FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SEP 29 1993

BARRETT PAVING MATERIALS, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. YORK 92-10-RM
	:	Citation No. 3866158; 9/17/91
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. YORK 92-11-RM
	:	Citation No. 3866159; 9/17/91
	:	Docket No. YORK 92-12-RM
	:	Citation No. 3866160; 9/17/91
	:	Docket No. YORK 92-13-RM
	:	Citation No. 3866161; 9/17/91
	:	Docket No. YORK 92-14-RM
	:	Citation No. 3866162; 9/17/91
	:	Docket No. YORK 92-15-RM
	:	Citation No. 3866163; 9/17/91
	:	Docket No. YORK 92-16-RM
	:	Citation No. 3866164; 9/17/91
	:	Docket No. YORK 92-17-RM
	:	Citation No. 3866165; 9/17/91
	:	Docket No. YORK 92-18-RM
	:	Citation No. 3866166; 9/17/91
	:	Docket No. YORK 92-19-RM
	:	Citation No. 3866167; 9/17/91
	:	Docket No. YORK 92-20-RM
	:	Citation No. 3866168; 9/17/91
	:	Docket No. YORK 92-21-RM
	:	Citation No. 3866169; 9/17/91
	:	Docket No. YORK 92-22-RM
	:	Citation No. 3866170; 9/17/91
	:	Docket No. YORK 92-23-RM
	:	Citation No. 3866171; 9/17/91

: Docket No. YORK 92-24-RM
: Citation No. 3866172; 9/17/91
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: Docket No. YORK 92-25-RM
: Citation No. 3866173; 9/17/91
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: Docket No. YORK 92-26-RM
: Citation No. 3866174; 9/17/91
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: Docket No. YORK 92-27-RM
: Citation No. 3866175; 9/17/91
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: Docket No. YORK 92-28-RM
: Citation No. 3866176; 9/17/91
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: Docket No. YORK 92-29-RM
: Citation No. 3866177; 9/18/91
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: Docket No. YORK 92-30-RM
: Citation No. 3866178; 9/18/91
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: Docket No. YORK 92-31-RM
: Citation No. 3866179; 9/18/91
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: Docket No. YORK 92-32-RM
: Citation No. 3866180; 9/18/91
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: Docket No. YORK 92-33-RM
: Citation No. 3867541; 9/19/91
:
: Docket No. YORK 92-34-RM
: Citation No. 3867542; 9/19/91

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, (MSHA),
Petitioner

v.

BARRETT PAVING MATERIALS,
Respondent

: CIVIL PENALTY PROCEEDING
:
: Docket No. YORK 92-119-M
: A.C. No. 30-02869-05509
:
: Jamesville Quarry
:
: Docket No. YORK 92-71-M
: A.C. No. 30-00009-05509
:
: Docket No. YORK 92-72-M
: A.C. No. 30-00009-05510
:
: Docket No. YORK 92-96-M
: A.C. No. 30-00009-05511
:
: Norwood Quarry

DECISION

Appearances: Anthony J. Colucci III, Esq., Block and Colucci, P.C., Buffalo, New York for Barrett Paving Materials;
William Staton, Esq., U.S. Department of Labor, Office of the Solicitor, New York, New York for U.S. Department of Labor.

Before: Judge Weisberger

These consolidated cases are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary (Petitioner) alleging violations by the Operator (Respondent) of various mandatory safety standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to notice, the cases were heard in Syracuse, New York on June 8, 9 and 10, 1993. Stephen W. Field, testified for Petitioner, and Phillip A. Royce and Kurt F. Fleury testified for Respondent. Respondent filed a Closing Statement on September 9, 1993. On September 13, 1993, a statement was received from Petitioner indicating that he elected not to file a post-hearing memorandum.

Docket Nos. YORK 92-119-M, YORK 92-71-M, and YORK 92-72-M

At the hearing, Petitioner indicated that Citation No. 3866158, one of the citations contained in Docket No. YORK 92-71-M and Citation No. 3869498 the subject of Docket No. YORK 92-119-M, would be vacated on the ground that Petitioner is unable to sustain its burden of proof of establishing the violations alleged therein. Based on the representations of counsel, I conclude that the vacation of these citations is appropriate, and hence order that Docket No. YORK 92-119-M be DISMISSED, and Citation No. 3866158 be DISMISSED.

At the hearing, the parties represented that Respondent is no longer contesting the following Citations in Docket No. YORK 92-71-M: Citation Nos. 3866166, 3866168, 3866169, 3866176, 3866177, 3866178, and 3866179. Also it was represented, with regard to Docket No. YORK 92-72-M, that Respondent was no longer contesting Citation No. 3867542. It was further represented that Respondent has agreed to pay the assessed amounts in all these citations. I have considered the representations of counsel, as well as all the documentation in the record, and I conclude that the settlement the parties have arrived at is proper under the Federal Mine Safety and Health Act of 1977, ("the Act,"). Accordingly it is ORDERED that Respondent pay the full assessed amount of $471.

Findings of Fact and Discussion

I. Docket No. YORK 92-96

A. Citation No. 3866162

1. Violation of 30 C.F.R. § 56.15004

(a) Testimony

On September 17, 1991, Stephen W. Field, an MSHA Inspector, inspected Respondent's Norwood Quarry operation. According to Field, he drove up to the area of the crusher in the company of the quarry superintendent, Kurt F. Fleury. According to Field, he and Fleury exited the vehicle. Field indicated that he walked towards the north side of the crusher, and Fleury followed him. According to Field, when he passed between the crusher and the conveyor, he observed dust and rock chips in the air and on the ground. According to Field, when he was approximately within 10 feet of the portable crusher he began to "constantly" feel rock chips hitting his face and arms (Tr. 19,24). He did not feel the chips until he was under the conveyor. When Field felt the rock chips hitting his face and arms, he turned around, and noticed that Fleury was not wearing safety glasses. According to Field, he asked Fleury to put on safety glasses, and Fleury indicated that he (Fleury) did not have them with him, and Fleury left the area. Field indicated that he did not recall Fleury asking permission to leave. Field testified that when Fleury returned with his glasses he told him that he was going to issue a citation. That evening, Field wrote and subsequently issued to Respondent a citation under Section 104(d)(1) of the Act, alleging a violation of 30 C.F.R. § 56.15004, which, as pertinent requires that persons wear safety glasses "...when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." In this connection, Field explained that because of the amount of dust and rock chips that were in the air, there was a hazard of an injury to a person's eyes.

Fleury testified, in essence, that he exited the pick up truck with Field in the vicinity of the primary portable crusher. He said that he stood approximately 2 to 3 feet in front of the truck, and asked Field if he could be excused to get his safety glasses from the truck. Fleury testified that Field agreed to this request. According to Fleury, he checked the glove compartment of the truck for his glasses, and when he did not find them, he got into the truck and drove to the office to obtain his glasses. Fleury testified that when he had been in front of the vehicle with Field, there was no discussion regarding glasses. According to Fleury, upon his return to the area of the crusher, Field told him that he was going issue a citation because an "employee" was not wearing safety glasses in a hazardous area. (Tr.168) Fleury testified that earlier that morning, he had seen an employee without glasses near the portable crusher. Field testified that he had not seen this employee. On rebuttal, Field testified that subsequent to the

testimony that he gave under direct and cross-examination, he recalled that Fleury had requested him not to put in the citation that the supervisor was without glasses, as it would have embarrassed him, and therefore he (Field) used the word "employee" in the citation.

(b) Analysis

Although there are differences in the versions testified to by Field and Fleury, the record tends to establish the following set of facts: (1) On September 17, 1991, Field and Fleury were on their way to inspect the area of the crusher and the conveyor; (2) in the area under the conveyor, and in the area between the crusher and the conveyor, there was a definite hazard of an eye injury; (3) Fleury did not have any safety glasses in his possession when he and Field exited the vehicle on the way to the conveyor and crusher; and (4) the vehicle was parked 60 or 80 feet from the primary portable crusher. Within the context of these facts, I find that it has been established that Respondent did violate Section 56.15004 supra, because Fleury was not wearing safety glasses "around an area of a mine... where a hazard can exist which could cause injury to unprotected eyes." (Emphasis added).

2. Significant and Substantial

According to Field, he concluded that the violation was "significant and substantial" because he "felt the violation was more serious." (Tr. 25)

In analyzing whether the facts herein establish that the violation is significant and substantial, I take note of the recent Decision of the Commission in Southern Ohio Coal Company, 13 FMSHRC 912, (1991), wherein the Commission reiterated the elements required to establish a significant and substantial violation as follows:

> We also affirm the judge's conclusion that the violation was of a significant and substantial nature. A violation is properly designated as significant and substantial "if, based on 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 Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:
>
> > In order to establish that a violation of a mandatory standard is significant and substantial under National Gypsum the Secretary 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.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), aff'g, 9 FMSHRC 2015, 2021 (December 1987) (approving Mathies criteria). 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., 6 FMSHRC 1834, 1836 (August 1984)), and also that the likelihood of injury be evaluated in terms of continued normal mining operations (U.S. Steel Mining Co., Inc. 6 FMSHRC 1573, 1574 (July 1984); see also Halfway, Inc., 8 FMSHRC 8, 12 (January 1986).

Southern Ohio, supra at 916-917.

I have found that, as cited, there was a violation of a mandatory safety standard herein which contributed to a hazard of an eye injury. It thus becomes incumbent upon the Secretary to establish that there was a reasonable likelihood of an injury-producing event i.e., an eye injury, contributed to by the fact that Respondent's employee was not wearing safety glasses. Field indicated that there was a large amount of dust and rock chips that were airborne. He said that he "constantly" felt these items on his face and arms. He was asked: "What were the size of the chips?" and he responded as follows: "Small chips, sixteenth by an eighth inch, eighth inch by an eighth inch" (Tr.24).

The evidence does not establish that an employee of Respondent was in the immediate area where these hazardous conditions existed i.e., between the crusher and the conveyor, and under the conveyor.[1] There is no evidence that Fleury entered this immediate area. According to the version testified to by Field, Fleury was behind him. It is conjecture that Fleury would have entered the immediate area where rock chips and dust were airborne, without having obtained his safety glasses. Also Fleury indicated that he reviewed accident records for a five year period, and found that none of Respondent's employees had

[1] Fleury testified that he had seen an employee the morning of the 17th without glasses near the portable crusher, but there was no evidence as to whether this employee was in the immediate area of the hazard.

been injured as a consequence of having had a foreign object enter their eyes, although three truck drivers had been so injured. Further, employee records going back to 1953 did not indicate any lost time as a consequence of an eye injury.

Within the framework of this record, I conclude that it has not been established that there was a reasonable likelihood of an injury producing event. Accordingly I find that it has not been established that the violation herein was significant and substantial.

3. Unwarrantable Failure

According to Field, he asked Fleury if there was any company policy concerning the wearing safety glasses, and Field indicated that there was not. He said that Fleury said that glasses were available, but that there is no company policy for employees to wear them. Also, according to Field, Fleury told him that he does not tell employees the locations on the site where glasses should be worn. According to Field, at the close out conference on September 18, Fleury told him that he would make a poor example for employees, as he seldom wears safety glasses. Fleury denied making this statement, and indicated that when Field asked him if he was aware of any company policy concerning the wearing of safety glasses, he indicated yes, but that no specific areas were posted. According to the uncontradicted testimony of Fleury, the following Notice is provided to all employees, and is also posted in the scale room, which is where employees punch in:

> * * *
> (4) Eye protection must be worn when welding, grinding, cutting, chipping, or any other operation causing hazard to the eyes.
> * * *
> Any violation of the above rules will result in disciplinary action, including discharge. (Exhibit R-1)
> * * *

I observed the demeanor of the witnesses during their testimony, and found Fleury more credible on these points.

In order to establish that a violation results from an operator's unwarrantable failure it must be established that an operator has engaged in aggravated conduct which is more than ordinary negligence (See, Emery Mining Corp., 9 FMSHRC 1997 (1987)). Within the framework of the above evidence I conclude that Petitioner has not met its burden in this regard.

I find that as a consequence of the violation herein an eye injury could have resulted. Hence, the violation is of a high level of gravity. Considering the remaining factors set forth in Section 110(i) of the Act, I find that a penalty of $150 is

appropriate for this violation.

B. Order No. 3866175

1. Violation of Section 56.15004, supra

On September 17, approximately three hours after Field orally issued Citation No. 3866162, he observed an employee[2] who was not wearing safety glasses. According to Field, at some point he noticed the employee (Jack Price) was approximately two feet from the 4 1/4 inch screen. Field said he also observed dust in the air, and small rock chips "in the area alongside the screen" (Tr. 29). He said that the walkway had a "buildup" of rock chips that was 4 to 6 inches deep (Tr. 29), and extended for about 5 feet on the east side of the walkway facing north. According to Field, Price was not wearing safety glasses. Field said he asked Price where his glasses were, and the latter said they were in the pick-up truck, and that he had just taken them off.

Fleury indicated that when he went to speak to Price when he and Field had first observed him, he told him to leave the area, and to go to where it was safe. Fleury also observed dust and rock chips airborne when he spoke to Price, but indicated that they were coming from the crusher below the walkway, and were not falling on the walkway.

After Field spoke to Price, he informed Fleury that he was going to issued an Order alleging a violation of 30 C.F.R. § 56.15004, supra.

Based upon the above, I conclude that inasmuch as an employee (Price) was observed around an area where there were airborne particles that could cause injuries to unprotected eyes, and the employee was not wearing safety glasses, Respondent did violate Section 56.15004 supra.

2. Unwarrantable Failure

According to Field, he asked Price if Fleury had told him to get his glasses and he answered "no" (Tr. 102). Fleury did not contradict this statement.

As discussed above, I(A)(3) infra, there is no evidence that Respondent had any policy not to advise employees to wear safety glasses. Nor is there any evidence that Fleury was aware that Price was not wearing glasses until he approached him, as Fleury had been with Field for the entire time between when he issued

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[2] The employee was subsequently identified by Fleury as Jack Price.

Citation No. 3866162 and Order No. 3866175. When Fleury noted that Price was not wearing glasses, although he did not order him to get safety glasses, he asked him to leave the area to get to a safe area. Within this framework, I find that it has not been established that the violation herein resulted from any aggravated conduct on the part of Respondent. Hence, it has not been established that the violation was a result of Respondent's unwarrantable failure. (See Emery, supra).

3. Significant and Substantial

The record establishes that Price was, at the time he was cited by Field, within a few feet of airborne rock chips, and was not wearing safety glasses. However, then is no evidence as to the duties he had to perform which would have required him to remain in the immediate area of exposure to airborne particles. There is no evidence regarding the amount of time Price would have been exposed to airborne particles in the subject area, in the normal course of his duties. For these reasons, and for the reasons set forth above, I(A)(2) infra, I find that it has not been established that there was a reasonable likelihood of an injury producing event i.e., an eye injury. Hence it has not been established that the violation was significant and substantial. I find that a penalty of $150 is appropriate.

II. Docket No. YORK 92-71-M

A. Citation No. 3866159

On September 17, at about 10:30 a.m., Field required an operator of a 35 ton Euclid haul truck to test the brake lights by applying the brake pedal. The brake light did not work. According to Field, the operator told him that he did not realize or know that the brake light did not work.

The vehicle in question travels from the plant to the Quarry and back. Part of this route goes down an incline which Field estimated to be 15 percent. In addition, two other haul trucks, a water truck, and a maintenance vehicle, travel the same route. There are no obstacles, or stop signs between the plant and the quarry.

Field issued a citation alleging a violation of 30 C.F.R. § 56.14100(b), which provides that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent a creation of a hazard to persons." Clearly the lack of a functioning brake light was a defect. Since other vehicles travel the same route, it is conceivable that should the subject vehicle have stopped without warning due to a break-down of equipment, a vehicle following it might have collided with it. Hence, this defect is one that affects safety.

In order for there to be a violation of section 56.14100(b), supra, it must be established that a defect that affects safety was not corrected "in a timely manner". The operator of the vehicle had informed Field that he did not know that the brake light did not work. There is no evidence as to how long this safety defect had existed before it was noted and cited by Field. Under these circumstances, I conclude that it has not been established that Section 56.14100(b), supra, was violated.

B. Citation No. 3866160

At approximately 10:40 a.m. on September 17, Field observed that a brake light was not working on another 35 ton Euclid haul truck. According to Field, the operator told him that he had not noticed that the brake light was not working. There is no evidence as to how long the brake light had not been working prior to the time it was noted by Field. There is also no evidence as to when the vehicle was last examined, and what was noted upon that examination. Accordingly, for the reasons discussed above regarding Citation No. 3866159 it is concluded that Petitioner has not established a violation of Section 56.14100(b), supra.

C. Citation No. 3866161

1. Violation of 30 C.F.R. § 56.14112(b)

Field indicated that when he and Fleury were at the primary portable crusher on September 17, they observed a guard on the ground. This guard was approximately 4 to 5 feet long, 3 feet high, and 16 inches wide. Fleury indicated that he did not know why it was not in place, and that he had not previously noticed that it was not in its usual place. According to Field, the lower drive pulley of the belt was exposed. He also indicated that the pinch-point of the pulley was 5 1/2 feet above the ground. The unguarded pulley was in operation. Field opined that although it would have been impossible to reach in and touch the unguarded pulley intentionally, a person could have tripped and then touched it accidentally.

Fleury did not contradict the observations of Field that the guard was not in place over the tail pulley, and that the pulley was in operation.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14112(b). Section 56.14112(b) supra, provides that guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

Inasmuch as when observed by Field, the belt and the pulley were in operation, and a guard was not in place, I find that

Section 56.14112(b), supra, was violated.[3]

2. Significant and Substantial

According to Field, he observed a loader operator walking within 4 feet of the unguarded pulley while it was in operation. He indicated that a person in close proximity to the unguarded pulley could have tripped and touched it, and a serious injury could have resulted such as loss of an arm or fingers, as the pulley was rotating at a high rpm. However, the pinch-point was 5 1/2 feet off the ground. There is no evidence that there were any significant slipping or tripping hazards present. Within this framework I find that although inadvertent contact with the pulley could have occurred, it has not been established that this event was reasonably likely to have occurred. Accordingly, I conclude that it has not been established that the violation was significant and substantial.

According to the uncontradicted testimony of Fleury, a foreman, Dennis Kelly, told him that the guards had been taken off the night before in order to facilitate the checking of the tension of a new belt that had been installed on September 16. I find this factor to mitigate Respondent's negligence herein somewhat. I find that a penalty of $75 is appropriate.

D. Citation No. 3866163

According to Field, the tail pulley of the portable stacking conveyor belt located at the discharge end of the portable crusher, was missing a top guard and two side guards. Field said that the top of the tail pulley was 6 feet above the ground, the tail pulley was 16 inches in diameter, and the pinch-point was at the bottom of the tail pulley. The pulley was in operation.

Fleury indicated that the top guard was on the ground. He said that he was told that the guard had been removed to allow the belt to be cleaned. According to Fleury, the conveyor was resting on a rock that he estimated at being almost 6 feet above the ground. He said that the opening on each side of the pulley began 6 inches above the rock, and that the tail pulley was recessed 6 inches inside the frame. I find that the testimony of

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[3] Fleury indicated that the guard had been removed the evening of September 16, as a new belt had been put on the conveyor the end of the shift of September 16, and its tension had to be adjusted. Fleury indicated that the belt had to be tested after it ran, and that it is not possible to check the tension in the belt without removing the guard. However, there is no evidence that, when cited, testing or adjusting were being performed. To the contrary, the evidence establishes that the belt was in operation when cited by Field.

Fleury is insufficient to establish, as argued by Respondent, that since exposed moving parts were more than 7 feet from walking surfaces, guards were not necessary.

I find that Respondent did violate Section 56.14112(b), supra as alleged by Field in the Citation he issued, as the tail-pulley was being operated, and the guard was not securely in place.

The pulley at issue was a self-cleaning pulley with fins that protruded from the pulley, and provided an additional source of potential injury. Field testified in essence, that he observed an employee within 3 feet of the pinch-point. He opined that it was reasonably likely that someone would contact the pinch-point sooner or later, and should this occur a serious injury would result.

Field did not measure the distance from the path taken by employees to the pinch-point, nor did he provide the basis for his opinion that the top of the tail pulley was 6 feet above the ground, and the diameter of the pulley was 16 inches. In contrast, Fleury indicated that he is 6 feet tall, and the bottom of the pulley was at eye level. According to Fleury, the pulley was set back 6 inches from the frame. He also stated that no one is assigned to work at the location in issue on a regular or irregular basis. There is no evidence of any walking or stumbling hazards in the area in question. Within this framework I conclude that it has not been established that the violation was significant and substantial. (See U.S.Steel, supra,)

According to Field, the lack of the guard was easily seen. He said that when he asked Fleury why the guard was not in place, Fleury said that he had not noticed it, and did not know why it was not in place. According to Fleury, he was told that the guard was taken off so that the belt could be cleaned. I find Fleury's testimony credible. I find that a penalty of $75 is appropriate.

E. Citation No. 3866164

On September 17, on the west side of the walkway, Field observed a spoked balance wheel at the east end of the crusher, moving at a high revolution per minute (rpm). According to Field, the wheel, which was 4 feet in diameter, was approximately 1 foot from the edge of the walkway in a lateral direction. Field indicated that, about 2 feet above the walkway rail, the top of the balance wheel was unguarded.

According to Field, the walkway was 30 inches wide. He said he observed the loader operator walk on the walkway "right by" the unguarded balance wheel in question. (Tr. 474).

On cross-examination, Field indicated that there were no pinch-points in the spokes of the wheel, and that the outside surface of the wheel is smooth. Field also indicated that diagonal straps between the walkway and the rotating wheel, could prevent a person from falling onto the balance wheel. He opined that the pinch-point still can be contacted by a person on the walkway by reaching between the crusher and the balance wheel. However, he could not recall the distance between these items.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14107(a), which, as pertinent, provides that "Moving machine parts shall be guarded to protect persons from contacting ...fly-wheels... and similar moving parts that can cause injury."

Due to the position of the wheel in relation to the walkway, I find that the exposed wheel can be contacted. Should one come in contact with the moving balance wheel, an injury can result. Accordingly, it has been established that Respondent herein did violate Section 56.14107(a), supra.

Field expressed his concern that since the wheel was not guarded, a person could contact the wheel by reaching around from the walkway between the crusher and the balance wheel. Field indicated that this movement could be done "very easily" over the bars (Tr. 496). However, he could not recall the distance between the crusher and the balance wheel. There is no evidence of the presence of any tripping, stumbling, or slipping hazards in the area in question. There is no evidence that persons regularly travel on the walkway. Two diagonal straps between the walkway and the exposed fly wheel could prevent a person from falling onto the balance wheel. Within this context, I conclude that although inadvertent contact with the unguarded wheel could have occurred, such an event was not reasonably likely to have occurred. Hence, it has not been established that the violation was significant and substantial (See, U.S. Steel, supra).

According to Field, the lack of the guard was "easily recognizable" (Tr. 476). The cited condition was 1 foot above the floor, and was along the walkway. Considering this fact along with the other factors set forth in Section 110(i) of the Act, I find that a penalty of $125 is appropriate.

F. Citation No. 3866165

1. Violation of 30 C.F.R. § 56.3131

According to Field, on September 17, there were several loose objects at the top of the 75 foot high highwall to the left and the right of the loader operator who was loading muck from a pile on the ground at the base of the highwall. He said that the loader operator was 30 feet to the left of a "chimney" (a series of stacked layers of limestone). He said the chimney was 6 to 8

inches wide at the top of the highwall, and had separated from the highwall. He said the separation narrowed towards the bottom of the highwall. He also described a chunk of loose material 6 feet by 8 feet by 2 1/2 feet on the top edge of the highwall in front of the loader. He indicated that, from the floor of the quarry, a gap could be seen around this chunk. Field opined that if the loader operator continued working to the left picking up muck from the pile, he then would be under this chunk. Field also observed several smaller chunks between this large chunk and the chimney. He said he also saw smaller chunks on the floor.

Field opined that if the chimney would fall it could go through the windows of the loader. He said, in essence, that the loader has roll-over, and "fall-object protective structures", but a large object falling from the highwall could knock the loader over, causing a serious injury to the operator inside the loader.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.3131 which provides as pertinent, as follows:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

Field was asked if he knows how long it took Fleury to remove the large chunk that he cited. Field answered as follows: "I believe he said he just touched it with the dozer blade or loader and it fell." (Tr.528) In contrast, Fleury indicated that he operated a 50 ton hydraulic jack between the rock and the highwall to remove the rock, and it took two hours to push it 3 feet away from the highwall when it fell. He said that it fell 50 or 60 feet to the left of where the loader operator was operating. I observed Fleury's demeanor in this regard, and found his testimony on this point credible. Fleury said that, in addition, in order to abate the Citation, he pushed loose material with his feet from the top of the highwall. He estimated this material as being between 6 inches and a foot square. Fleury indicated that he went to the bottom and top of the highwall with Field, and did not see any chimney. He said that Field did not tell him that he observed a condition that he described as a chimney. He said he did not see any crack in the wall that went down to the toe as described by Field.

Although the evidence is in conflict with regard to the existence on the highwall of a chimney or a layer of limestone to the right of the operator, I find that there was <u>some</u> loose

material at the top of the highwall. Also, there was a large chuck of material on the top of the highwall, as described by Field and not contradicted by Fleury. The presence of the loose material, and the chunk created some degree of "fall-of-material-hazard" to persons. It also is clear that following the normal course of mining, the loader operator would have been placed below the chunk of material. Hence, I find that Respondent did violate Section 56.3131, supra.

I find Fleury's testimony credible that it took the 50 ton hydraulic jack two hours to remove the chunk of material from the top of the highwall. Also, there is no evidence to predicate a finding that it was reasonably likely for the smaller pieces of loose material at the top the highwall and for the chimney condition to have fallen. I thus conclude that it has not been established that the violation was significant and substantial. For the same reasons, I conclude that the violation was of a low level of gravity. According to Field the loader operator told him that he had pointed out to his supervisor the existence of the large chunk on the highwall, small chunks, and the chimney. However, there is no evidence establishing when he pointed this out to his supervisor. Field said he asked Fleury why the conditions existed, and Fleury told him that he did not realize the conditions still existed, as he thought they had been taken care of the previous week. According to Fleury, the highwall had been blasted 3 or 4 days prior to the inspection, and he had inspected the perimeter of the highwall for loose material. Loose material was removed by an excavator. He also indicated that he reinspected the highwall on September 17, and loose material was removed. I thus find that Respondent's negligence herein was only of a moderate level. I find that a penalty of $50 is appropriate.

G. Citation No. 3866167

On September 17, Field inspected a site at the subject mine that contained six dump piles. The total area of the piles was approximately 125 feet long[4] and 50 to 60 feet wide. Access to the site was by way of a ramp, and the site was 10 feet higher than the lower level. There were no berms on the left and right side of the piles. Field indicated that Fleury told him that up until two weeks prior to September 17, dump trucks drove up the ramp, and backed up on top of the piles to dump their load. Field further indicated that Fleury told him that a bulldozer was used to push material off the piles. Field did not go to see the back side of the piles.

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[4] On cross examination Field said that total length of the piles was 50 to 60 feet, and that each pile was 8 to 10 feet wide.

Fleury testified that between March 1, 1991, and September 1, 1991, he was usually at the subject site 3 to 4 times a week, and observed operations on the dump piles. According to Fleury, in normal operations before a truck backs up to dump, a bulldozer is placed towards the edge of the pile. The truck then backs up alongside the bulldozer, which is approximately the same length as the truck, and which is used as a reference point to "spot" the trucks.

Field issued a Citation, which, as modified, alleges a violation of 30 C.F.R. § 56.9301 which provides that berms "...shall be provided at dumping locations where there is a hazard of overtravel or overturning". Since the site in question was approximately 10 feet higher than the ground below it, and since the dump trucks in their normal operation back up on the piles to unload, there clearly was a hazard of overtravel or overturning, in spite of Respondent's practice for bulldozers to "spot" dump trucks. I therefore conclude that Respondent did violate Section 56.9301.[5]

According to Field, if a truck would go over the edge of a pile, it would overturn. In that event bruises, sprains, fractures or even a fatal injury were reasonably likely to have resulted. However, although the record establishes that there was a hazard that a truck could have backed over the edge of the dumping site, there is no evidence in the record to base a finding that the conditions were such that this accident was reasonably likely to have occurred. Accordingly it must be concluded that the violation was not significant and substantial.

I find that a penalty of $75 is appropriate for this violation.

H. Citation No. 3866170

Respondent's Case 580-C backhoe ("backhoe") is equipped with a right brake, and a left brake. These two brakes can be operated independently by two separate pedals. In the alternative, if a bar is placed over both pedals, the two brakes can be operated at the same time. According to Field, on September 17, when the vehicle in question was in reverse, he had the operator apply the two brakes by stepping on the bar that applied pressure to both pedals. According to Field, the left rear wheel locked-up, and the front of the vehicle pivoted to the

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[5] I reject Respondent's argument that the Citation should be dismissed as the sites at issue were not being used at the date of the inspection. In normal operations there was a hazard of over-travel or overturning. Hence, the lack of berms constituted a violation of Section 56.9301, supra as set forth above.

right. When the backhoe was examined after Field noted the above, the left brake fluid reservoir was empty. Field said he believed that he asked Fleury where the backhoe is used and said "its throughout the plant" (Tr. 654) Field said that the backhoe goes down ramps. Fleury did not contradict this testimony.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14101(a)(3) which provides that: "All braking systems installed on the equipment shall be maintained in functional condition."

Fleury testified that after the Citation was orally issued he had only the right brake pedal applied, and the vehicle stopped.

Essentially, at the hearing, it was Respondent's position that, inasmuch as the backhoe is designed to be stopped with either brake, and does stop when either brake is applied independently, the brakes were functional. Respondent argued that there is not any regulation requiring that there be no differential between the right and left side brakes. Respondent also argues that there is no requirement for the vehicle to stop in a straight line.

According to Section 56.14101(a)(3) supra the braking systems are to maintained in "functional condition". Subsection (a) of Section 56.14101 is headed "minimum requirements", and provides that "...equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels."

I find that the backhoe can be stopped by either the right brake or the left brake operating independently. However, I further find, based on the uncontradicted testimony of Field, that when both brakes were depressed at the same time by use of a bar, the backhoe did not stop right away, but the left wheel locked-up causing the vehicle to pivot. Accordingly, since the backhoe did not stop when both brakes were applied simultaneously, the braking system was not being maintained in functional condition. I thus conclude that the Respondent did violate Section 56.14101(a)(3), supra as alleged.

Field opined that if the brakes were to be applied "hard" (Tr. 641), an operator would loose control, the vehicle would spin. He said it then could pivot and strike machinery, or a support beam, and could overturn causing serious injuries. Certainly this series of event can occur. However due to the lack of evidence in the record as to the specific distances of this vehicle to structures and other vehicles in the area it travels, I conclude that it has not been established that an injury producing event was reasonably likely to have occurred. Accordingly it is concluded that the violation was not

significant and substantial.

According to Field, he believed the backhoe operator told him he did not notice the condition of the brakes. Further, Field said that Fleury indicated that he was not aware of the condition of the brakes. I find Respondent's negligence to have been more than moderate as an operator of the backhoe should have been aware of the condition of the brakes. I find that a penalty of $100 is appropriate.

I. Citation No. 3866171

According to Field, the upper pulley of the No. 1 conveyor belt was approximately a few inches laterally removed from the walkway. He said the pinch-point of the pulley was 27 inches above the walkway. Field said that the diameter of the pulley was 8 to 10 inches, half of the diameter was not guarded, and the pinch-point was exposed. According to Field, Fleury, who was with him, said that he could see the pinch-point was exposed. Field indicated that Fleury told him that no persons are required to be in the area when the belt is in operation, but someone could go there to investigate should the belt in that area emit any noise. Field issued a Citation alleging a violation of 30 C.F.R. § 56.14107(a).

Fleury testified that, when cited by Field, the pulley in question and its pinch-point were covered by a guard as depicted in photographs taken later on that day, and before any work had been undertaken to abate the violative condition (Exhibits R-9 and R-10). Further, according to Fleury, the distance between the pinch-point and the outer edge of the guard that was in place when cited, was 1 foot 7 1/2 inches. He said that to abate the Citation, the guard that was in place was removed, and another guard was installed which was one inch longer. In rebuttal, Field testified that the pictures that Fleury referred to did not depict what he had observed. He said that the guard that he had observed extended only to the center of the diameter of the pulley, was a few inches short of the pinch-point, and did not cover the pinch-point.

I closely observed the demeanor of the witnesses when they testified, and I found Fleury to be the more credible witness. I thus find based upon the testimony of the Fleury, that the pinch-point was guarded, and hence there was no violation of Section 56.14107(a) supra.

J. Citation No. 3866172

According to Field, at approximately 2:00 p.m. on September 17, he observed the No. 2 belt, and saw that there was no guard around the bottom of the take-up self-cleaning pulley to prevent contact with the nip-points. Field said that the pulley

was a couple inches above an eye level. He said that his height is 6 feet 2 inches, and he was 4 to 6 feet away when he made his estimates that the bottom of the pulley was six feet off the ground, and the pinch-point was 6 feet 8 inches off the ground. Field did not measure the diameter of the pulley. Field said that Fleury told that an employee is required to go to the area to shovel at the base of the conveyor. Field indicated that he also observed footprints in the area.

According to Field, on September 18, when he returned to the subject site, Fleury told him that he had the pulley guarded. Field observed two side guards in place. He asked Fleury "...to extend the guard." (Tr.765)

In contrast, Fleury testified that on September 18, he was with Field at the tail pulley about noon, and at that time four guards were in place, and Field had said that the violative condition was properly abated. Also, Fleury indicated that at the time the citation was issued there two guards in place as depicted in a photograph (Exhibit R-19) taken later on that day before anything had been done to correct the violative condition. Fleury said that these guards had been installed two months prior to the date Respondent was cited. Also, according to Fleury, after the Citation was issued, two more screens were added in the front and in the back of the pulley. He said that pictures taken on September 17, measure the height of the guard and the pinch-point. (See, Exhibits R-11 and R-12 indicating the height of the pinch-point as a few inches above 7 feet).

Field cited Respondent for violating 30 C.F.R. § 56.14107(a) which, in essence, requires moving machinery parts to be guarded. I find that Section 56.14107(a), supra, must be read along with subsection (b) of Section 56.14107, supra, which unequivocally provides that guards shall not be required where the exposed moving parts are at least 7 feet away from walking or working surfaces. I place more weight upon the ruler measurement of the distance to the pinch-point taken by Fleury, as opposed to the estimate testified to by Field which was not based upon any actual measurement. I thus find that the pinch-point was more than 7 feet from the ground. Thus there was no requirement to guard the pinch-point.

However, since the pinch-point was only a few inches more than 7 feet above the ground, I find that the bottom of the pulley, which is below the pinch-point, was less than seven feet from the ground. Footprints were observed in the area by Field. Hence, I conclude that there were moving parts of the pulley less than 7 feet from a walking surface. Hence a guard was required to protect the bottom of the pulley. I observed the witnesses' demeanor, and found Fleury more credible regarding his testimony that on the date cited the pulley in question was protected by guards on 2 sides. However, even according to Fleury's testimony

2 sides were unguarded, with the moving part of the bottom of the pulley less than 7 feet off the ground. Thus Respondent did violate Section 56.14107 supra.

Taking into account the fact that the pinch-point was more than 7 feet above the ground, and the fact that exposed moving parts were close to 7 feet above the ground, I find that it has not been established that an injury producing event, i.e., contact with unguarded moving parts, was reasonably likely to have occurred. Thus it has not been established that the violation was significant and substantial. I find that a penalty of $50 is appropriate.

K. Citation No. 3866173

According to Field the C-8 belt conveyor take-up pulley, a self-cleaning pulley, was 4 feet above the ground. Although there were guards on the sides and on top, a back guard panel was missing, and the pinch-point was exposed.[6] Field said that the pinch-point was about 3 1/2 to 4 feet above the ground.

Field issued a Citation alleging a violation of 30 C.F.R. § 56.14112(b), which provides as follows: "Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard."

Section 56.14112(b) is violated if guards are not securely in place "while machinery is being operated". The only evidence of record on this point is Field's testimony regarding the conveyor as follows: "It was delivering material to the upper level." (Tr.808) This statement was provided by Field as a response to the following question: "And were you able to observe the purpose of this C-8 conveyor?" (Tr. 808). In this context, I find Field's testimony ambiguous as to whether the conveyor was actually observed in operation delivering material, or as to whether in Field's opinion such is the purpose of the conveyor. I thus find that the record is inadequate to establish that when observed by Field, the unguarded pulley was being operated. Hence, I conclude that it has not established that Respondent violated Section 56.14112(b) supra.

L. Citation No. 3866174

According to Field, on September 17, he observed the balance

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[6] I accept Field's testimony that the side parallel to the back did not have to be guarded as there was no access to that side.

wheel[7] of the "five and a half screen" (Tr. 824). Field said that the lower half of the balance wheel was exposed. According to Field, the bottom of the wheel was 4 1/2 feet above the edge of a walkway and adjacent to it, although he could not recall the lateral distance between the two. On cross-examination Field testified that the distance between the balance wheel and the walkway was a few inches. He approximated the diameter of the wheel as 16 inches. He said that the wheel was operating at a high "rpm". He was asked the location of the pinch-point and he indicated that "...To get your hand in between these spokes while this balance wheel is rotating, get your hand in the spokes and then there was a housing above it where your hand would get pinched" (sic) (Tr. 825).

Field opined that due to the protrusion of bolts on the face of the wheel, a hand coming in contact with the wheel could be lacerated or broken upon contacting the bolts.

Field issued a Citation alleging a violation of Section 56.14107(a), supra.

According to Fleury, a guard did cover most of the wheel leaving only a small segment, less than half the area of the wheel exposed, as illustrated on a photograph (Exhibit No. R-15) taken on September 17, after the area was cited and before anything had been done to cure the violative condition. He also testified that, as illustrated by Exhibit R-16, the measured distance between the subject wheel and the guard was 13 inches.[8] Also Fleury testified that employees worked only in assigned areas, and that no one was assigned to work in the cited area, and no one is required to be in the area when the conveyor is operating and the wheel is turning.

Although the evidence is in conflict regarding the extent of the unguarded portion of the wheel the record is clear that at a minimum, a section of the wheel that extended down from the top guard approximately 2 1/2 inches, was not guarded; that the wheel contained exposed bolts protruding from the surface; and that the wheel was moving. Due to its location in proximity to a walkway, it is conceivable that a person traversing the walkway could have

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[7] He testified that the wheel was spoked. However he observed the wheel only when it was spinning, and concluded that it was spoked based on the blurs that he saw at that time. A photograph of the wheel indicates that it was not spoked. (Exhibit R-15 and R-16)

[8] On cross-examination, it was elicited that he measured the distance between the wheel and a point on the guard that protruded approximately 5 inches from the surrounding surface.

fallen and come in contact with the exposed moving wheel and bolts, and could have sustained an injury. The fact that persons are not assigned to work in the area does not negate the possibility that at sometime a person could traverse the walkway, and stumble or trip in the area in question. Hence, I find that the Respondent herein did violate Section 56.14107(a).

Field opined that the lack of a guard herein was easily recognizable. However, no persons are assigned to work in the area in question. Also, Petitioner did not rebut or contradict Fleury's testimony that Respondent had not been cited in the past for inadequate guarding in this area. I conclude that Respondent's negligence was only moderate. A penalty of $20 is appropriate.

III. Docket No. YORK 92-72-M

A. Citation No. 3866180

On September 19, 1991, Field observed that when the operator of a 580-C backhoe turned on the motor for the windshield wiper, it did not work. He also noted that a wiper blade and a wiper arm were also missing. According to Field, the operator of the backhoe informed him that he had been at the quarry cleaning spillage. Field noted that there was dust on the windshield, the windshield was wet, and light rain was falling. Field said that vision through the windshield was obscured. However, he did not observe the windshield from looking at it from inside the vehicle.

Field issued a Citation alleging a violation of Section 56.14100(b), supra.

The testimony of Field establishes that, as observed by him on September 19, the vehicle in question was missing a wiper blade and arm, and the wiping mechanism did not work. The windshield had dust on it and also light rain was falling. Under these circumstances, I find that the conditions observed by Field were defects that created a hazard inasmuch as the view of the operator would certainly be obscured given the continuation of normal mining operations.

Field had previously observed and partially inspected the same vehicle on September 17, when he cited it in connection with Citation No. 3866170. He also reexaminated it again on September 18, in connection with the abatement of Citation No. 3866170. On neither of these occasions did he observe that the wiper arm and blade were missing. Also Field indicated that on September 17, the operator of the vehicle in question did not complain to him about the lack of wiper blades. According to Field, Fleury told him that no one had reported to him (Fleury) that the wiper blade and arm were missing, and he had no knowledge of these conditions.

According to Field, on September 19, 1991, the backhoe operator asked him if he could obtain a windshield wiper. Field asked the operator if he had reported the lack of a wiper to his supervisor after the pre-shift examination. Field said that the operator indicated that he had not because he and others had reported, "the condition" in the past and had not been able to get a wiper. (Tr.866) Field did not know when these reports were made. Neither the operator of the backhoe nor any other individual who allegedly made these reports testified in this matter. There is no indication whether the lack of this specific wiper and wiper blades had been reported to Respondent. Based on all these facts, I conclude that although there were defects observed by Field on September 19, there is insufficient evidence to establish that Respondent did not timely cure the defects, as it has not been established the length of time that Respondent had been aware of the conditions on the backhoe at issue. Accordingly, this Citation is DISMISSED.

B. Citation No. 3867541

At the hearing Petitioner indicated in its decision to vacate this Citation. Petitioner's request in this regard is granted.

ORDER

It is ORDERED that:

(1) Docket No. YORK 92-119 be DISMISSED; (2) The following Citation Nos. be DISMISSED: Nos. 3866158, 3866159, 3866160, 3866171, 3866173, 3866180, 3866754; (3) Respondent shall pay a total civil penalty of $1,157 within 30 days of this Decision.

Avram Weisberger
Administrative Law Judge

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