDS was not operated after June 30 because it was still worn out and the hopper had not been rebuilt. Tr. 534. At the time of the hearing MC-1 had been moved to a location closer to a raw material source. The unused TDS remained at the Davis Slough. Tr. 362.

Lastly, the Secretary argues that, even if the TDS had not been operated in April 2008, it was in the condition that it was in when Chaix inspected it when it had last been operated, and the citations should, therefore, be affirmed. It is, no doubt, correct that the TDS was in virtually the same condition on June 11, 2008, as when it had last been operated, whenever that was. However, that would often be the case for equipment that has been effectively taken out of service. The lesson of cases like *Ideal Basic Industries, Cement Div.* and *Allen Lee Good* is that equipment that is available for use by miners must be maintained in conformance with safety standards to protect miners from hazardous conditions. Conversely, equipment that is not available for use by miners does not pose a hazard to miners, and need not be so maintained. Inspection of such equipment, which does not pose a hazard to miners, would be counterproductive in that valuable and limited enforcement resources would be diverted from active mining operations.<sup>15</sup> The Secretary's expansive liability theory must be rejected.<sup>16</sup>

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<sup>14</sup> The Secretary questions why LTM did not abandon the TDS as an abatement measure, thereby avoiding the expenditure of employee time and materials to abate the cited violations, and suggests that it evidences an intent to use or preserve the option of using the TDS. That question was raised during the hearing, and West explained that the subject of abatement by abandonment simply did not come up. Tr. 525. It is somewhat surprising that LTM, an experienced mine operator, did not itself raise the issue. On the other hand, it had essentially abandoned the facility and locked-out its power supply, only to find that a newly assigned MSHA inspector believed that it remained subject to inspections.

<sup>15</sup> MSHA's inspection resources were stretched very thin in early 2008. The last previous inspection of MC-1, in March 2008, was conducted by an MSHA inspector on temporary assignment from Michigan because Oregon was "short-handed." Tr. 494-95.

<sup>16</sup> The Secretary's theory is problematic for other reasons. Citing an operator for a violation that occurred at some unspecified time in the past could pose due process issues. It also could call for speculation on factors to be considered in evaluating whether a violation existed, if so, its gravity and the level of an operator's negligence. As noted *infra*, evaluation of such issues for an alleged guarding violation may involve staffing patterns at the time of the alleged violation, and other such factors.

As noted above, if the Secretary had established that LTM had operated the TDS periodically despite its being locked out, then it would have been available for use, and the citations would be considered on the merits. A closer question would have been presented if the Secretary had proven that the TDS had been operated “in the recent past,” as Chaix believed. However, recent operation was likewise not established.

Based upon the foregoing, I find that the TDS was not available for use by miners, and that the citations issued for conditions on the TDS must be vacated.

### The Mobil Crusher #1 Citations

There are seven citations remaining at issue related to MC-1. Six of those allege a violation of the standard requiring that moving machine parts be guarded. The standard provides:

#### § 56.14107 Moving Machine Parts

(a) Moving 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 parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

30 C.F.R. § 56.14107.

The standard is broadly worded because it must be applied to myriad circumstances and, as such, calls for interpretation by mine operators and MSHA inspectors. Not surprisingly, there is some variation, or inconsistency, in the application of the standard. The citations at issue here present a not uncommon factual pattern – a new or different inspector perceives a violation of the standard in conditions that were not viewed as violative by inspectors during prior inspections. Assessing the validity of such citations can present difficult issues. As explained in *Good*, when the Secretary’s interpretation of a regulation is challenged, the initial determination is whether the regulation or standard is plain or ambiguous. The Secretary’s interpretation of an ambiguous regulation must be deferred to if it is “reasonable, consistent with statutory purpose, and not in conflict with the statute’s plain language.” 23 FMSHRC at 1004. If the Secretary’s position is sustained, a separate inquiry must be made, i.e., whether an operator had fair notice of the Secretary’s interpretation.

To determine whether an operator received fair notice of the agency’s interpretation, the Commission asks “whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (Nov. 1990). . . .

. . . .

In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. . . . Also relevant is the testimony of the inspector and the operator's employees as to whether certain practices affected safety. . . . Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine [including the existing guarding on each moving part, the location of each part in relation to where miners traveled and worked, and when and how miners accessed each part, if at all].

23 FMSHRC at 1004-05 (opinion of Commissioners Jordan and Beatty) (citations omitted).

In evaluating whether a particular condition violated the standard, the gravity of any such violation, and whether LTM had fair notice of the Secretary's interpretation of the standard, the potential exposure of miners to the moving machine parts must be considered. In *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984), the Commission held that a similar guarding standard must be interpreted by considering whether there is a reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. Chaix's determinations that guarding violations existed, and his assessment of the gravity of the violations, was premised upon two general theories of exposure. One was that a miner involved in inspecting or maintaining the machinery might become entangled while in the process of touching gear boxes or bearing caps and/or greasing the bearings while in operation. The other was the potential for a person to contact the moving parts while traveling or cleaning in the vicinity of the potential hazard, e.g., by falling. The inspection/maintenance theory is generally applicable to all of the guarding violations, and will be addressed first. The travelway/cleanup theory is particular to each violation, and will be discussed in conjunction with the specific citation at issue.

Chaix's inspection/maintenance theory of exposure was based upon his general mining experience, particularly his approximately six months in a position he described as "conveyor mechanic." Tr. 14, 214-15. He believed that miners would place themselves into very close proximity to moving machine parts on conveyors in order to perform inspection and maintenance tasks, e.g., physically touching gear boxes and bearing caps with their hands in order to feel for vibrations or excessive heat – indicators of problems or impending failure. Tr. 33, 97, 113, 128, 268-69. He also believed that close contact was required in order to grease bearings which he assumed was done while machinery was in operation to promote even distribution of grease. Tr. 34-35.

Brian West testified that LTM did not perform inspection and maintenance functions in the manner described by Chaix. He has worked with crushing operations for many years, and has nine to ten years of experience working on conveyors. Tr. 385, 405. West testified that LTM's crusher operator would perform a general walk-around inspection daily, but would not come into close proximity to any moving parts. Tr. 383, 425-27. Any maintenance that needed to be performed, and maintenance included greasing, was done while the equipment was deenergized and locked and tagged out.<sup>17</sup> Tr. 408, 504-05, 536. West testified that it was not necessary to touch a bearing to determine if it was failing, because it could be heard, smelled, and/or seen. Tr. 385-86. Bearings were typically run to failure, even though that might result in unscheduled down time. Tr. 489. Touching bearing caps, guards, or other parts in the vicinity of moving parts was not the standard way to diagnose problems, and LTM's employees were not trained to do that. Tr. 385, 401-04, 408, 425. Chaix did not claim to have seen any of LTM's employees take such actions, and conceded that he did not know how LTM's employees were trained. Tr. 269-70.

Around the time of the inspection, MC-1 was staffed by the crusher operator and two loader operators, and virtually no maintenance was performed on the plant.<sup>18</sup> Tr. 527-28. In order to perform maintenance, the men would have had to work overtime or shut the plant down early, and West did not recall any overtime being recorded on time cards and did not see the men performing any maintenance. Tr. 527-28.

I find West's testimony, which addressed actual practices at MC-1, to be credible. LTM did not closely inspect or service its conveyors or other equipment while in operation. In fact, the prospect of a miner reaching around or near guards in close proximity to moving machine parts like conveyor head or tail pulleys strikes me as a highly dangerous practice. LTM's practice of performing maintenance only when equipment was locked and tagged out, regardless of any advantages Chaix's touch/feel theory might have in the diagnoses of impending failure, seems eminently reasonable. It also is in conformance with other standards, e.g., 30 C.F.R. § 56.14204 which provides that machinery shall not be lubricated manually while it is in motion where application of the lubricant may expose persons to injury. In evaluating the guarding violations, no weight will be accorded to the close inspection/maintenance theory of exposure.

Citation No. 6398752

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<sup>17</sup> An exception to the lock out/tag out policy was that gear boxes on major equipment, e.g., screens, were monitored periodically with an infrared heat sensor gun, which could provide the operating temperature of the gearbox from a distance of 15-20 feet. Tr. 386-87, 497.

<sup>18</sup> At the time of the hearing, the plant had been moved to a different location, and a ground man had been employed to perform maintenance tasks like greasing. He reported for his work after the crusher crew had gone home. Because many of the grease fittings were inaccessible without removal of guards, extended grease lines were installed as the plant was reassembled, in order to speed the maintenance operation. Tr. 527-29.

Citation No. 6398752 alleges a violation of the guarding standard, which is described in the “Condition and Practice” section of the citation as follows:

The left side of the head pulley on the #3 hopper feeder conveyor has not been adequately guarded. Open access to the moving machine parts was left at a height of 26 inches from the walkway, and 12 inches from the existing (inadequate,) side guard, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with these moving machine parts. A miner was observed traveling on foot and working in and around the plant while in operation at the time of the inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

The citation was modified on June 25, by adding the following language to the Condition and Practice section:

The tail and head pulleys of the #3 feeder are inadequately guarded, offering exposure to the moving machine parts. The head and tail pulleys of the #1 and #2 feeder conveyors also offer access to the moving machine parts. Termination due time has already been extended to 06/30/2008 in order to allow for the completion of all corrective work.

Ex. G-13.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial (“S&S”), that one person was affected, and that the operator’s negligence was moderate. A civil penalty in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary’s interpretation of the standard. It also contests the special findings and the amount of the penalty.

#### The Violation

Raw material was fed into MC-1 through a three-bin hopper. Conveyor belts located under the hoppers transported material onto a collector belt, the under-hopper conveyor, which transferred it to a belt that fed it into a cone crusher. The hopper/conveyor assembly was trailer mounted, and access to the area was restricted by company policy. The Secretary introduced three photographs of the cited condition that were taken by Chaix on June 11. The first depicts the pulley in question. Ex. G-15/1. The other two depict the condition after the citation had been terminated by the installation of additional guarding and an extended grease line. Tr. 102; Ex. G-15/2, G-15/3. None of the Secretary’s photographs show the “existing (inadequate,) side guard” referred to in the citation. LTM introduced a photograph showing the area and the then-existing

side guard. Tr. 100, 381; Ex. R-6/2. Another photograph, a side view, shows that the shaft of the pulley was approximately one foot inside the edge of the existing guard. Ex. R-6/2. It also shows, in the far right background, the general area of the #2 hopper conveyor that Chaix noted as being inadequately guarded in the modification to the citation.

I have rejected the Secretary's inspection/maintenance theory of exposure. As to the travelway/cleanup theory, Chaix theorized that a person passing through the area could slip and fall and possibly become entangled in the pulley. Tr. 94. As depicted in a photograph, the area in question was an approximately two-foot wide passageway, or walkway, between the hoppers and what appears to be the body of a trailer. Ex. G-15/2. Dual trailer tires appear to extend across the passageway adjacent to what was then an opening in the guarding, and step plates were located on the tops of the tires. Chaix's concern was that a miner using the step plates on top of the tires could slip and fall possibly encountering the pulley. Tr. 94. LTM's policy, upon which its personnel were trained, was that no one was allowed to enter the subject area while the crusher was in operation. Tr. 384-85, 393. There was a gate mounted on the side of the trailer, barely visible in a photograph, that normally was closed and had a "Do Not Enter" sign on it. Tr. 391; Ex. G-15/2. The under-hopper conveyors were monitored from the other side of the conveyors, by someone standing on the ground and looking under the raised machinery. Tr. 384. Chaix had seen one miner in the general area, but had not seen anyone enter or travel the walkway in question. Tr. 94, 253-54. He also acknowledged that West told him about the no-entry policy when he inspected that area.<sup>19</sup> Tr. 260.

In *Good*, all four Commissioners who decided the case concluded that the guarding standard was ambiguous when applied to the facts of that case, and I so find here.<sup>20</sup> The Secretary's interpretation of the standard is entitled to deference if it is reasonable, consistent with the statutory purpose and not in conflict with the statute's plain language. On the facts presented, the only issue is whether the Secretary's interpretation, i.e., that the pulley was not adequately guarded, is reasonable. Chaix's initial photo depicts a completely open rotating side of the head pulley and shaft, an obvious hazard.<sup>21</sup> Ex. G-15/1. However, Chaix took the photograph by partially entering the restricted area and reaching inside the existing guard. Tr. 395-96.

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<sup>19</sup> When Chaix and West approached the area, Chaix motioned that West should enter the trailer. West explained LTM's policy, stated that he was not permitted to enter the area because the conveyors were running. Chaix then stepped into the area near, but not on, the tire step plate, to take his first photograph. Tr. 393-96, 496.

<sup>20</sup> The Secretary argues, citing *Good*, that the standard is not ambiguous, and clearly requires guarding of all moving machine parts that are not more than seven feet away from a walking or working surface. Sec'y. Br. at 14. However, all four Commissioners who decided *Good* held that the guarding standard was ambiguous in the applications there at issue in that it did not specify the extent to which moving machine parts should be guarded. 23 FMSHRC at 1004, 1008.

<sup>21</sup> There was very little evidence introduced as to the alleged hazards presented by the pulleys on the #2 and #3 hopper conveyors noted in the amendment to the citation. The Secretary failed to carry her burden of proof as to those parts.

If it is assumed that a miner would violate LTM's policy by entering the walkway while the machinery was in operation, contact with the moving machine parts of the head pulley would have been at least theoretically possible. As LTM's photos make clear, in order to contact the rotating parts, a miner would have had to reach around the existing guard. It is highly unlikely that he would contact the pulley if he slipped and fell, because the pulley was significantly recessed behind the guard. In order to reach the pinch point where the belt started to wrap around the pulley he would have had to extend an arm around and inside the guard at least one foot.

I have serious doubts that the Secretary's interpretation is reasonable. In any event, it is clear that LTM did not have fair notice of the Secretary's interpretation. Consequently, the citation will be vacated.

The factors outlined in *Good* that are relevant to the fair notice defense as presented here are the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard, and the circumstances at the operator's mine, including the location of the pulley in relation to where miners traveled and worked, and when and how miners accessed it.

Here, at least until the June 11, 2008, inspection, MSHA consistently enforced the standard as applied to the guarding for the pulley. The condition had been inspected by MSHA many times in the past, most recently in March 2008, and no previous inspector determined that the guarding, which had not been changed, was inadequate. Tr. 390. It was Chaix's issuance of the instant citation that created inconsistency in MSHA's enforcement. There is no evidence that MSHA has published notices that would have informed mine operators with ascertainable certainty that the guarding of the head pulley was inadequate.<sup>22</sup>

The circumstances at MC-1 were that the pulley was located in an area where travel was restricted. LTM had a firm policy, upon which its miners were trained, that entry into the trailer's travelway was prohibited when the plant was operating. There is no evidence that that policy was ignored by LTM's employees, either routinely or occasionally. In fact, there was typically only one person in the general area, the crusher operator, who would not have had occasion to enter the area in violation of LTM's policy. As the Secretary argues, restrictive entry policies are not always followed, and the history of mining is replete with examples of injuries and fatalities that occurred when preventive practices that "always" were implemented, were not. Consequently, there is a possibility, albeit small, that a miner would attempt to use the walkway in the trailer, encounter a tripping hazard, and fall in the vicinity of the pulley. However, the pulley was located behind a substantial guard, and any inadvertent contact, e.g., by a person

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<sup>22</sup> Rodric Breland, supervisor of MSHA's Albany Field Office, identified a number of materials on guarding put out by MSHA, including the standard itself, the Policy and Procedures Manual, a guarding handbook, and a power-point presentation. Tr. 586. None of those instructional materials were introduced into evidence. Nor were any references made to such materials in an attempt to demonstrate that the Secretary had notified operators with ascertainable certainty of her interpretation of the regulation as applied to conditions like those cited here.

falling while on the restricted travelway, would have been highly unlikely. I have rejected the inspection/maintenance theory of exposure and there is no evidence of any exposure attributable to cleanup activities for the location in question.

Taking all of these factors into account, I find that LTM did not have fair notice of the Secretary's interpretation of the standard as to the condition cited. Accordingly, the citation will be vacated.

Citation No. 6398753

Citation No. 6398753 also alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The head pulley and shaft couplings on the "underhopper conveyor" have not been adequately guarded. Open access to the moving machine parts was left at a height of 60 inches, at a distance of 24 inches from the side of the chute, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with these moving machine parts. A miner was observed traveling on foot and working in and around the plant while in operation at the time of the inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-16.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary's interpretation of the standard. It also contests the special findings and the amount of the penalty.



## The Violation

The conveyor at issue passed under the three-bin feeder hopper. The hopper feeder conveyors deposited material onto the subject conveyor, which in turn deposited it onto another conveyor which fed it into a cone crusher. The head pulley at issue was on the upper, discharge, end of the conveyor, and is depicted in photographs taken by Chaix and LTM. Ex. G-18, G-19, R-7.

As with the previous citation, I find application of the broadly worded standard to the particular parts at issue to be ambiguous, and that deference should be afforded to the Secretary's interpretation if it is reasonable. Chaix's photograph of the purported hazard depicts a relatively open side of the head pulley, with some red-painted guarding in place. Ex. G-18/1. As with the previous citation, however, there is considerably more to the picture. Immediately adjacent to the pulley, and not shown in Chaix's photograph, were steel plates forming a "rock box" to keep materials on the conveyor at the transfer point. The plates are shown in photographs taken by LTM and by another MSHA inspector when he terminated the citation. Ex. R-7, G-18/2, 3 and 4. In order to reach the pulley, one would have to reach over the steel plates to the hazard, which was 60 inches off the ground and 24 inches away from the outer edge of the rock box. Tr. 265. A photograph taken by LTM shows the crusher operator standing in the location that Chaix was in when he took his photograph. Tr. 113-14, 406; Ex. R-7/1. Other photographs show the opposite side of the transfer point, steel deflector plates, and red-painted guarding of the conveyor drive. Ex. R-7/2, R-7/3.

The Secretary's inspection/maintenance theory of exposure has been rejected. As to the travelway/cleanup theory, Chaix believed that a miner would be in the area at least once at start-up, and that there might be more frequent travel because of the location. Tr. 117. West disagreed, stating that there would be no reason for a miner to be in the area, with the exception of an initial walk-around inspection. Tr. 406. West also believed that there was no possibility that a miner would inadvertently come into contact with the parts. Tr. 407-08. As the pictures readily establish, there was no possibility that a miner engaged in cleanup or traveling in the area would contact the supposed hazard, which was located five feet off the ground and two feet on the other side of shoulder-height steel plates. The Secretary's interpretation of the standard as to this condition is unreasonable, and is not entitled to deference. In addition, LTM did not have fair notice of the Secretary's interpretation.

The factors relevant to the fair notice defense are the same as those identified with respect to the previous citation. Here, as there, MSHA's enforcement of the standard was consistent, until Chaix issued his citation. The condition had been inspected by MSHA in the past, most recently in March 2008, and no previous inspector determined that the guarding was inadequate. There is no evidence that MSHA has published notices that would have informed mine operators with ascertainable certainty that the guarding of the head pulley was inadequate. Considering those factors, the isolated location of the pulley, the existing guarding and the additional protection provided by the rock box, LTM did not have fair notice of the Secretary's interpretation of the standard as applied to the subject pulley.

Citation No. 6398754

Citation No. 6398754 alleges a violation of the guarding standard, described in the “Condition and Practice” section of the citation as follows:

A keyed shaft on the v-belt drive on the "under 1400 feed" conveyor has not been adequately guarded. Open access to this rapidly moving machine part was left at a height of approximately 46 inches, at a distance of 17 inches from the handrail on the cone work deck, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with this spinning machine part. A miner was observed working on this deck while the plant was in operation during the course of this inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-20.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty, in the amount of \$176.00 was proposed for this violation.

LTM does not explicitly assert that the shaft was adequately guarded, or that it did not have fair notice of the Secretary’s interpretation of the guarding standard with respect to the parts at issue here. Resp. Br. at 21-22. It does contend that the violation was not S&S.

Significant and Substantial

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).

Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250 (Nov. 1998); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986); *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

The condition is depicted in several photographs. A close-up view of the approximately one and seven-eighths inch diameter shaft shows that it did not project beyond the woven steel mesh guard for the v-belt drive. Tr. 122, 415; Ex. G-22/1. A hole in the mesh, approximately four inches by four inches provided some access to the shaft. Other photographs provide a better perspective of the condition. A photo introduced by LTM shows the railing referred to in the citation, as does a photograph taken after the condition had been abated by welding a box shaped cap over the opening. Ex. G-22/2, R-8/1.

The exposed shaft was near a work platform for the cone crusher. The platform was about five feet wide, and a miner working on the platform would have been on the side farthest away from the railing depicted in the photographs. Tr. 277, 417. The guard and shaft surface were 17 inches outside the railing, and the shaft was several inches beyond where the platform and railing terminated, as shown in a photograph introduced by LTM. Tr. 418; Ex. R-8/1. Aside from the previously rejected inspection/maintenance exposure, Chaix determined that a miner traveling on the walkway might slip or trip, or become startled, or step back into the hazard. Tr. 278. West testified that a miner would rarely be in that corner of the walkway/platform, and that it would not be easy to contact the shaft, which was outside the rail extension. Tr. 418-19.

I find that the shaft was essentially flush with the existing guard and, because of its location, 17 inches away from and several inches outside the end of the railing and the fact that a miner would rarely, if ever, be in that corner of the platform, that the condition was unlikely to result in an injury. Because the shaft did not protrude beyond the surrounding guard, any injury would have resulted in lost work days, and would not have been permanently disabling. This condition, likewise, had not been deemed a violation during previous MSHA inspections, and I find that LTM's negligence was low.

#### Citation No. 6398755

Citation No. 6398755 alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The self-cleaning tail pulley on the "under 1400" conveyor has not been adequately guarded. Access to this rapidly rotating finned pulley was left open across the entire 42 inch width of the conveyor at a height of 20 inches at the bottom, and the top sides at a height of 36 inches, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with this spinning machine part. This condition was obvious to the casual observer. A miner was observed traveling on foot and working in and around the plant while it was in operation during the course of this inspection. Seven other guarding violations were cited in this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-23.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty, in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary's interpretation of the standard. It also contests the special findings and the amount of the penalty.

#### The Violation

The self-cleaning tail pulley was located under the 1400 trailer-mounted crusher. It is depicted in photographs taken by Chaix and LTM. A close up of the pulley itself, taken by Chaix while he reached under an existing guard, and several other photographs show the condition of the existing guarding before abatement measures were taken. Ex. G-25/2, G-25/3, G-26/1. The location of the pulley and conveyor in relation to the trailer components is partially shown in another photograph introduced by the Secretary. Ex. G-25/1. As with other conditions,

photographs taken by LTM on the day of the inspection, present a considerably better perspective of the alleged hazard. Ex. R-9.

The conveyor in question was located underneath the trailer on which the crusher was mounted. The trailer deck was roughly four feet high, and the conveyor was recessed about three feet in from the sides of the trailer. Tr. 292, 425. It was recessed a greater distance from the ends of the trailer, and the trailer's framing further prevented access to the conveyor, as depicted in LTM's photographs. Tr. 422; Ex. R-9/1, R-9/2, R-9/7-9. A ladder providing access to the trailer deck, and jacks supporting the trailer, also inhibited access to the conveyor.<sup>23</sup> Ex. R-9/1, R-9/4. At its lowest point, the end where the pulley was located, the guard was slightly less than 20 inches off the ground. Tr. 133, 428; Ex. R-9/6.

There is little question that a person that became entangled in the rotating tail pulley would suffer a serious, possibly fatal, injury. LTM had installed guarding around the pulley to prevent such entanglements. The question is whether the guarding was adequate, i.e., met the requirements of the standard.<sup>24</sup> There were two alleged deficiencies in the guarding, an opening on the top near the tail pulley, and the absence of a bottom guard.

As with the previous citation, I find application of the broadly worded standard to the particular parts at issue to be ambiguous, and that deference should be afforded to the Secretary's interpretation if it is reasonable.

The Secretary argues the aforementioned two theories of exposure, inspection/maintenance and travelway/cleanup. The inspection/maintenance theory has previously been rejected, and this application further evidences the bases for doing so.<sup>25</sup> The photographs also make clear that the existing guarding was more than adequate to prevent contact by anyone walking in the vicinity who might trip and fall. Because of its location under the trailer deck, a person walking in the area would be at least three feet, and probably considerably farther, away from the guarding. A miner engaged in cleanup activities could, however, position himself under the trailer deck closer to the conveyor.

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<sup>23</sup> LTM's photograph of the crusher illustrates a color-coding system that it employed at the MC-1 plant. Green denoted proper travelways and approaches to equipment, e.g., the ladder to the trailer deck and the gate to enter it. Orange denoted areas where caution was required, such as the railing around the trailer deck. Red signaled "stop" - do not proceed, as indicated by the guards around the conveyor and pulley. This color scheme was not implemented at the TDS, because there was no intention to use that facility. Tr. 437-38.

<sup>24</sup> As the photographs depict, not all of the attachment points for the guarding were in use. However, the guarding was substantial in construction, and was in the location it was intended to be in. Chaix did not cite the guard for being improperly secured. Tr. 295.

<sup>25</sup> As Chaix explained, the existing guarding inhibited a miner's ability to inspect and maintain the conveyor while it was in operation, and one would have to enter the guarded area to grease the pulley shaft bearings. Tr. 145. As West explained, however, LTM's employees do not perform those functions, or any function in close proximity to such equipment, while it is in operation. Tr. 425-27.

There was conflicting testimony on LTM's cleanup activity. Chaix explained that spillage would be inevitable in the area of the pulley, and the photographs confirm that spillage occurred at that location. Tr. 135. Because of the presence of the shovel, shown in the photographs, he assumed that spillage, including spillage under the conveyor's tail pulley, would be cleaned by a miner using the shovel. Tr. 134, 146. He did not see a skid steer at the plant, a piece of mobile equipment that could be used for cleaning, and assumed none was available. Tr. 146. He did not know how often cleaning would be needed, but stated that it would not be unusual to see it done once per shift. Tr. 135. He did not inquire about actual cleanup activities at MC-1, or, apparently, about the availability of a skid steer. Tr. 135. West testified that there was a skid steer available for use at MC-1, and that he believed that miners would use it rather than a shovel to clean the area. Tr. 430-32. The skid steer was located at LTM's nearby asphalt plant, approximately 150 yards from MC-1.

The presence of shovels in the MC-1 area strongly suggests that they were used for cleanup of fugitive material, and I so find. However, while a shovel was most likely used to clean small open areas, such as the approach to the ladder leading to the crusher deck, it is not clear that a shovel was used to clean underneath the conveyor. The pictures suggest that fugitive material was allowed to build up in that area, and it is more likely that removal of such material would have been done infrequently and that a skid steer would have been used because of the amount of material involved. Ken Hanson, one of Knife River's safety managers, testified that at Knife River facilities under his control, which did not include MC-1, build-ups of material under a tail pulley were either removed with a "skid loader," or by hand after the machinery had been locked and tagged out. Tr. 208. As previously noted, MC-1 was essentially a one-man operation, and it is highly unlikely, but possible, that the crusher operator would have used a shovel to clean under the conveyor and tail pulley.<sup>26</sup>

Chaix opined that a miner using a long-handled tool, like the shovel shown in his photograph, near a conveyor pulley could suffer a very serious injury and that MSHA records include instances of fatalities occurring under such circumstances. Tr. 137. Unknown is the extent of guarding, if any, that was in place when such events may have occurred. Here the alleged deficiencies in the guarding were an opening on the top of the guard and the absence of guarding on the bottom of the pulley. The opening, which was located approximately one foot away from the end of the existing guard, is depicted in one of the Secretary's photographs. Ex. G-25/3. Access from the rear was blocked by the trailer's frame, and the solid metal guard around the pulley. A miner cleaning under the conveyor would not be exposed to danger because of the opening in the top of the guard. I find that that opening was not a deficiency that rendered the existing guarding inadequate, either solely or in conjunction with the alleged deficiency in bottom guarding.

As explained in the following discussion of the fair notice issue, there is a considerable history to MSHA's enforcement of the standard as it relates to the guarding of the bottoms of tail

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<sup>26</sup> For example, a buildup of material that contacted the belt and threatened to disrupt operations might have been dealt with initially by simply shoveling some of the material away from the belt.

pulleys. Chaix did not explain, in detail, the mechanics of how use of a shovel near a conveyor could be hazardous. It appears that the concern is possible entanglement, i.e., that the tool may get caught between the belt and pulley and be forcefully rotated around the pulley resulting in flailing of the handle and possibly pulling the miner into the pulley. Here, the existing guard effectively covered the top and sides of the pulley and related portions of the conveyor. The pulley itself was recessed, such that no part of it extended below the guard. Two to three feet away from the pulley, the belt sagged slightly below the side guard. However, the guard appears to have been sufficient to prevent entanglement with the pulley, especially since a miner would most likely be sliding the bottom of the shovel along the ground and would not be attempting to shovel material onto the belt, which was inaccessible from that area.

Considering the relatively isolated location of the tail pulley, and the considerable guarding that was in place, guarding that had thus far been deemed in compliance with the standard by LTM and other MSHA inspectors, I find that the Secretary's interpretation of the standard, as applied to the cited condition is not reasonable, and is not entitled to deference. In addition, I find that LTM did not have fair notice of the Secretary's interpretation.

The factors relevant to the fair notice defense are the same as those identified with respect to previous citations. Here, as there, MSHA's enforcement of the standard was consistent, until Chaix issued his citation. The condition had been inspected by MSHA in the past, most recently in March 2008, and no previous inspector determined that the guarding was inadequate. Tr. 436. There is no evidence that MSHA has published notices that would have informed mine operators with ascertainable certainty that the guarding of the tail pulley was inadequate.

Unlike the guarding of conditions discussed in previous citations, the topic of bottom guarding for conveyor tail pulleys has provoked considerable interaction between mine operators and MSHA. Ken Hansen has worked with crushers for 40 years and has dealt with guarding issues throughout. Tr. 190-92. He testified that around 2004-2005, he was visited by two MSHA inspectors, who told him that they had been informed during an office meeting that bottom guarding would not be required on tail pulleys that were no more than 30 inches above the ground. Tr. 193-94. Knife River, and other mine operators it dealt with in Southern Oregon, applied that standard. It was applied throughout Knife River's 5-6 mines over the course of several years and there were no citations issued for the absence of bottom guarding on tail pulleys that were less than 30 inches off the ground. Tr. 195-96. However, around August or September of 2008, Hansen was told by another MSHA inspector, Mike Anderson, that the standard that was going to be applied was "knee height." Tr. 198. He did not like the ambiguity inherent in the new interpretation, and took a "wait and see" approach to the newly announced "guideline." Tr. 206-07. One of his concerns was that reducing ground clearance by lowering a tail pulley to avoid having to install bottom guarding would require more frequent stoppage of the equipment, because material has a tendency to build up at the tail pulley and cleaning it requires that the equipment be deenergized, and locked and tagged out. In his opinion, re-starting a plant like MC-1 is "the most dangerous time" because you have to know where all your people are, and things can break. Tr. 205-06.

Lynn Gullickson worked for Knife River for 11 years, and for the last six years held the position of Safety Resource Manager for the Western Oregon, Northwest Division. He has worked for 43 years in crusher operations, including 17 years as a crusher operator, maintenance man, and asphalt plant operator. Tr. 549. In 2005 and 2006 he requested and obtained compliance assistance visits from MSHA on two new crusher plants. The topic of bottom guarding for tail pulleys was discussed, and his understanding was that tail pulleys less than 28-30 inches off the ground did not require bottom guarding. Tr. 550. Then about 2007-08, the standard became “knee height.” Tr. 550. There was no official document establishing the rule, and he doesn’t know where it came from.<sup>27</sup>

Michael Flewelling, one of three safety managers for Knife River Materials, testified that he was present at a meeting on June 11, 2008, when one of the meeting participants received a call regarding a citation that had been issued by Chaix at the Davis Slough for a tail pulley without a bottom guard that was close to the ground. His understanding was that the 30-inch guideline was in effect, i.e., bottom guarding was not required for pulleys less than 30 inches off the ground. Tr. 573. He called MSHA’s Albany Field Office and spoke to the Field Office Supervisor, “Brad” Breland. As a result of that conversation, his understanding was that the guideline was “knee height,” about 24 inches or so. Tr. 573-74. Several persons, including LTM’s representative, were present and overheard the call.

Rodric Breland, supervisor of MSHA’s Albany Field Office since January 2008, confirmed that he had a phone conversation on June 11, 2008, with Flewelling and other Knife River personnel on the subject of bottom guarding for tail pulleys. Tr. 588. While he did not recall the exact wording of the discussion, he did recall that the concept of “knee height” came up, “but there was a lot more to it.” Tr. 588. He explained that his position on bottom guarding has been relatively consistent, i.e., that there is no minimum standard and that all pertinent facts have to be examined. MSHA does not insist on guards when a person would have to lay on his back and reach up into a pulley – but a pulley that was 20 inches off the ground and in a position where it could cause injury would have to be guarded – every situation is different. Tr. 588-89. He also explained that there are a number of materials on guarding put out by MSHA, including the standard itself, the Policy and Procedures Manual, a guarding handbook, and a power-point presentation. Tr. 586.

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<sup>27</sup> While not relevant to the issues presented here, controversy over application of the guarding standard to the bottoms of tail pulleys continued. Gullickson related that five citations for such violations were issued to Knife River on May 27, 2009, where the tail pulleys ranged from 10 to 32 inches off the ground. The Secretary determined to vacate those citations after Knife River contested them before the Commission. Tr. 559-62. The paperwork effectuating the actions noted that the citations would serve as notice for future enforcement. Ex. R-13 at 16-20. Subsequently Knife River representatives met with high level MSHA officials, who agreed to visit the MSHA Field Office and retrain the inspectors on the guarding of tail pulleys. Tr. 563, 565-68. The conditions that lead to the citations, which had not been altered, had not been cited subsequently. Tr. 563, 568. Roderic Breland, MSHA’s Field Office Supervisor, confirmed that higher level MSHA officials had determined to vacate the citations, and produced photographs of the cited conditions. Tr. 591-600; Ex. G-37.



Breland was an impressive witness. His approach to difficult guarding questions raised by mine operators and inspectors is commendable. He strives for consistency in enforcement and he often travels to a mine site to personally observe conditions in which an inspector's interpretation of the standard has been disputed. It is apparent that MSHA did not establish rigid criteria for interpreting the guarding standard as applied to bottom guarding for conveyor tail pulleys. The "30-inch" and "knee height" guidelines referred to by LTM's witnesses were not official MSHA-sanctioned interpretations. However, MSHA inspectors attempting to explain their interpretation of the standard to mine operators may well have used such terminology. LTM's witnesses credibly testified to conversations with MSHA inspectors that led them to reasonably conclude that the standard did not require bottom guarding for tail pulleys that were less than 30 inches, and later knee height, from the ground. Their understanding was validated by years of experience, and numerous inspections in which the "guidelines" appeared to have been consistently applied.

LTM reasonably viewed Chaix's citation for inadequate guarding of the tail pulley as a significant and unexpected departure from their settled understanding of how the standard applied to the subject condition. Upon consideration of the factors relevant to this defense, I find that LTM did not have fair notice of the Secretary's interpretation of the guarding standard as applied with respect to this citation.

#### Citation No. 6398756

Citation No. 6398756 alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The v-belt drive on the #2 (El Jay) screen has not been adequately guarded, offering open access to the rapidly rotating primary drive and idler pulleys. Both the leading and the trailing sides of the primary drive pulley were left open to contact. This condition was obvious to the casual observer. Miners performing inspection, maintenance, lubrication, or cleanup activities in this area risk very serious injuries resulting from entanglement with these moving machine parts. Seven other guarding violations were cited in this same inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-27.

Chaix determined that it was unlikely that the violation would result in a permanently disabling injury, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty, in the amount of \$100.00 was proposed for this violation.

LTM contends that the v-belt drive was adequately guarded in that the guard extended down to within 20 inches of the walking surface, that it did not present a hazard, and that it did not have fair notice of the Secretary's interpretation of the standard.

### The Violation

The cited condition is depicted in a number of photographs taken by Chaix and LTM. Ex. G-29, R-10. A large electric drive motor, which transmitted power to the v-belt drive, was traversed by an elevated walkway. The motor extended completely through the walkway, such that persons using the walkway had to climb over it. Tr. 154; Ex. R-10/2. Intermediate steps, approximately 14 inches above the walkway, were provided on each side of the motor. Ex. R-29/1-2, R-10/2-3. Adjacent to and about six inches from the steps, there were openings in the guarding that allowed direct access to the drive and idler pulleys. Tr. 152-54; Ex. R-29/1-2. Chaix believed that they presented an entanglement hazard that could lead to a permanently disabling injury.

The Secretary's inspection/maintenance theory of exposure has been rejected. However, the travelway/cleanup theory is more viable here. The steps adjacent to the openings in the guard were an integral part of a walkway used by miners to access part of the screen. While the walkway would have been used infrequently, it was designated as a travelway for use by miners. The openings in the guard were in close proximity to the steps and were large enough to admit a shoe or boot.

LTM argues that the factory-mounted guard was no more than 20 inches above the walkway, i.e., less than knee height, which met the previously noted guideline. However, application of any such guideline would be extremely doubtful here. As Breland noted in reference to this citation, the condition here was more hazardous to a foot, and a minimum height standard would have no application to this type of hazard.<sup>28</sup> Tr. 589.

Again, I find the standard ambiguous as applied to the specific condition at issue in this citation. However, I find the Secretary's interpretation of the standard to be reasonable and entitled to deference.

LTM's fair notice defense presents a close question. The guard for the v-belt drive was not painted red, as were the guards that LTM installed on MC-1. That was because it was incorporated into the design of the screen and was installed at the time the screen was manufactured. Tr. 441. It is a reasonable inference that it had been used in that condition for a

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<sup>28</sup> LTM's argument is based, in part, on Chaix's termination of the citation, wherein he noted that the guard had been extended "down to approximately knee height." Ex. G-27/2. There were no photographs of the condition, as abated. It is unclear whether knee height was considered from the main walkway, from the step, or from some other reference point. As Chaix admitted, the termination documentation was vague and not his best work. Tr. 301-04.

number of years, and had not been cited as being in violation of the guarding standard in prior inspections of MC-1, including the March 2008 inspection.

In determining whether LTM had fair notice of the Secretary's interpretation, as with other citations at issue in this case, the pertinent factors to be considered are the consistency of the agency's enforcement, whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard, and the circumstances at the operator's mine, including the location of the pulley in relation to where miners traveled and worked, and when and how miners accessed it. MSHA's enforcement of the standard with respect to this condition had been consistent, until Chaix issued the citation. No previous inspector determined that the guarding was inadequate. While, as Breland noted, MSHA has published a good deal of material addressing application of the guarding standard, there is no evidence that it has published notices that would have informed mine operators with ascertainable certainty that the guarding of the v-belt drive, as presented here, was inadequate.

While the cited condition was directly adjacent to an elevated walkway, that walkway was traveled infrequently, especially when the equipment was in operation. Chaix testified that the screen was an extremely noisy piece of equipment, and that he would not expect any miner to be in that area while the machinery was in operation unless he had some compelling reason to be there. Tr. 152. His evaluation of the gravity of the violation was based upon a "very, very low basis of frequency to exposure." Tr. 152. Considering the relatively isolated location of the cited condition, the previously recognized adequacy of the factory-installed guard, and the extremely limited occasions that a miner would have traversed the walkway while the screen was in operation, I find that LTM did not have fair notice of the Secretary's interpretation of the standard.

#### Citation No. 6398757

Citation No. 6398757 alleges a violation of the guarding standard, described in the "Condition and Practice" section of the citation as follows:

The self-cleaning tail pulley on the #2 underscreen conveyor has been inadequately guarded, exposing miners performing inspection, maintenance, lubrication, or cleanup activities in this area to the risk of very serious injuries resulting from entanglement with this rapidly rotating machine part. The finned rotating pulley, at a height of 20 inches to the bottom of the side guards and 28 inches to the center of the shaft, was exposed across its bottom side for the entire 44 inch width of the conveyor, with less than 6 inches from the existing (inadequate,) guards to the pulley. Grease points were located on the shaft bearings. This condition was obvious to the casual observer. A miner was observed traveling and working in and around the plant while it was in operation at the time of this inspection. Seven other guarding violations were cited during this inspection. Therefore, termination due time has been set to allow for all corrective action to be properly completed.

Ex. G-30.

The citation was amended on June 25, 2008, to add the following language to the “Condition and Practice” section:

There are also openings in the guard at the adjustment assemblies, large enough to easily admit a body part, at a distance of less than 6 inches from the existing (inadequate,) guard to the finned tail pulley.

Ex. G-30 at 5.

Chaix determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator’s negligence was moderate. A civil penalty, in the amount of \$176.00 was proposed for this violation.

LTM contends that the pulley was adequately guarded and did not present a hazard, and that it did not have fair notice of the Secretary’s interpretation of the standard. It also contests the special findings and the amount of the penalty.

#### The Violation

The condition at issue in this citation, the tail pulley on the No. 2 underscreen conveyor, is similar to that addressed by Citation No. 6398755. It is depicted in several photographs taken by Chaix and by LTM. Ex. G-32/1, G-32/2, G-33, R-11/1-7. Chaix’s photos are close-ups of the tail pulley that were taken by reaching down under the existing guarding, which extended down to 20 inches from the ground. Tr. 161, 305. LTM’s photos show that the tail pulley, like the one previously discussed, was located under a trailer deck and was recessed approximately three feet away from the sides of the trailer deck. There was no trailer framing immediately behind the existing guard. However, access to the pulley was impeded by blending chutes that extended down and away from the sides of the pulley/guard. Tr. 444; Ex. R-11/4. R-11/6-7.

In addition to those distinctions, there were also assemblies on each side of the conveyor that were used periodically to adjust the tension on the belt. They were the subject of the amendment to the citation two weeks after it was issued. The pulley shaft was mounted in bearings that were affixed to an assembly that was attached to square tubing that slid into an opening in a bracket. The end of the sliding adjustment consisted of a threaded rod, on which two nuts were placed and were used to make the adjustments. Chaix believed that the openings in the guard were large enough for a body part to be inserted. Tr. 313; Ex. G-30/5. He pointed out an opening in the guard that he believed did not “fully protect miners” by referring to a “dark spot behind the shaft and bearing” shown on the left side of a photograph taken by LTM. Tr. 165; Ex. G-33/1; R-11/1. Another photograph, a side view of the “opening,” shows that the adjustment mechanism almost completely blocked access to the opening. Ex. R-11/4. West described the spatial relationship between the slot on the guard and the square tubing of the adjustment mechanism and opined that it did not provide easy access to the tail pulley. Tr. 448-

50; Ex. R-11/4. Adjustments to belt tension and alignment are performed while the conveyor is running, but only when necessary. The nuts on the end of the sliding mechanism, where the adjustments are made, are about three feet away from the tail pulley, on the other side of the blending chutes. Tr. 447.

The presence of the adjustment mechanism and the need to occasionally adjust belt tension and alignment do not materially differentiate the conditions at issue in this citation from those at issue in Citation No. 6398755. For the reasons there stated, I find that the Secretary's interpretation of the guarding standard to the tail pulley in question is not reasonable and is not entitled to deference, and that LTM did not have fair notice of the Secretary's interpretation of the standard.

#### Citation No. 6398758

Citation No. 6398758 alleges a violation of 30 C.F.R. § 56.12032, which requires that "inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The violation was described in the "Condition and Practice" section of the citation as follows:

Fourteen holes had been left open on multiple components of the electrical equipment in the plant MCC trailer, ranging in size up to 3 inches in diameter and voltage up to 480 VAC. The electrical conductors, both insulated and exposed (bare metal,) were clearly visible through several of the uncovered openings.

The "JCI control" panel had 5 open holes, up to 1 1/8" diameter. 480VAC.

The 120/240VAC breaker panel had 3 holes up to 1 1/4" diameter.

The Cutler/Hammer disconnect box had one hole, 1 1/4" diameter. 480VAC.

The "El Jay #2" panel had 2 holes: one 1 1/2" diameter, one 1 3/4" diameter. 480VAC.

The "6x20 JCI" panel had one hole. 480VAC.

The "Jaw" panel had one hole, 3 inches in diameter. 480VAC.

The junction box above the "6x20" and "El Jay" panels also had one open hole.

This MCC electrical trailer is also used on a daily basis as a shop, an operator's station, and a break and lunch room, as well as for storage of tools and equipment (including combustibles and flammables.) The trailer had a narrow walkway, and the lunch room had one door to exit, requiring miners to pass in close proximity to the electrical panels in order to escape. Electrical equipment and junction boxes with open holes pose a shock /burn /fire hazard to miners working, traveling, or taking a break in this area. This condition was extensive and obvious to the casual observer. Termination due time is set to allow for proper corrective work to be completed.

Ex. G-34.

Chaix determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty, in the amount of \$392.00 was proposed for this violation.

LTM contends that there was "no likelihood that the hazard will result in injury, and thus the citation should be dismissed." Resp. Br. at 30. It also contests the special findings and the amount of the penalty.

LTM's assertion that there was no likelihood that an injury would result is not a defense, but goes to the gravity of the violation. *Allied Products Co. v. FMSHRC*, 666 F.2d 890 (5th Cir. 1982). While not broadly worded, the regulation has been applied to require that there be no openings in electrical control boxes. *Richard E. Sieffert Res.*, 23 FMSHRC 426 (Apr. 2001) (ALJ) (open backs of electrical control boxes violated regulation). There is no dispute that there were more than one dozen openings in electrical equipment/junction boxes that were located in a trailer that housed electrical controls for MC-1. Chaix took photographs of the bottoms of various electrical panel boxes showing holes ranging up to three inches in diameter. Ex. G-36. The regulation was violated.

## S&S

The fact of the violation has been established. A measure of danger to safety was contributed to by the openings in the electrical boxes allowing access to energized electrical conductors. There is little question that if a miner came into contact with an energized electrical circuit he could reasonably have been expected to suffer a serious injury. As is often the case, the primary issue in the S&S analysis is whether the violation was reasonably likely to result in an injury causing event.

The exterior dimensions of the trailer in question were on the order of eight feet by eight feet. Tr. 460. It housed various electrical control boxes, as shown in photographs introduced by LTM. Ex. R-17. Some of the boxes were energized, and some were not. Tr. 321, 457. West testified that the box that had the three-inch hole in it was not energized. Tr. 457. The holes were on the bottoms of the boxes. Tr. 177. The trailer was used for a variety of activities, including energizing and deenergizing equipment, storage of tools and supplies and as a lunch/break room. A miner entering or exiting the lunch room would pass by one electrical panel. Tr. 515-16. Chaix noted that combustible and flammable materials were stored in the trailer, but aside from wood, he was unable to identify specific substances. Tr. 318-20. West testified that there were a couple of cans of aerosol brake cleaner in the trailer, but no oil or grease. Tr. 463-64, 517.

Chaix determined that there were a number of ways that the hazard posed by the holes could result in an injury. He cited, as an example, that the three-inch hole could lead to direct contact with an energized conductor. Tr. 181. He also noted that the voltage of at least some of

the circuits was well above that of potentially fatal household current, and that if something became energized a fatality could result. Tr. 183. Contact could also result in shock/burn injuries, and he cited the possibility of a fire starting through the ignition of materials that might accumulate inside an electrical panel. Tr. 184.

The possibility of a miner coming into direct contact with an energized conductor inside of one of the panels was extremely remote. While the trailer had multiple uses, miners would enter it for brief periods only a few times each day. All of the openings were on the bottoms of the boxes, and below waist height. Tr. 460-61. The box with the three-inch hole in it was not energized. Tr. 457. There is no evidence that any material had accumulated in the boxes, and the pictures do not show any accumulations. The boxes were inside the trailer, not open and exposed to the elements. While a serious injury, even a fatality, was possible, it was highly unlikely. The possibility of a fire appears to have been virtually non-existent.

I find that the violation was not S&S, and that it was unlikely to result in a fatal injury. I agree with Chaix's assessment that the operator's negligence was moderate.

#### The Appropriate Civil Penalties

The parties stipulated that Mobil Crusher #1 is a small mine; that its controlling entity is medium sized, and that it had not been cited for any violations within the fifteen months preceding the inspection. LTM does not contend that the maximum penalty that could be assessed for the violations would affect its ability to continue in business. The Secretary does not contend that the violations were not promptly abated.

Citation No. 6398754 is affirmed. However, the violation was unlikely to result in a lost work days injury and was not S&S. LTM's negligence was low. A civil penalty of \$176.00 was proposed by the Secretary. The lowering of the levels of gravity and negligence justify a reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty calculation regulations,<sup>29</sup> I impose a penalty in the amount of \$100.00.

Citation No. 6398758 is affirmed. However, the violation was unlikely to result in a fatal injury and was not S&S. A civil penalty of \$392.00 was proposed by the Secretary. The lowering of the level of gravity justifies a reduction in the proposed penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and guided by the Secretary's penalty calculation regulations, I impose a penalty in the amount of \$100.00.

LTM withdrew its contest of Citation No. 6398766, which alleged that miners' training records were incomplete. The civil penalty proposed for that violation, \$100.00, will be imposed.

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<sup>29</sup> 30 C.F.R. Subchapter P, Part 100.

## **ORDER**

**WHEREFORE**, Citation Nos. 6398748, 6398749, 6398750, 6398751, 6398752, 6398753, 6398755, 6398756 and 6398757 are **VACATED**. Citation Nos. 6398754 and 6398758 are **AFFIRMED as modified**. Citation No. 6398766 is **AFFIRMED**. Respondent is **ORDERED** to pay civil penalties in the total amount of \$300.00, within 45 days.

/s/ Michael E. Zielinski

Michael E. Zielinski

Senior Administrative Law Judge

Distribution (Certified Mail)

Evan H. Nordby, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Chris Lawrence, Regional Safety Manager, LTM, Incorporated, Knife River Materials - Coast Division, P.O. Box 1145, Medford, OR 97501