FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

July 9, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-268-M
Petitioner	:	A.C. No. 23-01892-05543
v.	:	
	:	Docket No. CENT 2000-387-M
TABLE ROCK ASPHALT	:	A.C. No. 23-01892-05544
CONSTRUCTION, CO., INC.,	:	
Respondent	:	Docket No. CENT 2001-2-M
	:	A.C. No. 23-01892-05545
	:	
	:	Table Rock Quarry #3
	:	
	:	Docket No. CENT 2000-306-M
	:	A.C. No. 23-01836-05568
	:	
	:	Table Rock Quarry #1

DECISION

Appearances: Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Bradley S. Hiles, Esq., R. Lance Witcher, Esq., Blackwell Sanders Peper Martin, LLP, St. Louis, Missouri, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Table Rock Asphalt Construction Company, Inc. (Table Rock). The petitions sought to impose a total civil penalty of $2,055.00 for eleven alleged violations of the mandatory safety standards in 30 C.F.R. Part 57 of the Secretary's regulations governing underground mines. One of the cited S&S violations was attributed to Table Rock's alleged unwarrantable failure, six additional alleged violations were also designated as significant and substantial (S&S) in nature, and the remaining four cited conditions were characterized as non-S&S. These matters were heard from April 24 through April 26, 2001, in Branson, Missouri. The parties have filed thorough Proposed Findings of Fact and Conclusions of Law that have been considered in the disposition of these matters.

During the course of the hearing, the parties reached a settlement agreement with respect to Citation No. 7891486 in Docket No. CENT 2001-2-M wherein the citation was modified to delete the S&S designation. Consequently, Table Rock agreed to pay a reduced civil penalty of $55.00 rather than the $161.00 penalty initially proposed by the Secretary. (Tr. 97-98). The parties' settlement agreement was approved on the record. (Tr. 98). In addition, the Secretary moved to vacate non-S&S Citation No. 7891420 and S&S Citation No. 7891424 in Docket No. CENT 2000-268-M, and S&S 104(d)(1) Citation No. 7891409 alleging Table Rock's unwarrantable failure in Docket No. CENT 2000-387-M. (Tr. 303, 334). The Secretary's motion to vacate was also granted on the record. (Tr. 305, 335).

Thus, four alleged violative conditions designated as S&S and three alleged non-S&S violations remain in dispute. The Secretary seeks to impose a total civil penalty of $795.00 for these remaining seven citations.

I. Pertinent Case Law and Penalty Criteria

This decision applies the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> 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 [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission explained its *Mathies* criteria as follows:

> 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 Company Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984). (Emphasis in original).

The Commission subsequently reasserted its prior determinations that as part of any "S&S" finding, the Secretary must prove the reasonable likelihood of an injury occurring as a result of the hazard contributed to by the cited violative condition or practice. *Peabody Coal Company*, 17 FMSHRC 508 (April 1995); *Jim Walter Resources, Inc.*, 18 FMSHRC 508 (April 1996).

With respect to the imposition of penalties, this decision applies the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

Applying the statutory penalty criteria, Table Rock is a small mine operator that is subject to the jurisdiction of the Mine Act. Table Rock has a good compliance history in that the majority of violative conditions cited during the two year period preceding the issuance of the citations in issue were designated as non-S&S violations. It is not contended that the $2,055.00 civil penalty initially proposed by the Secretary will negatively impact Table Rock's ability to continue in business. Finally, Table Rock abated the cited conditions in a timely manner.

II. Findings and Conclusions

Table Rock operates two underground limestone facilities known as the Table Rock Quarry #1 located in Branson, Missouri, and the Table Rock Quarry #3 located in Kimberling, Missouri. Both quarries are considered small operations in that Table Rock employs less than ten employees at each location. Quarry operations are conducted on a single shift basis, each shift operating five days per week. Each mine uses a room and pillar mining method in which limestone is drilled and blasted in underground operations. The product is then brought to the surface by haul trucks where the material is crushed, sized and stockpiled for sale to customers. As underground mine facilities, each quarry is inspected by the Mine Safety and Health Administration (MSHA) four times per year.

Six of the outstanding citations in these proceedings were issued by MSHA Inspector Robert Capps as a consequence of inspections conducted in March and June 2000 Table Rock's #3 quarry. The remaining citation for disposition was issued by MSHA Inspector Jerry Hoskins at Table Rock's #1 quarry in April 2000. At the time these citations were issued, both inspectors were assigned to MSHA's Little Rock, Arkansas Field Office.

a. Citation Nos. 7891421 and 7891422 (Berms)
(Docket No. CENT 2000-268-M)

Capps arrived at Table Rock's #3 quarry on the morning of March 1, 2000, whereupon Capps conducted a pre-inspection conference with foreman Wyndell Carey. Capps proceeded on foot to inspect the underground operation where active mining was occurring. Capps was accompanied underground at various times by Carey, Jim David, who is Table Rock's assistant operations manager and safety director, and laborer Terry Bayliff.

Section 57.9300(b), 30 C.F.R. § 57.9300(b), requires, in pertinent part, where a risk of overturn exists, berms on haul roads ". . . shall be at least mid-axle height of the largest [vehicle] that *usually travels* the roadway (emphasis added)." As a preliminary matter, we must address the minimum mid-axle height required under the cited regulatory standard. Capps testified that haul trucks were the largest vehicle and the "primary vehicle" that "usually traveled" the haul roads. (Tr. 526, 566-67, 569, 580). In fact, Citation No. 7891421, one of the subject berm citations issued by Capps, notes that safe use of haul trucks are the focus of concern. (Gov. Ex. 14). The mid-axle height of Table Rock's haulage trucks is 18 inches. (Tr. 497, 580).

At the hearing, the Secretary suggested larger graders that occasionally are used to maintain the haul road, that have mid-axle heights of 24 to 30 inches, should govern the minimum berm height required by section 57.9300(b). (Tr. 480-81). The Secretary's attempt to raise the berm bar is contrary to well established law that, where a regulatory provision is clear, the terms of the provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning, or, unless such meaning would lead to an absurd result. *Rawl Sales & Processing Co.*, 23 FMSHRC 463, 466 (May 2001) (citations omitted). The plain meaning of the term "usually travels" in section 57.9300(b) dictates that the minimum berm height required by the standard. In this case the largest vehicle usually traveling the haul road is a haulage truck. Thus, the 18 inch mid-axle height of the haulage trucks governs the minimum berm height required by the safety standard.

After inspecting the underground areas, Capps, traveled the haul road alone in his own vehicle to inspect Table Rock's stockpiles. Capps noted the berm along the haul road was in "excellent shape" measuring ". . . [b]etween 36 to 48 inches. Three to four feet." (Tr. 473, 498, 586). Upon returning from the stockpiles in his vehicle via the haul road, Capps noted an area on the left side approximately half way up the mine exit roadway from the explosives magazines that was approximately 50 feet in length that was not provided with a berm of mid-axle height. Capps reportedly observed that part of the inadequate 50 feet berm area was approximately 10 inches in height and part of the area had no berm at all.

Capps testimony regarding whether he got out of his car and took actual measurements of the subject berm area was equivocal. (Tr. 503-04). Capps testified that, "I must have gotten out of my car and measured the height because I [was] specific [in the citation] about ten inches." (Tr. 503). Capps later testified that "[he] walked right up on [the berm]." (Tr. 516). At another

point in his testimony, Capps stated, "I didn't measure [the distance that was not adequately bermed], but I estimated it to be 50 feet in length." (Tr. 474). Significantly, Capps admitted he did not get out of his vehicle when he "eyeballed" the other 25 feet of allegedly inadequate berm he also cited that is discussed below. (Tr. 558). Capps did not take any photographs of the cited berm conditions. (Tr. 558). Since the berm area in issue was on the right side of Capps' car, if Capps had not left his vehicle, Capps would have had to look through the windshield and passenger window to observe the area from his vehicle. (Tr. 515-16).

As Capps continued driving the haul road from the stockpiles, Capps noted "a partial berm . . . not sufficient height to protect the operators of vehicles . . ." that was approximately 25 feet in length located at the final down hill section of the mine entrance elevated roadway. (Gov. Ex 15). Capps testified that he "eyeballed" the condition from his vehicle. (Tr. 558). He did not stop to take measurements of the height or length of the subject berm condition. (Tr. 515-16).

At approximately at 11:00 a.m., after traveling the haul road, Capps returned to talk to Carey and David. Capps told Carey there were two areas of berm that needed to be "brushed up." (Tr. 622-23). Capps told Carey the areas were located "halfway up the big hill on the right and at the bottom of the hill right where it turns and goes up." (Tr. 623). Capps also informed David that "a couple of berms needed freshened (sic) up." (Tr. 585). Both Carey and David concluded that Capps was not going to issue citations for the two berm areas discussed by Capps. Capps told Carey and David that he would complete his inspection of other mine areas and meet Carey and David at 1:00 p.m. for a close-out conference.

At the 1:00 p.m. meeting, Capps did not issue any citations or mention any violations. Capps testified that he "assumed" Carey and David understood the berm conditions were violations although he did not explicitly tell them they were violations, or, that he intended to issue citations. (Tr. 665-66).

After Capps left the mine on the afternoon of March 1, 2000, David drove up the haul road to observe the areas noted by Capps. David determined the berms were between 36 and 48 inches with the exception of the two areas that were between 20 and 24 inches. David explained that when you have 20 to 24 inches next to a four foot berm it may look deceivingly low. (Tr. 587-88). David testified he would have taken photographs and measured the berms if he knew Capps intended to cite the conditions as violations. (Tr. 589). Upon returning from the haul road, David instructed Carey to add material to the subject areas. Carey used a front-end loader to add material to two areas of the berms. Carey estimated these low areas were approximately 18 to 20 inches high. (Tr. 625-26). Bayliff also testified he did not observe any unusually low berm areas during his several trips on the haul road on March 1, 2000. (Tr. 654-56).

Capps returned to his hotel and wrote Citation Nos. 7891421 and 7891422 on the evening of March 1, 2000, citing alleged S&S violations of section 57.9300(b) of the mandatory safety standards for inadequate berms at the two locations discussed above. (Gov. Exs. 14, 15). Capps

returned to Table Rock's #3 quarry the following morning on March 2, 2000, whereupon Capps served the citations on Carey. Carey testified he was surprised to receive the citations because he thought Capps had determined that there had been a "clean inspection." (Tr. 634).

As a threshold matter, I note the Secretary has the burden of proving, by a preponderance of the evidence, that a violation of the cited mandatory safety standard has occurred. *Southern Ohio Coal Co.*, 14 FMSHRC 1781, 1785 (November 1992) (citations omitted). Viewing the testimony most favorably for the Secretary, at best, it is clear that Capps does not remember whether or not he took actual height measurements of the approximate 50 foot area of the berm cited in Citation No. 7891421. Applying the preponderance evidentiary standard, Capps' failure to recall casts doubt on the reliability of his testimony. Without Capps' representation that he measured the berm, the Secretary cannot establish that the berm was 10 inches in height or less. In this regard, absent actual measurements, I credit David's testimony that Capps may be mistaken because an 18 inch high berm area may look lower than it actually is when compared to adjacent 48 inch berm areas. Moreover, absent clear evidence of objective measurements, the Secretary has failed to rebut the testimony of David and Carey that the cited berm areas were at least 18 inches high. **Accordingly, Citation No. 7891421 shall be vacated**.

With respect to the 25 foot berm area cited in Citation No. 7891422, Capps admitted he did not measure this area and that he only observed this area from his vehicle. Consequently, consistent with the above discussion, **Citation No. 7891422 shall also be vacated**.

Having vacated these berm citations, I note, parenthetically, that it is regrettable that Capps did not clearly inform Table Rock of the alleged violative berm conditions during his March 1, 2000, inspection. Had he done so, if Table Rock had contested the alleged violative conditions, actual measurements and photographs undoubtedly would have been taken.

b. Citation No. 7891423 (Serviceable Fire Extinguishers)
(Docket No. CENT 2000-268-M)

As a result of his March 1, 2000, inspection of the underground areas of Table Rock's #3 quarry, Capps also issued Citation No. 7891423 for a significant and substantial violation of the mandatory safety standard in section 57.4200(b)(2), 30 C.F.R. § 57.4200(b)(2). The citation was issued because Table Rock "failed to provide a serviceable fire extinguisher at the ANFO blasting agent storage trailer located in the mined out underground area." (Gov. Ex. 16). It is undisputed that, although fire extinguishers were kept on the powder truck that was used to transport ANFO blasting material from the storage trailer to active mine areas, the nearest stationary fire extinguisher to the Ammonia Nitrate Fuel Oil (ANFO) blasting agent trailer was located approximately 200 feet away at the underground maintenance shop. Section 57.4200(b)(2) provides that on-site fire fighting equipment shall be "strategically located" and "readily accessible" although these terms are not defined in the Secretary's regulations.

In defending against the citation, Table Rock argues that the ANFO trailer is normally not accessed on foot. Rather, it is normally used by the blaster and his helper when they are loading ANFO from the trailer into the powder truck for transport to active areas of the mine. The powder truck is equipped with four fire extinguishers. In apparent recognition that the closest fire extinguisher to the ANFO trailer located 200 feet away does not satisfy the cited safety standard, Table Rock asserts the mobile fire extinguishers located on the powder truck constitute strategically located and readily accessible fire fighting equipment satisfying the standard.

The presence of mobile fire extinguishers may be a mitigating factor material to the reasonable likelihood of injury issue central to the S&S question. However, with respect to the fact of the violation, mobile fire extinguishers cannot satisfy the provisions of section 57.4200(b)(2) in circumstances, however infrequent, when individuals are in or around the blasting trailer when the powder truck is not present. In this regard, I do not find convincing Table Rock's contention that it intentionally does not provide fire extinguishers in close proximity to the blasting trailer in order to encourage personnel to evacuate rather than fight a fire in the vicinity of the trailer. Such a policy ignores the safety of maintenance shop personnel who may continue to go about their duties 200 feet away from the trailer while persons at the trailer high-tail-it out of the mine because they do not have the option of extinguishing a potentially explosive fire in its early stages. Accordingly, the Secretary's interpretation and application of the "strategically located" and "readily accessible" terms in section 57.4200(b)(2) to require fire extinguishers in the immediate vicinity of the blasting trailer are reasonable. Consequently, the undisputed facts support the conclusion that a violation of section 57.4200(b)(2) has occurred.

Turning to the significant and substantial issue, applying the *Mathies* criteria, it is apparent that the cited violation, *i.e.*, the failure to provide readily accessible stationary fire extinguishers, contributes to the discrete safety hazard of an inability to extinguish a fire. It is also obvious, given the ANFO trailer as the site of the potential hazard, that if a fire were to occur, serious, if not fatal injuries, will occur.

However, an S&S finding also requires a finding that it is reasonably likely that the hazard contributed to will result in an event, *i.e.*, a fire and explosion, in which there is a serious injury. *U.S. Steel*, 6 FMSHRC at 1836. The Secretary has failed to demonstrate ignition sources in the vicinity of the ANFO trailer that is located in an inactive area of the mine. Moreover, the presence of fire extinguishers on the powder truck is an additional factor that mitigates the likelihood of fire. Consequently, the Secretary has failed to demonstrate that serious injury was reasonably likely to occur.

Accordingly, **Citation No. 7891423 shall be modified to delete the significant and substantial designation**. In addition, given Table Rock's reasonable reliance on the mobile fire extinguishers that are normally present when the ANFO trailer is accessed, **the degree of negligence attributable to Table Rock shall be reduced from moderate to low**.

As previously noted, applying the statutory penalty criteria, Table Rock is a small mine operator without an extraordinary violation history. Table Rock abated the violation in a timely manner and the $184.00 initially proposed by the Secretary for Citation No. 7891423 will not impair its ability to continue in business. Given the reduction in Table Rock's degree of negligence and the reduction in the gravity of the cited non-S&S violation, **a civil penalty of $55.00 shall be imposed for Citation No. 7891423**.

c. Citation No. 7893052 (Magazine Ground Strap)
(Docket No. CENT 2000-306-M)

MSHA Inspector Jerry Hoskins conducted a routine inspection of Table Rock's Quarry #1 on April 11 and April 12, 2000. On April 12, 2000, Hoskins issued Citation No. 7893052 alleging a significant and substantial violation of section 57.6132(b), 30 C.F.R. § 57.6132(b). This mandatory safety standard requires that ". . . [m]etal magazines shall be equipped with electrical bonding connections between all conductive portions so the entire structure is at the same electrical potential . . . ." (Gov. Ex. 22). Citation No. 7893052 was issued after Hoskins observed a broken grounding strap on the door of the steel magazine housing detonator explosives, causing the door to be at different electrical potential than the magazine. The Secretary proffered a photograph of the broken grounding strap observed by Hoskins to support the alleged section 57.6132(b) violation. (Gov. Ex 23). Hoskins characterized the cited violation as significant and substantial because he believed the differing electrical potential caused by the broken strap could cause sparks when the magazine door was opened risking a possibility of ignition and explosion.

In its defense, Table Rock contends the citation should be vacated because Hoskins did not test the electrical potential with an Ohmmeter to verify the alleged differing electrical potential. In this regard, Table Rock speculates that the two four inch steel hinges that joined the magazine structure with its door was an alternative to the grounding strap that was an equally effective method of electrical bonding to ensure that equal electrical potential was maintained to prevent a source of ignition.

I am not persuaded by Table Rock's conjecture that the steel hinges provided adequate and effective electrical bonding. Such a theory is belied by the magazine manufacturer's design of a heavy duty grounding strap welded into the body of the magazine structure. (See photo in Gov. Ex. 23). Hoskins failure to take Ohmmeter readings does not constitute a flawed citation. If a grounding strap on a steel structure is severed, and no alternative methods of grounding have been installed to address the defective strap, it is reasonable to conclude, without further electrical testing, that the structure is not properly grounded. Consequently, the evidence supports the fact of occurrence of the cited violation in Citation No. 7893052.

With respect to the issue of S&S, Hoskins testified that sparks (heat) occurring as the magazine door was opened created by the unequal electrical potential could ignite the detonators. However, David testified, without contradiction, that the detonators stored in the cited magazine were electrical detonators requiring electricity to pass through the detonators completing a circuit. (tr. 769-72). In accordance with the shunting provisions in section 57.6401(a), 30 C.F.R. § 57.6401(a), the electric detonators were kept shunted until they were connected to an electrical blasting line. A shunt is a plastic fitting placed on the ends of the two detonating wires of each detonator to ensure that the wires remain separated and that they can not be activated. Hoskins could not recall whether the subject detonators were shunted. (Tr. 758).

Addressing the significant and substantial issue, applying the *Mathies* criteria, it is apparent that the cited violation, *i.e.*, the defective guarding strap creating the potential for disparate electrical potential, contributes to the discrete safety hazard of a magazine explosion. In such event, it is reasonably likely that serious injury will occur.

However, as previously discussed, an S&S finding also requires a finding that it is reasonably likely that the hazard contributed to will result in an event, *i.e.*, an explosion, in which there is a serious injury. The Secretary does not assert that explosives other than electric detonating caps were, or will be, stored in the subject magazine. Given the unrebutted testimony that the subject detonators were electrical and shunted, the Secretary's assertion that it is reasonably likely that a potential heat generating spark caused by unequal electrical potential will cause an explosion is unpersuasive. Significantly, the Secretary has not shown that heat caused by a spark poses a risk of igniting electrical detonators. The fact that the detonators are shunted makes such heat related ignition even more remote. Although the transmission of electricity from lightening striking the ungrounded metal structure may provide a significant source ignition, it can not be said that it is reasonably likely that lightening will strike the cited magazine. Given the remoteness of lightening striking, and the absence of evidence of any other significant sources of ignition, **Citation No. 7893052 shall be modified to delete the significant and substantial designation**.

Hoskins attributed this grounding violation to a moderate degree of negligence. The defect in the grounding strap prominently located on the front of an explosives magazine was readily apparent and should not have been ignored. Reliance on the door hinges as a means of grounding, as Table Rock appears to suggest, accentuates rather than mitigates its negligence. While grounding is an important safety precaution on any piece of equipment, its importance on an explosives magazine is self evident. Accordingly, in addition to deleting the S&S designation in **Citation No. 7893052**, the citation **shall be modified to reflect the cited violation was attributable to a high degree of negligence**. I have previously discussed the statutory penalty criteria as it applies to Table Rock. Given the increase in the degree of Table Rock's negligence, **a civil penalty of $100.00 shall be imposed for Citation No. 7893052**.

d. Citation Nos. 7891488, 7891489 and 7891490 (Return Roller Guarding) (Docket No. CENT 2001-2-M)

On June 19, 2000, Capps returned to Table Rock's #3 quarry to conduct another routine inspection. On the following day Capps issued Citation Nos. 7891488, 7891489 and 7891490 citing non-significant and substantial violations of the mandatory safety standard in section 57.14109, 30 C.F.R. § 57.14109. The cited conditions concerned three unguarded return rollers (idlers) on two different conveyors located in an area of the mine that was not frequently traveled. Specifically, Citation No. 7891488 cited a return roller under the jaw crusher that was located under the conveyor belt, 37 inches from the ground and five inches in from the outer perimeter of the conveyor's frame. The other two return rollers cited in Citation Nos. 7891489 and 7891490 were located under the impactor conveyor belts, 37 inches and 34 inches from the ground, respectively. Both impactor return rollers were located four inches from the outside of the conveyor frames. Section 57.14109, the mandatory safety standard initially cited, provides, in pertinent part, that "unguarded conveyors *next to travelways"* shall be equipped with railings to prevent persons from falling on or against the conveyor (emphasis added).

Citation Nos. 7891488, 7891489 and 7891490 were modified on December 12, 2000, to reflect the mandatory safety standard violated was section 57.14107(a), 30 C.F.R. § 57.14107(a), rather than section 57.14109. Capps testified that the citations were modified because the areas immediately surrounding the cited conveyor systems were not "travelways" as defined by the regulations.[1] (Tr. 134-35, 156). In fact, as previously noted, the subject areas are traveled infrequently.

Section 57.14107, the revised safety standard cited, provides:

> (a) moving parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, 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*.

(Emphasis added).

[1] Section 57.2, 30 C.F.R. § 57.2, defines "travelway" as ". . . a walk or way regularly used and designated for persons to go from one place to another."

Before addressing the validity of the subject guarding citations, it is instructive to examine the Commission's decision in *Thomas Brothers Coal Company*, 6 FMSHRC 2094 (September 1984) that addressed the purpose of section 77.400(a), a similar mandatory guarding standard governing coal mining. The Commission stated:

> We find the most logical construction of the standard is that it imports the concepts of *reasonable possibility of contact and injury*, including contact stemming from inadvertent stumbling or falling, momentary inattention or ordinary carelessness. Applying this test requires *taking into consideration all relevant exposure and injury variables*. For example, accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-case basis.

6 FMSHRC at 2097 (emphasis added).

Thus, as a general proposition, stumbling and inadvertent contact are the concerns that the guarding standard addresses. That is why 57.14107(b) exempts "moving parts [that] are at least seven feet away from walking or working surfaces," although such areas may be accessed by ladders. The standard is not intended to require moving parts to be guarded in order to prevent contact by personnel who may climb up to inaccessible areas, or, intentionally crawl, or reach, under inaccessible areas near ground level to perform maintenance. Under such circumstances, section 57.14105, 30 C.F.R. § 57.14105, requires maintenance of equipment to be performed only after the power is turned off and the equipment is blocked against motion. Moreover, guarding such inaccessible areas may require removing the guard to accomplish cleaning.

Turning to the facts of this case, Secretary's purported reliance on the inadvertent contact hazard caused by a trip and fall as the basis for applying the guarding standard is undermined by Capps' testimony. Capps conceded that moving parts can be functionally guarded solely by location if the moving part was covered by a belt and near ground level. (Tr. 112). Capps further admitted that the possibility of inadvertent contact with the cited rollers as a consequence of stumbling was "unlikely" ". . . partially because of the height and because of the fact of the location that [the rollers are] in, because it's normally a low-traffic area." (Tr. 113).

The remoteness of inadvertent exposure to the cited rollers is further demonstrated by Capps' testimony concerning the hazards created by contact with moving conveyors. Capps testified that there are pins in a conveyor belt's coupling system that could catch onto the clothing of an individual walking next to a conveyor belt. In such an event, the individual could become entangled in the moving belt and sustain serious injury. However, Capps conceded the protections contemplated by the provisions of section 57.14109, that require railings to prevent

persons from falling on or against a conveyor, do not apply to the cited conveyors because the possibility of contact is remote because the cited areas are not where people normally travel. (Tr. 157-58). Capps further admitted that inadvertent contact with the cited rollers, located 34 to 37 inches from the ground and covered by the conveyors, is even more remote than inadvertent contact with the belt. (Tr. 296-99).

Rather, it is clear that the Secretary's primary basis for seeking to apply section 57.14107(a) is the alleged hazard posed to clean-up personnel. In this regard Capps testified about people who could be drawn into the rollers while cleaning spillage around the cited rollers with shovels. (Tr. 115, 174). However, Capps stated he never observed any employees cleaning the cited areas with shovels, and he did not know if the roller areas were cleaned with shovels. (Tr. 136, 174, 177-78). Table Rock maintains that spillage in the vicinity of the cited areas is removed by using a scoop attached to a bobcat vehicle. The operator of the bobcat sits in a steel caged operator's cabin and is not exposed to the return rollers. (Tr. 207, 225, 228, 281-82, 286, 287).

The Secretary's concern for the safety of clean-up personnel as a basis for imposing the guarding requirements of section 57.14107(a) assumes that the subject areas under the conveyor will be cleaned manually without de-energizing the belt as required by section 57.14105. Such an assumption is a not an adequate basis for application of section 57.14107(a) in the current case.

While almost anything is possible, regardless of how remote, application of the guarding standard in this case is tantamount to requiring all moving parts, regardless of their lack of accessibility and their location in untraveled areas of the mine, to be guarded. If the Secretary wishes to pursue such a regulatory approach, she should do so through the notice and comment rulemaking process. However, the plain language of the regulatory standard currently only requires guarding of moving parts that, through inadvertence, "can cause injury." Here, the Secretary has failed to demonstrate that there is a *reasonable possibility* of inadvertent contact. *Thomas Brothers*, 6 FMSHRC at 2097. This conclusion is consistent with the Secretary's characterization of the alleged violations as not reasonably likely to cause injury (non S&S). While designating these alleged violations as non-S&S is not fatal to the Secretary's case, nevertheless, it is an implicit recognition of the degree of remoteness of the possibility of injury.

Finally, Table Rock had partially guarded the cited rollers with chain link material that hung approximately 18 inches from the conveyor frame, leaving approximately 18 inches of clearance from the ground. This 18 inch clearance allowed the bobcat scoop to clean under the cited conveyors. This chain link material further protected individuals from inadvertent contact. The Secretary suggests this partial guarding is an admission by Table Rock that guarding was required. (Tr. 122). Just as the Secretary is not estopped from citing the alleged violative conditions in these matters because they had not been cited by MSHA inspectors during prior inspections, so too, Table Rock is not estopped from denying liability because, in an abundance of caution, it elected to install partial guarding. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421 (June 1981); *accord Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416-17 (10th Cir. 1984). **Accordingly, Citation Nos. 7891488, 7891489 and 7891490 shall be vacated**.

ORDER

1. In view of the above, **IT IS ORDERED THAT** Citation Nos. 7891421, 7891422, 7891488, 7891489 AND 7891490 **ARE VACATED**.

2. **IT IS FURTHER ORDERED THAT** Citation Nos. 7891423 and 7893052 **ARE MODIFIED** to delete the significant and substantial (S&S) designation. In addition, Citation No. 7891421 **IS MODIFIED** to reflect the cited violation is attributable to the respondent's low degree of negligence, and, Citation No. 7893052 **IS MODIFIED** to reflect the cited violation is attributable to the respondent's high degree of negligence.

3. **IT IS FURTHER ORDERED THAT** Table Rock Asphalt Construction Company, Inc., pay a civil penalty of $155.00.00 in satisfaction of Citation Nos. 7891423 and 7893052.

4. **IT IS FURTHER ORDERED THAT**, pursuant to the parties' agreement, Citation No. 7891486 **IS MODIFIED** to delete the significant and substantial (S&S) designation, and that Table Rock Asphalt Construction Company, Inc., pay a civil penalty of $55.00.00 in satisfaction of Citation No. 7891486.

5. **IT IS FURTHER ORDERED THAT**, consistent with the parties' agreement, Citation Nos. 7891420, 7891424 and 7891409 **ARE VACATED**.

6. **ACCORDINGLY**, **IT IS FURTHER ORDERED THAT** Table Rock Asphalt Construction Company, Inc., shall pay a total civil penalty of $210.00 within 45 days of the date of this decision. Upon timely receipt of payment, the civil penalty proceedings in Docket Nos. CENT 2000-268-M, CENT 2000-306-M, CENT 2000-387-M and CENT 2001-2-M **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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