FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 19, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. CENT 95-261-M
	:	A.C. No. 39-00993-05514
v.	:	
	:	Docket No. CENT 95-267-M
HIGMAN SAND AND GRAVEL, INC., Respondent	:	A.C. No. 39-00993-05515
	:	
	:	Docket No. CENT 96-30-M
	:	A.C. No. 39-00993-05516
	:	
	:	Screener Plant #1

DECISION

Appearances: Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Amchan

Findings of Fact

On July 18, 1995, MSHA representative Lloyd Ferran inspected Respondent=s sand and gravel mine in the southeast corner of South Dakota. Two Higman employees were at the mine, Mark Rasmussen, the foreman, who was feeding the hopper to the plant with a front-end loader and Eldon Seely, who was loading customer trucks with another front-end loader. Neither miner accompanied Mr. Ferran as he inspected the plant area.

Docket No. CENT 95-261-M

Citation No. 4643516, unguarded chain drive and tail pulley

When inspecting the hopper feed conveyor, Inspector Ferran discovered a chain drive and a self-cleaning tail pulley which were not guarded. They were located underneath the hopper in an enclosed area. There were doors that could close off the area in which the drive and pulley were located, but these doors were open on July 18. Inspector Ferran observed a shovel and fresh foot prints near the tail pulley, which led him to conclude that a miner had been in the area while the conveyor belt was running. Foreman Rasmussen greased equipment in the area every morning before turning on the equipment (Tr. 11-23, 169, 317-26, 372-73).

Ferran issued Citation No. 4643516 to Respondent, alleging a significant and substantial (S&S) violation of 30 C.F.R. '56.14107(a). This regulation requires the guarding of moving machine parts that can cause injury. Section 56.14107(b), on which Respondent relies in challenging the citation, exempts moving parts that are at least seven feet away from walking or working surfaces.

The inspector required termination (abatement) of the citation by the next morning, July 19, 1995. When he arrived at the worksite on the 19th, Foreman Rasmussen advised him that he had been instructed not to abate this or any other citation issued on July 18. Ferran waited until noon, then issued section 104(b) withdrawal Order No. 4643528 and left the worksite (Tr. 24-26).

The next morning, July 20, 1995, the inspector returned and found the plant operating. No action had been taken to terminate the citation. After some discussions involving Respondent, Ferran and MSHA=s headquarters office in Denver, the plant shut down about noon. Respondent terminated the violations by replacing the entire plant with other equipment (Tr. 30-33).

Respondent violated '56.14107(a)

The issue regarding the unguarded chain drive and tail pulley is whether they could Acause injury@ within the meaning of '14107(a), or whether there were seven feet away from walking or

working surfaces, and thus exempt from the guarding requirement under section 56.14107(b).

Respondent contends the regulation was not violated because the only person who ever came within seven feet of the unguarded chain drive and tail pulley was Foreman Rasmussen. More importantly, it argues that Rasmussen only was in this area before turning on the moving equipment. Each morning before turning on the equipment he greased it and shoveled under the tail pulley (Tr. 326). Nevertheless, exposure to moving parts and injury was possible.

Although Rasmussen=s normal procedure may have made injury unlikely, I believe that reliance on his practices does not preclude injury--particularly from the unguarded tail pulley. Rasmussen was asked if he ever shoveled while the tail pulley was in operation. He responded, AYou can=t, cannot. You=d end up with your arm when the shovel went in there.@ (Tr. 326).

I understand this to mean that you ordinarily do not shovel while the tail pulley is moving because it is dangerous. I infer that a situation may arise where material may build up under the tail pulley while it is running. Under such conditions, one must either turn all the equipment off or shovel with the pulley running; otherwise, the conveyor belt will tear.

The record does not indicate that Respondent had a work rule preventing shoveling when the machinery was in operation. When Ferran visited the same site a month later, Rasmussen was on vacation and Eldon Seely was in charge of the worksite. The equipment was running (Tr. 175). Although, this was different equipment than that cited in July, it convinces me that Mr. Rasmussen=s routine did not eliminate the possibility that someone might be injured by the unguarded tail pulley. I therefore find a violation of the standard.

The Secretary has not established that the violation was S&S

The Commission test for a "S&S" violation, as set forth in Mathies Coal Co., supra, is as follows:

> 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.

I conclude that given the fact that Mr. Rasmussen was normally the only person to enter the area in which the chain drive and tail pulley were located, and that he routinely did so only before the equipment was turned on, that it was not reasonably likely that the hazard would have resulted in injury in the normal course of mining operations.

Section 104(b) Order No. 4643528 is affirmed

Upon discovering a failure to abate, an inspector must apply a rule of reason in determining whether to issue a section 104(b) order or to extend the abatement date, Martinka Coal Co., 15 FMSHRC 2452 (December 1993). I conclude that Inspector Ferran acted reasonably in issuing the instant order.

On July 18, the inspector reviewed the citations and time allotted to terminate them with Foreman Rasmussen. The latter did not indicate that he would be unable to abate the citations in the time period allowed by Ferran. On July 19, Rasmussen did not tell the inspector that he needed more time to abate, he told him that Respondent would not abate (Tr. 34-35). Moreover, on July 20, when Respondent decided to comply with the abatement requirements of this and other citations, it was able to do so within a matter of hours.

I assess a $150 civil penalty for Citation No. 4643516 and Order No. 4643528

The Secretary proposed a penalty of $240 for the instant citation and order. I assess a $150 penalty on the basis of the penalty assessment criteria in section 110(i) of the Act.

Given the fact that I deem the violation to be Anon-S&S,@ I believe a penalty of $50 would be appropriate for the original citation, taking into account the low likelihood of injury (gravity), the low degree of negligence of the original violation, the fact that Respondent is a small mine operator and the absence of an indication that Respondent has a poor record of MSHA compliance in the past. The parties have stipulated that the proposed penalties will not compromise Respondent=s ability to continue in business (Tr. 5).

I deem the degree of negligence to be low because I believe that Respondent did have a reasonable good faith belief that its procedures adequately protected its miners from the unguarded moving machine parts. However, when a mine operator decides to ignore the abatement requirement in an MSHA citation, it does so at the risk that the citation will be upheld and that it may be assessed much higher penalties for its failure to abate.

The sixth factor in assessing penalties under section 110(i) is the good faith of the operator in rapidly abating a violation once it is brought to its attention. When an operator refuses to abate, and the original citation is affirmed by the Commission, the provisions of section 110(b), providing for a civil penalty of not more than $5,000 for each day during which the violation continues, should be considered. In this case, I deem it appropriate to assess an additional $50 penalty for Respondent=s failure to have abated the violation by the beginning of the work day on July 19 and July 20, 1995.

Citation No. 4643517: Inadequate handrails on an elevated platform

On July 18, Inspector Ferran observed an engine located on a platform 11-12 feet above ground level. Mr. Rasmussen climbed up a ladder each morning to turn on the engine and in the evening to turn it off. Although there was a handrail and midrail on the part of the platform furthest from the engine, the side of the platform between the ladder and the engine was unguarded for a horizontal distance of 1-1/2 feet. On the opposite side of the platform, a distance of two feet horizontally was unguarded (Tr. 36-41).

Ferran issued Respondent Citation No. 4643517, alleging an AS&S@ violation of 30 C.F.R. Section 56.11002. This regulation requires that handrails be provided and maintained on elevated crossovers, walkways, ramps and stairways. I find that the regulation is applicable. The platform provided access to the engine and therefore was an elevated walkway within the meaning of the standard.

I conclude further that the Secretary has established a violation, but not a S&S. It is possible, as claimed by Inspector Ferran, that a miner could trip and fall off the unprotected portion of the platform. However, I find that it was not reasonably likely. The only task to be performed by miners on the platform was to turn on the engine at the middle of the platform. It is therefore unlikely that one would accidently approach the unguarded portions of the edge of the platform and fall off.

Penalty Assessment for Citation No. 4643517 and section 104(b) Order No. 4643529

The Secretary proposed a $292 penalty for this citation and the section 104(b) order issued when Respondent initially refused to abate the citation. I assess a $150 penalty for reasons that are essentially the same as those considered with regard to the previous citation and order [1] .

Given the assessment criteria, other than good faith rapid abatement, I would assess a $50 penalty for the original citation. I would note, with regard to the negligence factor, that Respondent did have a reasonable belief that its employees were adequately protected from injury and that the platform was in the same condition as when it was purchased (Tr. 327-29). With respect to gravity, although injury was unlikely, the likely result of an accidental fall of 11-12 feet would be death or serious injury.

[1] My consideration of the penalty criteria is essentially the same for all the citations in these dockets unless specifically noted. Similarly, my analysis as to the validity of the section 104(b) orders will not be repeated unless it differs from that concerning Order No. 4643528.

As with the previous citation and order, I believe that the appropriate penalty for Respondent=s unwillingness to abate within the time period allowed by Inspector Ferran is a $50 per day additional penalty for both July 19, and July 20, 1995. Therefore, considering the lack of good faith in rapidly abating the original citation, I assess a total penalty of $150 for Citation No. 4643517 and Order No. 4643529.

Citation No. 4643518: Unguarded V-belt(s)

On the engine located on the elevated platform discussed above were two unguarded v-belts. One, the direct drive belt, was located on the side of the engine, right at the edge of the platform, approximately 1-**2** feet about the platform. It is clearly shown in the photographic Exhibits, G-3.

The other unguarded belt was on the engine=s alternator and was located at the front of the engine, near the start/stop button about 3-1/2 feet off the ground. It can be seen in the bottom photograph of Exhibit G-3 and in Exhibit G-4 (albeit mounted upside down).

Inspector Ferran issued Respondent Citation No. 4643518 which states:

> The v belt on the direct drive unit was not guarded adequately to prevent accidental contact with the pinch point. This hazard was approximately one foot off the landing, and extending to 1 **2**[.] employee (sic) are in this area on a daily basis starting and stopping the motor.

The citation initially alleged a non-S&S violation of '56.14107(a), but was modified on July 20, 1995, to allege an AS&S@ violation.

Inspector Ferran exhibited a great deal of confusion in describing this citation at hearing. At first, he testified that the citation referred to the direct drive belt. Then he recanted and testified that the citation referred to the alternator belt (Tr. 51-62). The inspector conceded that the direct drive belt does not require a guard because its location precludes employee contact while it is moving (Tr. 70).

The Secretary=s counsel moved at hearing to amend the citation to allege a violation with respect to both belts (Tr. 64-65). Respondent opposed the motion, moved to dismiss the citation and moved to exclude Exhibit G-4, which depicts the alternator belt.

The citation clearly describes the direct drive belt. I find no violation of section 56.14107(a) with respect to this belt. Aside from Inspector=s Ferran=s concession, the record establishes that the belt was started and stopped from the ground and that it was not moving when Foreman Rasmussen was on the elevated platform to start the engine (Tr. 339-42, 375-76).

It is a close question as to whether I should allow the Secretary to amend Citation No. 4643518 to include the alternator belt. Respondent claims prejudice in that it was not on notice from the language of the citation that the absence of a guard on the alternator belt was an issue in this proceeding. Ferran claims that he discussed this belt with Rasmussen during the inspection (Tr. 69). Rasmussen testified that Ferran never mentioned the alternator belt to him (Tr. 339). I credit Rasmussen=s testimony in this regard, because it is corroborated by the language of the citation itself.

The Commission=s procedural rules do not address amendment of pleadings. Therefore, the Commission looks for guidance to the Federal Rules of Civil Procedure and particularly Rule 15, Cyprus Empire Corporation, 12 FMSHRC 911, 916 (May 1990). The portion of Rule 15 that is relevant to the instant proceeding starts with the third sentence of Rule 15(b):

> If evidence is objected to at the trial on the ground that it is not within the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining

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To start the direct drive belt Rasmussen pushed the clutch with a pole from the ground. To turn the belt off, he pulled a string attached to the clutch from ground level (Tr. 339-342).

> the party=s action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

See, J. Moore, Moore=s Federal Practice Par. 15.14, 20 ALR Fed 448.

When Respondent=s counsel prepared for the hearing, he did not discuss the alternator belt with either Foreman Rasmussen or Harold Higman, Jr., part-owner of Respondent (Tr. 338, 396-397). Nevertheless, I conclude that Respondent is not substantially prejudiced by the amendment. Mark Rasmussen was familiar enough with the alternator belt to adequately defend Respondent against the allegation that the absence of a guard violated section 56.14107(a).

Rasmussen testified that the alternator belt is recessed approximately three inches inside the housing of the front of the motor, but was not completely inside the housing. He was able to recognize the location and configuration of the belt from Exhibits G-3 and G-4. He testified that a miner would Ahave to try hard@ to get caught in the belt. Finally, when asked if he could lean up against the metal housing without Agetting in trouble with the belt,@ Rasmussen responded, AI could but I don=t know about the next guy... .@ (Tr. 343).

I conclude that Respondent had a sufficient opportunity, through Rasmussen, to prove that the alternator belt was either adequately guarded or posed no hazard to miners without a guard. Therefore, I conclude that Respondent was not materially prejudiced by the amendment, which is granted so that the citation includes an allegation of lack of guarding of the alternator belt. Further, I conclude that the record clearly establishes a violation of section 56.14107(a) with regard to this belt.

In allowing the amendment, I have also considered that while the violative equipment was removed from service by Respondent, it is possible that it will be returned to service. Given the lack of material prejudice to Respondent from the amendment, I believe the purposes of the Act are best served by imposing a legal requirement to guard the alternator belt if this equipment is used again.

Citation No. 4643518 is affirmed as a non-S&S violation and a $50 civil penalty is assessed. Section 104(b) Order No. 4643530 is vacated

The record is insufficient to establish that there was a reasonable likelihood of injury resulting from Respondent=s failure to guard the alternator belt. The belt was partially recessed in the housing of the engine motor and exposure to the belt was limited to the brief period of time that Rasmussen or another miner would turn the engine on or off (Tr. 42, 343). I therefore find the violation to be non-S&S.

Respondent was also issued section 104(b) Order No. 4643530, for its refusal to terminate this citation. Since the citation does not accurately describe the violative condition, Respondent cannot be fairly held accountable for its failure to immediately guard the alternator belt. I therefore vacate Order No. 4643530.

Having considered the penalty criteria in section 110(i), I assess a $50 civil penalty for Citation No. 4643518. In assessing such a low penalty, I have placed great weight on the fact that it is not clear the violation was even detected by Inspector Ferran, which I think indicates that Respondent=s negligence in not guarding the alternator belt was very low. My consideration of good faith attempts at abatement and gravity are included in my discussion of the AS&S@ issue and the section 104(b) order.

Citation No.4643519: Opening in cover of a self-cleaning tail pulley

Inspector Ferran observed a two-foot by nine-inch opening in the cover of a self cleaning tail pulley on the stacker conveyor (Tr. 74-86, Exh. G-5). He then issued Citation No. 4643519 to Respondent alleging a non-S&S violation of section 56.14107(a).

This citation is affirmed. Although there were no grease fittings inside the opening of the cover, it was possible for a person to trip, fall and get a hand in the tail pulley. Moreover, although cleaning under this pulley was usually done with a front-end loader, it could have also been done with a shovel (Tr. 345-49).

Ferran also issued section 104(b) Order No. 4643531 for Respondent=s failure to timely abate this citation. Taking into account the small likelihood of injury, I conclude that a $25 civil penalty is appropriate for the initial citation. An additional $50 is assessed for the two days that the violation continued after termination was required for a total penalty of $75.

Citation No. 4643522: Failure to provide records of continuity and resistance tests

On July 18, Inspector Ferran asked Foreman Rasmussen to show him the continuity and resistance records of the plant=s electrical grounding systems. No such records were provided to Ferran, although some records of continuity and resistance tests were kept at Respondent=s offices in Akron, Iowa, eight miles from the Richland Pit. I credit Inspector Ferran=s testimony that he was not told about the records at Akron (Tr. 218).

Ferran issued a non-S&S citation alleging a violation of section 56.12028. That standard requires that continuity and resistance testing of grounding systems be performed after installation, repair, and modification; and annually thereafter. It provides further that the most recent test results shall be provided to an inspector upon request.

I conclude that the standard requires that the mine operator bring the test results to the mine site, if the Secretary=s authorized representative so requests. An operator who insists that the inspector travel elsewhere is in violation of the regulation. Moreover, I conclude that Respondent did not have results of resistance and continuity tests performed in the previous year on the grounding systems at Richland because none had been performed.

On July 20, 1996, Inspector Ferran assisted Rasmussen in terminating the citation by helping him perform the continuity and resistance tests. Rasmussen testified that he Ahad kind of forgotten how to do it@ (Tr. 350-51).

Ferran discovered that one of the grounding wires on the motor junction box had been disconnected (Tr. 92). Rasmussen believed the wire may have become detached in the early spring of

1994 when the motor had been repaired in Akron (Tr. 351). There is no indication that any other event occurred after the spring of 1994 that would have knocked the grounding wire loose.

I infer that had continuity and resistance testing been performed since that repair work, the detached ground wire would have been detected. Moreover, if records of continuity and resistance tests performed within the year prior to the inspection were in Respondent=s files at Akron, copies could have been produced at hearing. I infer from the failure to produce such records that there were no such records for the year prior to July 18, 1995.

I assess a $25 penalty for Respondent=s initial failure to provide records that complied with the requirements of the standard. I assess $25 for each day that it persisted in this refusal, for a total penalty of $75 for Citation No. 4643522 and 104(b) Order No. 46435532. This assessment does not take into account the gravity of Respondent=s failure to perform continuity tests on its equipment within the year prior to the inspection. I decline to assess such a penalty since the Secretary did not cite for failure to perform the test. I note, however, that the failure to test created a situation where inadequate grounding of the equipment was allowed to persist and posed serious potential hazards.

Citation No. 4643524: Failure to conduct workplace examinations

On July 18, Inspector Ferran issued Citation No. 4643524 alleging a violation of section 56.18002(a). That regulation requires that a competent person examine each working place at least once each shift in order to detect safety hazards. Mr. Rasmussen told the inspector that he performed such examinations but that he kept no records of his examinations (Tr. 97-98). Ferran concluded that if daily workplace exami - nations were being performed, he would not have found the number of violations that he detected (Tr. 102).

I vacate this citation and credit Mr. Rasmussen=s testimony that he examined all working places each day when he greased the equipment (Tr. 352-53). The fact that Ferran found a number of violative conditions may be the result of Respondent=s belief

that the conditions cited were not violations, rather an indication that workplace examinations were not performed.

Citation No. 4643525: Absence of Berms on ramp leading to the hopper

On the first day of the inspection, Ferran observed Mr. Rasmussen feed the hopper with his model 980 Caterpillar Front-End Loader. There was a short ramp to the hopper which had no berms on either side. When feeding the hopper, the front wheels of the vehicle were five to six feet above the floor of the pit and only a foot or foot and a half from the edges of the ramp (Tr. 104-110).

Ferran cited Respondent for a violation of section 56.9300(a). That regulation provides that:

> Berms or guardrails shall be provided and maintained on the banks of roadways where a drop off exists of sufficie turn or endanger persons in equipment.

Inspector Ferran believes that the ramp presented a hazard because it was at a three or four percent grade and because the loader's bucket was raised 8-10 feet in the air when feeding the hopper (Tr. 106-109). Both Mr. Rasmussen and Harold Higman, Jr., dispute the inspector's contention that there was a danger of the loader tipping due to the absence of berms (Tr. 355-356, 392-396).

Higman, who has significant experience operating such vehicles, opined that the incline of the ramp and the differential in height between the wheels is insufficient to cause the loader to tip over (Tr. 396). I conclude that the opinions of Respondent's witnesses on this issue have at least equal validity to those of Mr. Ferran. Therefore, I find that the Secretary has not established that a drop off of sufficient grade or depth to cause an accident existed and I vacate this citation.

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Citation No. 4643513: Failure to notify MSHA prior to commencement of intermittent operations

Respondent also received Citation No. 4643513 alleging that it violated section 56.1000. That standard requires an operator to notify MSHA of the actual **or approximate** date that mine operations will commence. The standard requires that the notification include the mine name, location, the company name, mailing address, person in charge, and whether the operations will be continuous or intermittent.

In challenging this citation, Respondent asserts that it was not required to notify MSHA of commencement of operations at the Richland Pit in 1995 because the pit had never been closed down the previous fall. Nevertheless, I conclude that Respondent is subject to the notification requirement contained in section 56.1000.

Vice-President Harold Higman, Jr., conceded that Respondent reports to MSHA that Richland is an intermittent operation (Tr. 404-05). I consider Respondent estopped from asserting otherwise. By virtue of its status as an intermittent operation, the Richland Pit is generally subjected to only one inspection per year, rather than the two inspections it would receive if it were a continuous operation, MSHA Program Policy Manual, section 103.

MSHA proposed a $50 civil penalty for this violation. I assess a $20 penalty. The penalty must account for the fact that Respondent was issued a citation for a violation of the same requirement in 1994. However, it should also reflect that most of the information required was conveyed to Inspector Ferran by Mr. Rasmussen in early 1995.

Sometime prior to April 1, 1995, Inspector Ferran encountered Mr. Rasmussen at Respondent's pit near Volin, South Dakota (Tr. 117). Rasmussen informed the inspector that Respondent would start mining at a site near Richland in April and gave him directions to the pit (Tr. 234-5).

It appears that Respondent resumed its full-time production operations at Richland in May or June 1995 (Tr. 370-71). Since the date on which this occurred depended upon the weather, it appears that when Rasmussen informed Ferran that he would start in April, he provided virtually all the information required by the standard. The gravity of the violation was therefore very low and I assess a penalty of $20.

Citation Nos. 4643513 and 4643520: failure of miners to wear seat belts while operating front-end loaders on July 18, 1995

On July 18, 1995, Inspector Ferran observed both foreman Rasmussen and miner Eldon Seely operating their front-end loaders while not wearing a seat belt (Tr. 119-20, 124-25). He issued Citation Nos. 4643513 and 4643520, alleging S&S violations of 30 C.F.R. Section 56.14130(g), as a result.

Rasmussen was feeding the hopper with his loader, which also had weak service brakes (Tr. 121). Seely was using his loader primarily to load customer trucks (Tr. 125). I affirm these violations as S&S violations and assess civil penalties of $100 for each of these citations.

Anytime a driver operates in an occupational setting without a seat belt, there is a reasonable likelihood of an accident resulting in serious injury. Thus, I find the gravity of these violations to be high. I also find the negligence of Rasmussen, which is imputed to Respondent, to be high. If supervisors do not feel compelled to observe MSHA=s safety regulations, it is likely that their subordinates will be lax in complying with them as well. If a mine operator expects its employees to comply with the Act, it is essential that its foremen set an example and comply with MSHA=s requirements.

Docket No. 96-30-M

Citation No. 4643521: First Aid Training

On July 18, Ferran asked foreman Rasmussen and miner Eldon Seely if either had been trained in first aid. Rasmussen showed him a card issued by Respondent indicating that his first aid training had expired a month earlier. The inspector thereupon

issued Citation No. 4643521, alleging a violation of 30 C.F.R. Section 56.18010 (Tr. 132). This regulation states that:

> Selected supervisors shall be trained in first aid. First aid training shall be made available to all interested employees.

Mr. Rasmussen did have some sort of first aid training several times prior to July 1995 (Tr. 360-61). This training primarily concerned cardio-pulmonary resuscitation (CPR), rather than other facets of first-aid (Tr. 382).

I vacate the citation because the regulation only requires that some degree of first aid training be provided to supervisors, which I conclude Mr. Rasmussen received. The standard does not specify the details of the first aid training or require any periodic retraining or any demonstration that the supervisor learned or remembered anything from the training. The standard also does not require an active first aid card.

I do not believe that such requirements can be extrapolated from section 56.18010. If MSHA wants to assure that there is a supervisor present at every metal/non-metal surface mine who is competent to administer first-aid, it will have to revise its regulations.

Citation No. 4643526: Inoperative horn on front-end loader

Inspector Ferran determined that the horn on Mr. Rasmussen=s front-end loader was not operable on July 18, 1995 (Tr. 137-39). He therefore issued Citation No. 4643526 alleging a non-S&S violation of section 56.14132(a). Although it is rare for persons or vehicles to come near Mr. Rasmussen=s vehicle, it is possible (Tr. 363-64). Therefore, I affirm the citation and assess a $25 civil penalty.

With regard to this issue I credit the testimony of Harold Higman, Jr., that Rasmussen=s training included more than CPR (Tr. 401-02). Rasmussen did not recall such training (Tr. 382).

Citation No. 4643527: Inadequate service brakes on front-end loader

Mr. Ferran also determined that the compressor supplying air to the service brakes of Mr. Rasmussen=s front-end loader was leaking. Due to this leak, the service brakes would not hold the loader when idling on the ramp to the hopper (Tr. 143-48).

Although Rasmussen normally operates his loader when no other people or vehicles are around him, he has had occasion to use his service brakes to stop the loader quickly (Tr. 365). Thus, I conclude that the Secretary has established a S&S violation of section 56.14100(b), as alleged in Citation No. 4643527.

Rasmussen=s vehicle had a problem with slow-reacting brakes for several months prior to the inspection(Tr. 365, 384-85). This indicates a considerable degree of negligence on Respondent=s part in letting this condition persist. Given this negligence and the reasonable likelihood of a serious injury due to the slowness of the brakes, I assess a $100 civil penalty for this violation.

Citation No. 4643552: Failure to wear seat belt at August 1995 inspection

On August 15, 1995, Inspector Ferran returned to the Richland Pit. Mr. Rasmussen was on vacation and Eldon Seely was in charge at the mine. Ferran observed another miner operating Rasmussen=s front-end loader without wearing a seat belt (Tr. 152-57).

The driver told Ferran that he had not been told by anyone that he was required to wear a seat belt (Tr. 153). Ferran issued Citation No. 4643552 alleging a S&S violation of 30 C.F.R. 56.14130(g). MSHA subsequently proposed a $102 penalty for this citation.

I affirm this citation as an AS&S@ violation and assess a $400 civil penalty. The Commission assesses penalties de novo after considering the six penalty criteria in section 110(i) of

the Act. It is not bound or limited by MSHA regulations or determinations regarding proposed penalties, United States Steel Mining Co., 6 FMSHRC 1148 (May 1984).

I believe that with customer trucks operating at the pit, there is a reasonable likelihood that failure of the loader driver to wear a seat belt would result in a serious injury. Thus, I believe that gravity factor would call for a penalty of about $100, when combined with consideration of Respondent's size, good faith in rapidly abating the citation, and the fact that Higman's ability to stay in business is not affected.

However, when consideration is given to Respondent's prior history of violations and negligence, a considerably higher penalty is warranted. I believe it would be entirely incon - sistent with the purposes of section 110(i) to ignore the two seat belt citations Respondent had received a month before. Also, the fact that the driver had not been told that wearing of a seat belt was a condition of his employment establishes a high degree of negligence given the recent prior citations. Therefore, I conclude that a $400 civil penalty is appropriately assessed.

ORDER

The citations, orders and proposed penalties in these dockets are resolved as follows:

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Citation/Order	Proposed Penalty	Assessed Penalty
4643516/4643528	$240	$150
4643517/4643529	$292	$150
4643518/4643530	$240	$ 50;
4643519/4643531	$195	$ 75
4643522/4643532	$108	$ 75
4643524	$ 50	Vacated
4643525	$102	Vacated

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4643513	$ 50	$ 20
4643515	$ 81	$100
4643520	$102	$100

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4643521	$ 50	Vacated
4643526	$ 50	$ 25
4643527	$102	$100
4643552	$102	$400

Respondent shall pay the total assessed penalties of $1,245 within thirty (30) days of this decision.

Arthur J. Amchan
Administrative Law Judge

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