FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 11, 2006

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. CENT 2005-139-M A.C. No. 39-01328-52100
v.	:	Docket No. CENT 2005-162-M A.C. No. 39-01328-39719
BOB BAK CONSTRUCTION, Respondent	:	Docket No. CENT 2006-009-M A.C. No. 39-01328-67942 Crusher #3

DECISION

Appearances: Jennifer Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Bob Bak Construction ("Bak Construction"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The cases involve seven citations and one order issued by MSHA at the No. 3 crusher operated by Bak Construction. An evidentiary hearing was held in Pierre, South Dakota. The parties presented testimony and documentary evidence and filed post-hearing briefs.

At all pertinent times, Bak Construction operated the No. 3 Crusher ("crusher") on an intermittent basis at different locations in central South Dakota. The citations and order at issue in these cases were issued by MSHA Inspector John King on August 26, 2004.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 7915395

On August 26, 2004, MSHA Inspector John King inspected the crusher. The mine was operating with two end loaders and a dozer. The shaker and screener/crusher were operating. (Tr. 17). The inspector issued Citation No. 7915395 under section 104(a) of the Mine Act alleging a violation of section 57.14130(g) as follows, in part:

> The operator of the Michigan Clark 175A front end loader was observed not wearing his seatbelt as required. He stated that he had been trained to wear it and had heard the mine operator state that it was a requirement to do so at all times. There was a potential for the front end loader operator to sustain severe or even fatal injuries were he to be thrown from his loader.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was of a significant and substantial nature ("S&S") and that Bak Construction's negligence was moderate. The safety standard provides, in part, that "[s]eat belts shall be worn by the equipment operator except when operating graders from a standing position . . . ." The standard applies to various types of self-propelled mobile equipment including "wheel loaders." 30 C.F.R. § 57.14130(a)(3). The Secretary proposes a penalty of $275.00 for this citation.

When Inspector King began his inspection, he observed David Spider in the operator's compartment of the Clark Michigan 175A front end loader. King signaled with his hand for Spider to drive the loader over to where he was standing. (Tr. 22). King testified that when he climbed up into the operator's compartment he saw that Spider was not wearing a seatbelt. (Tr. 22-23). The inspector testified that Spider told him that he had been wearing the seatbelt most of the day but that he "had been in and out of his piece of equipment a couple of times and just didn't put it back on at that time." (Tr. 23).

Spider testified that when the inspector arrived he was parked without the engine running. (Tr. 134, 141). Spider said that he was sitting in the loader watching the hopper to determine when he should get more clay to mix with the gravel. *Id.* When the hopper needed more clay, he would start up the engine, build up air for the brakes, and put on his seatbelt before operating the loader. (Tr. 135). He testified that he needed to get more clay about every 20 minutes. (Tr. 134). Spider testified that, although he was not wearing a seatbelt, he was not operating the front end loader at the time of King's inspection of the loader. (Tr. 134-36, 141-42). He further testified that he had been trained to use his seatbelt and was aware of the MSHA requirement. (Tr. 138).

In rebuttal, Inspector King testified that when he first arrived at the crusher, he observed Spider operating the loader feeding clay into the hopper. (Tr. 23, 224-25). King testified that, while he is not certain, he believes that the loader was moving at the time he signaled Spider to drive toward him. (Tr. 223-34). King also doubted if a loader operator would kill the engine while waiting to load more clay because turning the engine on and off would not be good for the engine or the hydraulic system. (Tr. 224, 228). Although Spider may not have been moving the loader at the precise instant that he called him over, King believes that the engine was running.

During discovery, Bak Construction responded in the affirmative to the following request for admission served by the Secretary: "Please admit that, on or about August 26, 2004, Respondent violated 30 C.F.R. § 56.14130(g) when the operator of the Clark Michigan 175A front end loader was observed not wearing his seatbelt as required." Following the hearing, Bak Construction filed a motion to withdraw this admission because the testimony of Spider demonstrates that he was just sitting in the loader at the time he was observed by Inspector King and the engine was not running. The Secretary opposes the motion. Under the authority granted me under Commission Procedural Rule 58(b), I grant Bak Construction's motion to withdraw the admission. I find that there will be no prejudice to the Secretary in granting the motion. My holding in this regard is limited to the facts in this case.

Based on the testimony of Inspector King, I find that a violation of the safety standard has been established. I credit Inspector King's testimony concerning these events over the testimony of Mr. Spider. Spider's testimony was neither persuasive nor convincing. Specifically, I find that, although Spider may have been wearing his seatbelt during part of his shift, he was not wearing it while operating the loader prior to the time the inspector entered the operator's compartment. I credit King's testimony that Spider told him, at the time of his inspection, that he forgot to put on the seatbelt the last time he got back into the loader.

Inspector King testified that the violation was S&S because the loader operator must make sharp turns when operating the equipment. (Tr. 24). Some of these turns must be made in reverse gear and some must be made with the bucket in a raised position. He also testified that he believed that, although the ground was level, soft spots could develop on the ground which could turn into ruts over time. In addition, the ground is likely to become slippery when wet. (Tr. 25). The door on the operator's compartment was pinned open. As a consequence, Spider could have fallen out of the loader to the ground 12 feet below. (Tr. 30). Another loader was operating in close proximity to Spider's loader. It was reasonably likely that Spider would be ejected from the cab if he encountered heavy ruts or if he collided with another piece of equipment. (Tr. 29-31, 59-60). The Secretary argues that, based on potential ground conditions and the specific use and condition of the loader, it was reasonably likely that a serious injury would occur, assuming continued mining operations.

Bob Bak testified that the area was very well maintained, without holes or ruts, and that the area was not dangerous to equipment. (Tr. 148). Darrell Dawson, another loader operator at the crusher, testified that the area was fairly smooth. (Tr. 124). Bak Construction argues that,

because the working surfaces were mostly flat and the loader never travels faster than five miles per hour, the possibility of a serious injury was unlikely. Bak Construction also maintains that the potential hazards that were of concern to Inspector King were highly speculative and did not create a potential for a serious injury.

A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established that the violation was serious and S&S. A discrete safety hazard was created by the violation. Although the loader traveled at a very low rate of speed, the door on the operator's side of the loader was open. I credit the testimony of Inspector King with respect to the hazards that were present, as summarized above. Although the ground was fairly smooth at the time of the inspection, there was a slight slope in the area. In addition, with the door to the operator's compartment pinned open, there was a risk that the equipment operator would fall from the loader in the event of an accident or other unexpected event. I find that it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

Some of the evidence suggests that Bak Construction's negligence was less than moderate. Nevertheless, it is significant that, of the three pieces of mobile equipment operating on August 26, two were cited for seat belt violations. In addition, Bak Construction has been cited for seat belt violations in the past. *Bob Bak Construction*, 19 FMSHRC 582, 585-86 (March 1997) (ALJ); *Bob Bak Construction*, 19 FMSHRC 1791, 1793-94 (Nov. 1997) (ALJ). Consequently, I find that the violation was the result of Bak Construction's moderate negligence. The Secretary's proposed penalty of $275.00 is appropriate.

B. <u>Citation No. 7938404</u>

Inspector King also issued Citation No. 7938404 under section 104(a) of the Mine Act alleging a violation of section 57.14130(i) as follows, in part:

> The operator of the Clark Michigan 175B front end loader had not properly attached his seat belt to the unit when he replaced the seat on this day. He stated that he had failed to complete bolting the female end of the seat belt to the unit as required. He went on to state that he had received training in seat belt use, was aware of the written company policy on seat belt use, and was told by the operator to wear his seat belt when in self-propelled mobile equipment at the beginning of the shift that day. There was a potential for the front end loader operator to be thrown from the unit were an accident to occur and sustain fatal injuries.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Bak Construction's negligence was moderate. The safety standard provides, in part, that "[s]eat belts shall be maintained in functional condition and replaced when necessary to assure proper performance." The Secretary proposes a penalty of $275.00 for this citation.

Inspector King testified that when he climbed up onto the loader to inspect it, he noticed that the seatbelt was not properly attached to the loader. It was draped across Jeremy Heron's lap. (Tr. 35-37; Exs G-4, G-5). The inspector testified that the doors of the loader had been propped open and Heron was operating in close proximity to Spider's loader. (Tr. 29, 38). Huron told the inspector that he had replaced the seat in the cab that morning and he did not secure the seatbelt to the floor of the cab. (Tr. 37). He told the inspector that Mr. Bak had told him to attach the seatbelt before operating the loader. *Id.* Bak Construction contends that because it has policies in place regarding seatbelt use and he instructed Heron to reattach the seatbelt before operating the loader, the citation should be vacated.

The Secretary argues that the evidence establishes that Mr. Bak failed to effectively enforce its seatbelt policies. Two of the three pieces of mobile equipment in operation on the day of the inspection were in violation of the seatbelt standard. In addition, the Secretary argues that Bak Construction's history of previous violations shows that it has violated the seatbelt standard a number of times in the past. Given this history, the Secretary contends that Bak Construction had a heightened responsibility to ensure that functioning seatbelts were installed in all of its mobile equipment and that the operators use these belts.

I find that the Secretary established a violation. There is no question that the seatbelt in the loader operated by Heron was not functional. Bak Construction argues that the Secretary did not establish that the violation was S&S. Its arguments are the same as for the previous citation. For the same reasons discussed above, I find that the violation was serious and S&S. The operator's door for this loader was also pinned back creating a similar hazard.

I also find that Bak Construction's negligence was moderate for the reasons discussed with respect to the previous citation. The Secretary's proposed penalty of $275.00 is appropriate.

C. Order No. 7915397

Inspector King also issued Order No. 7915397 under section 104(g)(1) of the Mine Act alleging a violation of section 46.6(a) as follows, in part:

> Jack Sumners was operating a Dresser TD-25 bulldozer and pushing base material to the pit for loading by front end loaders . . . . He had not received the safety training required by Part 46 of the Mine Safety and Health Act. Mr. Sumners is a newly hired experienced miner who has been working since August 23 at this location.

Inspector King determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that Bak Construction's negligence was high. The safety standard provides, in part, that training must be provided to newly hired experienced miners. The Secretary proposes a penalty of $500.00 for this order.

Near the end of his inspection, Inspector King asked for the training records for Bak Construction's employees. Inspector King testified that the training records for Jack Sumners could not be located. (Tr. 41-42, 78, 82). Sumners started working at the crusher on August 23, 2004. Sumners had worked in the construction industry for at least 20 years operating heavy equipment and he had also previously worked at a quarry. (Tr. 42, 45, 69, 191, 200). The inspector believed that Bob Bak called his wife, Elsie Bak, at the office to determine if a certificate of training was there. (Tr. 41). King testified that it appeared that Sumner had not been trained because Mr. Bak believed that his wife had trained him while Ms. Bak believed that Mr. Bak had trained him. (Tr. 42). Elsie Bak is authorized to provide experienced miner training. Inspector King recalls that Bob Bak told his wife to come to the crusher to complete Sumner's training. (Tr. 46). MSHA Supervisory Inspector Joe Steichen, who accompanied King on the inspection, also testified that Bak asked his wife to come to the mine site. (Tr. 108, 119). Nevertheless, Sumner told Inspector King, on the day of the inspection, that he had been trained. (Tr. 78). The training certificate that was subsequently provided to Inspector King shows that Sumners received his training on August 23, 2004. (Tr. 47-48; Ex. G-7). Sumners had initialed the form at the time he was given the training. Inspector Steichen testified that Mr. Bak never told him that Sumners had actually been trained. (Tr. 109).

The Secretary contends that the preponderance of the evidence shows that Sumners did not receive the mandatory training. In the alternative, the Secretary moved at the hearing to plead, in the alternative, that Bak Construction violated section 46.9(c)(2)(i). That section provides that a record of the newly-hired experienced miner's training must be made and given to the miner. As grounds for the motion, the Secretary states that the Commission's procedural rules authorize pleading in the alternative through the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1(b). The Commission and its judges have allowed the Secretary to plead in the

alternative. *See Walker Stone Co. v. Sec'y of Labor*, 156 F.3d 1076 (10th Cir. 1998); *Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990); *CDK Contracting, Inc*., 23 FMSHRC 783 (July 2001) (ALJ). The Commission has analogized the modification of a citation to an amendment of a pleading under rule 15(a) of the Federal Rules of Civil Procedure. The Commission put forth the following standard with regard to the amendment of a citation:

> In Federal Civil proceedings, leave for amendment 'shall be freely given when justice so requires.' The weight of authority under Rule 15(a) is that amendments are to be liberally granted unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed.

Wyoming Fuel Co., 14 FMSHRC 1282, 1289-90 (Aug. 1992) (citations omitted). The Secretary also points to cases in which the Commission has recognized that citations may be amended during the course of the hearing. *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (Aug. 1997); *Higman Sand & Gravel*, 18 FMSHRC 951, 958-59 (June 1996) (ALJ). Finally, she reasons that, because the motion to leave was made at hearing, Bak was given ample opportunity to cross examine the Secretary's witnesses and to question its own witnesses on this issue. The Secretary contends that the record reveals that Bak Construction failed to complete the necessary training record and provide it to Inspector King upon request.

Mr. Sumners testified that he received his required training on August 23, 2004. (Tr. 192-94; Ex. R-103). The training record shows that Bob Bak provided the training. *Id.* Elsie Bak testified that she was never asked to take part in Sumners' training. (Tr. 205). Instead, she was merely asked to sign all of the training certificates, including Sumners', when Mr. Bak returned to the office later on April 26. (Tr. 208, 211-12). She testified that the certificates had been in Mr. Bak's pickup truck at the crusher on August 26. (Tr. 208). Bak Construction also contends that Inspector King was initially confused at the hearing but that he eventually admitted that the training certificate for Sumners was at the mine, but that it wasn't signed at the bottom of the form. (Tr. 85). King admitted that the training certificate was initialed by Sumners. (Tr. 86, Exs. G-7, R-103). He also admitted that if he had noticed Sumners' initials on the certificate, he probably would have vacated the order. (Tr. 72-73). Inspector King vacated other section 104(g)(1) orders that he issued with respect to the training of other miners when he realized that each miner had initialed the form. (Tr. 85-86). He also admitted that Sumners told him that he had been trained. (Tr. 88).

I find that the Secretary did not establish a violation of section 46.6(a). Inspector King based his conclusion that Sumners had not received the required training in large part on the telephone conversation he overheard when Mr. Bak called Elsie Bak. King could only hear one side of the conversation. Specifically, Inspector King testified that "there was no reason for me to believe that Mr. Sumners had, in fact, received his training other than his statement to me that he had; otherwise I was listening in on the conversation of which I was made privy to between Mr. and Mrs. Bak, and it led me to believe that Mr. Sumners had not received the required 4

hours of the seven core subject training." (Tr. 89). I cannot affirm a citation on the basis of testimony concerning one side of a phone conversation, especially where the training certificate shows that training was provided on August 23 and Elsie Bak denies that she was asked to provide any additional training.

Bak Construction opposes the Secretary's motion to amend the citation to include, in the alternative, a charge that it violated section 46.9(c)(2)(i). Bak Construction conceded that the Commission has the power to allow such an amendment; however, it argues that such an amendment is only appropriate when it will not prejudice the opposing party. It contends that it will be prejudiced by such an amendment.

I grant the Secretary's motion to amend the order to also allege a violation of section 46.9(c)(2)(i). There will be no prejudice to the Bak Construction in granting the motion. I find that the Secretary did not meet her burden of proving a violation of section 46.9(c)(2)(i). The record is extremely murky as to what training records were available to Inspector King on the day of the inspection. Inspector King issued similar orders for other employees at the crusher but he vacated them when he discovered that they were initialed by the individual employees. Ms. Bak testified that all of the certificates were in Bob Bak's pickup truck at the crusher on August 26. I find that there was genuine confusion about what training records were available at the crusher on August 26 because there was a lack of communication between Inspector King and Bob Bak concerning the training that was given and the training records that were available. The Secretary, who has the burden of proof, failed to establish a violation of either of the two cited training regulations. Consequently, Order No. 7915397 is vacated.

D. Citation No. 7915396

Inspector King also issued Citation No. 7915396 under section 104(a) of the Mine Act alleging a violation of section 56.14132(a) as follows:

> The Clark Michigan 175A front end loader did not have a manually operated horn. The manually operated horn was originally provided by the manufacturer as a safety feature and is used to signal when starting up and in emergency situations. There was a potential for a person in the area to not know the loader was placed into motion.

Inspector King determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that Bak Construction's negligence was moderate. The safety standard provides, in part, "[m]anually operated horns . . . provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of $60.00 for this citation.

Inspector King testified that section 56.14200 requires equipment operators to sound a warning before starting such equipment. (Tr. 238-39). He stated that it appeared to him that the horn had been removed at some point prior to the inspection. (Tr. 237-38; Ex. G-9). He also testified that he believes that the loader was originally equipped with a horn. (Tr. 266-67). He contends that Mr. Bak should have recognized that the horn was missing. *Id.*

Bob Bak testified that, although all of the company's other mobile equipment were equipped with horns, this particular loader had never been so equipped. (Tr. 325-26). He stated that he bought the loader used about 20 years ago. He testified that the company has never been cited by MSHA for the absence of a horn on this equipment.

The Secretary argues that she established a violation of the safety standard because Inspector King testified that the loader was once equipped with a horn and that it had been removed. He stated that, if the loader had never been equipped with a horn, previous MSHA inspectors would have noticed this fact. He also stated that Mr. Bak seemed surprised to learn that the loader was not equipped with a horn since all other loaders at the site had horns. (Tr. 242). Bak also testified that the cited loader was not equipped with a horn because he did not believe that the loader needed one. (Tr. 326). The Secretary argues that Bak's inconsistent statements make his testimony less than credible.

Bak Construction argues that the evidence establishes that the cited loader had never been equipped with a horn. This safety standard does not require that a mine operator install a horn on mobile equipment that was never provided with a horn; it only requires that horns that are so provided must be maintained in working order. Inspector King's testimony makes clear that he was not really sure that this particular loader had ever been equipped with a horn. Bob Bak credibly testified that this particular loader never had a horn on it. (Tr. 308). Bak Construction also maintains that, in the previous 20 years that it has been using this loader, it has not been cited by MSHA for the failure to have a horn. It argues that, if the Secretary believes that a horn were required, she would have cited the loader years ago. Bak Construction contends if it is now required to install a horn on equipment that was never provided with one, the Secretary failed to provide fair notice of her change in the interpretation of the standard. *Alan Lee Good* , 23 FMSHRC 995 (Sept. 2001). As a consequence, Bak Construction argues that the citation should be vacated.

It is clear that the Secretary intended that this safety standard require that horns installed on mobile equipment be maintained in operating condition. The standard does not require the installation of a horn on a piece of equipment that was never equipped with a horn. The Secretary's Program Policy Manual provides:

> Standard 56/57.14132(a) sets a *maintenance standard* for manually operated horns or other audible warning devices that are provided as safety features on self-propelled mobile equipment. . . . This standard should be cited if any audible warning device *that was*

> *provided on the equipment* as a safety feature is not functional. This includes manually-operated horns, automatic reverse-activated signal alarms, wheel-mounted bell alarms and discriminating backup alarms.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56, at 61 (2003) *(emphasis added*). As stated above, Bak Construction presented credible evidence that this loader was never provided with a horn. (Tr. 308, 325). Bak Construction abated the citation by removing an air horn from a "salvage truck" and installing it on the cab of the loader. (Tr. 325). Thus, Mr. Bak did not repair an existing horn. I find that the Secretary failed to establish a violation of the standard. There has been no credible showing that this loader, which Mr. Bak bought used over 20 years ago, had ever been equipped with a horn. The standard does not require the installation of a horn on a loader that had never been equipped with one. Consequently, Citation No. 7915396 is vacated.

E. Citation No. 7915400

Inspector King also issued Citation No. 7915400 under section 104(a) of the Mine Act alleging a violation of section 56.11002 as follows, in part:

> The steps leading into the power generation van were not provided with handrails. The unit is accessed daily to service, start, and shut it down. The steps were clean and in good state of repair. . . . There was a potential for a slip and/or fall resulting in an injury.

Inspector King originally determined that an injury was unlikely and that any injury could reasonably be expected result in lost workdays or restricted duty. Inspector King amended the citation on September 7, 2004, to add the following language:

> After a review of the photo taken and discussion, it was determined that a significant and substantial violation occurred. It was noted that the interior floor of the power generation van was wet with spilled lubrication oil, the steps were steep and 53" off the ground, and there was oil on the steps.

He determined Bak Construction's negligence was moderate. The safety standard provides, in part, "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of $72.00 for this citation.

Inspector King testified that the van was a standard cargo trailer that was about 40 feet long and 8 feet wide. (Tr. 243). The van was used to house the generator and to store diesel fuel, grease, and oil. (Tr. 244, 269-70; Ex. G-10). The inspector also testified that the stairs had

previously been equipped with a handrail but, when the crusher was moved earlier in the year, the handrail was not reinstalled. (Tr. 243, 249; Ex. G-11).

As to the S&S allegation, Inspector King testified that miners were exposed to a trip and fall hazard when entering and leaving the generator van to start it up in the morning and to shut it down at the end of the shift. (Tr. 244-45). In addition, miners would occasionally enter the van at other times of the day. Inspector King noted that the stairs were steep and the steps were stained with oil. As a consequence, he believed that the stairs could become slippery at times. (Tr. 246, 248, 289). In addition, the inspector testified that the floor of the van was covered with accumulated oil from years of use. (Tr. 246). Without a handrail, a miner would not be able to brace himself if he slipped while carrying tools or other materials. If a miner were to fall, he could suffer broken bones or sprains. The side supports for the steps extended slightly above the floor of the van, which created a tripping hazard for anyone entering or exiting the van. Supervisor Steichen also observed fresh oil and grease on the floor of the van as well as oil stains on the stairs. (Tr. 299-300). He noted that the ground at the bottom of the stairs was uneven and scattered with rocks.

Mr. Bak testified that there was not any spilled oil or grease within 15 feet of the door of the van. (Tr. 310). Any oil on the floor was by the generator at the back of the van. He also testified that there was no oil on the steps. (Tr. 311). Mr. Back stated that if someone carrying a five gallon pail walked up the steps, he could grab the side of the van with his other hand and safely walk up. Finally, Mr. Bak testified that he had to fabricate a handrail to abate the citation. (Tr. 310). He stated that a handrail had never existed on these stairs.

Bak Construction contends that the testimony of King and Steichen is not credible. For example, it points out that Inspector King did not make any reference to oil on the stairs in his inspection notes. (Tr. 270). Indeed, his notes stated that the steps were clean and in good repair, as did his original citation. (Tr. 271-72). His notes also do not mention the presence of grease or oil on the floor of the van. (Tr. 273). Inspector King acknowledged that a person walking up the stairs can hold on to the doorway for the van to steady himself. (Tr. 274). Bak Construction also argues that, because these stairs have never been equipped with a handrail and the generator van has been inspected many times by MSHA, it did not receive fair notice that a handrail was required at that location.

Bak Construction maintains that the evidence shows that King changed the citation to include the S&S allegation because Supervisory Inspector Steichen required him to do so. (Tr. 274-75). It further maintains that MSHA changed the inspector's notes relating to this citation to support this S&S finding. For example, King originally believed that the steps were 48 inches high, but the modified citation states that the steps were 53 inches high. While this difference is not significant, Bak Construction argues that it shows that King and Steichen's testimony should not be credited. Inspector King admitted that he changed some of his notes concerning the citation. (Tr. 270). Supervisory Mine Inspector Steichen admitted at the hearing that his notes

did not document any concern about oil on the steps and that he also did not document any tripping hazards. (Tr. 306).

I find that the Secretary established the violation. The cited area was a stairway that was required to be equipped with a handrail under the safety standard. The photograph clearly shows that the stairs were equipped with a bracket to hold a handrail. (G-11). Inspector King credibly testified that Mr. Bak told him that he forgot to replace the handrail when the crusher was moved. (Tr. 243). To abate the citation, Mr. Bak found the handrail that had been used at the previous location. (Tr. 243, 249). I credit the testimony of Inspector King over the testimony of Mr. Bak on this issue.

I also find that the Secretary established that the violation was S&S. It must be remembered that, when considering whether a violation is S&S, the judge must assume continued normal mining operations. In addition, the Secretary is not required to establish that it is more probable than not that an injury will result from the violation. The stairway to the generator van was rather steep and it was about four feet high. The steps on the stairs were not non-skid metal treads but were wooden boards that were secured to the metal frame. Although there was no fresh oil or grease on the steps, they were stained with oil. Thus, the evidence establishes that oil is sometimes spilled on the stairway. The ground at the bottom of the stairs was uneven. The frame for the stairs extended above the floor of the van. I find that these conditions created a tripping and stumbling hazard to anyone entering or exiting the van. As a consequence, it was reasonably likely that someone would stumble and injure themselves, assuming continued mining operations. The hazard contributed to by the violation would likely result in a reasonably serious injury. As Inspector King testified, the types of injuries that can reasonably be expected include broken bones or sprains.

I do not accept Bak Construction's argument that I should not credit the testimony of King and Steichen because the citation was modified to include an S&S determination or because some of the details of their testimony were not documented in their notes. MSHA inspectors frequently modify citations after consulting with their supervisor and other inspectors and after reflecting on the conditions observed. I do not agree with Bak Construction's statement that "[t]he whole process of amending the citation to make it an S&S is suspect." (Bak Br. 23). Both King and Steichen freely admitted that the citation was amended based in part on subsequent discussions between the two of them.

I also find that Bak Construction's negligence was moderate. A penalty of $80.00 is appropriate for this violation.

F. <u>Citation No. 7938402</u>

Inspector King also issued Citation No. 7938402 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows:

> The side discharge conveyor located on the underside of the Pioneer 212 screen plant was not provided with adequate guards at the drive motor v-belts and the head and tail pulleys. There is normally no foot traffic in this area while the plant is running. However, there was a potential for a person to become entangled were they to come in contact with a pinch point.

Inspector King determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that Bak Construction's negligence was moderate. The safety standard provides, in part, "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $60.00 for this citation.

Upon inspection of the Pioneer 212 Screen Plant, King determined that three areas of the side discharge conveyor were not properly guarded. (Tr. 250-52). The existing guards on the head pulley and drive motor v-belts, only four feet off the ground, were inadequately constructed to keep an employee from coming into contact with either the head pulley or v-belt. Tr. 251. In addition, the tail pulley on the conveyer was not guarded at all. (Tr. 250; Ex. G-13). King acknowledged that the only employees who would enter into the area surrounding the conveyor were the skid steer operator, or possibly the front end loader operator. (Tr. 252). He also conceded that he did not have notes regarding employees being in the area and that he did not see any footprints in the area. (Tr. 282).

Bak Construction's witnesses testified that employees rarely walked or worked near the screen plant while it was operating. Darrell Dawson testified that the tail pulley was too high for any employee to trip into it. (Tr. 334). He admitted, however, that both Bob Bak and Spider walk around the conveyor area while it is in operation. (Tr. 333). Bob Bak testified that no maintenance is done on the equipment while it is in operation and that cleaning is performed with a loader or skid steer, with no possibility of physical contact with the machinery. (Tr. 314). He also opined that the guard covering the v-belt drive and pulley was adequate enough to prevent injury if someone were to stumble or fall in the vicinity. (Tr. 315).

The Secretary maintains that the use of machines for cleanup does not exclude Bak from complying with mandatory safety regulations. Sec'y Br. 30. She concludes that "[t]he fact that exposure to guarding hazards was limited does not negate the existence of a violation – it merely reflects on the gravity of the violation." (S. Br. 30). The guarding standard "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Thomson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Therefore, with regard to the few employees who enter the conveyor area, there is a possibility of inadvertent contact with moving machinery and the standard should apply.

Bak Construction contends that, because the guards on the head pulley and v-belts met minimal standards and the tail pulley was too high for any employee to make accidental contact, there was no chance for injury. (Bak Br. 24-26; Tr. 280, 313). This fact, coupled with the fact that the few employees who enter the area do so in machinery, leads Bak Construction to conclude that there is no violation of the guarding standard and that, if a violation is found, its negligence was low.

I find that the Secretary established a violation. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros.*, 6 FMSHRC at 2097. In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. There is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Although the evidence reveals that foot traffic around the screen plant was low, people do walk through the area from time to time. (Tr. 333, 340). An employee may attempt to clean up small accumulations of material with a shovel while the plant is operating. A well-constructed guard provides a physical barrier that prevents accidental contact with moving machine parts.

I find that the violation was not serious because the hazard contributed to by the violation is unlikely to result to an injury. Bak Construction's negligence was relatively low because Mr. Bak did not believe that the cited conditions created a safety hazard. The Secretary's proposed penalty of $60.00 is appropriate.

G. Citation No. 7938403

Inspector King issued Citation No. 7938403 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The smooth tail pulley under the clay hopper was not provided with a guard. The pinch point is approximately one foot off the ground and the belt travels at approximately 32 feet per minute. Normally, there is no foot traffic in this area while the plant is running. Were a person to become entangled, a debilitating injury could occur.

Inspector King determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that

Bak Construction's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector King issued the citation because the smooth tail pulley on the clay hopper was not provided with a guard. (Exs. G-15, G-15). Inspector King testified that the clay hopper is used to feed the clay binding material into the mined product to meet customer specifications. (Tr. 257). King also stated that the clay in the hopper readily absorbs moisture with the result that the hopper often becomes clogged. Tr. 258. The inspector believed that, as a result, an employee was required to monitor the area and clean up clogged material. (Tr. 258-59). King testified that the smooth tail pulley was previously guarded, but that Bak Construction removed the guard at some point in time. (Tr. 255-56).

Bob Bak first testified that, in the 20 years in which he has operated the hopper, the pulley has never been guarded. (Tr. 324). He also testified that, when the clay sticks in the hopper, a 12-volt vibrator shakes the clay loose. (Tr. 319-21). The conveyor belt is normally not running when the vibrator is in use. (Tr. 321). As with the previous citation, only those responsible for cleanup would come into the area surrounding the tail pulley and those employees would do so using machinery. (Tr. 283). Additionally, Mr. Bak testified that, because the pinch point on the conveyor is extremely low, it is not likely that anyone would come into contact with the pulley. (Tr. 318). In fact, he stated that if someone were to approach the conveyer on foot, he would likely hit his head on one of the hopper braces before reaching the pulley. (Tr. 319, 337-38). Finally, he testified that Bak Construction had not received any citations in the past for failing to guard the pulley. (Tr. 324).

The Secretary makes the same arguments with respect to this citation as she did with respect to the previous citation. She maintains that the guarding standard is not dependent on a high likelihood of injury, but rather on any possibility of inadvertent contact with moving machinery. She concludes that Bak Construction failed to guard moving parts and is therefore in violation of the standard.

Bak Construction also makes similar arguments with respect to this citation. The company states that, because of location of the pulley, it is not possible for any employee to make accidental contact with the moving machinery. (Bak Br. 26-27). Therefore, it concludes that there is no violation of the relevant machine guarding standard. Finally, Bak Construction maintains that it was not provided with fair notice that a guard was required at this location because it was never cited during MSHA's previous inspections.

I find that the possibility that anyone would come in contact with the cited smooth tail pulley was extremely remote. The pulley was at ground level and it was located at the bottom of a chute that narrowed at the bottom. Someone walking in the area would hit his head on the side of the chute or on the structure supporting the chute before he could reach the pulley. In *Thompson Bros*, the Commission made clear that citations issued under this standard must be "resolved on a case-by-[case] basis." *Id.* I find that the Secretary did not establish that there was

a reasonable possibility of contact because of the location of the pulley. A miner would be unable to get close enough to the pulley for it to pose a hazard in the event he stumbled and fell down. Consequently there was no realistic possibility that anyone stumbling or falling would come into contact with the moving parts or that anyone would make contact due to inattention or careless behavior. In addition, the belt moves at a low speed and the pinch point is located on the underside of the pulley next to the ground. (Tr. 318; Ex. G-15). Other Commission administrative law judges have vacated citations where the Secretary did not establish a reasonable possibility of contact with the moving machine parts. *See Hamilton Pipeline, Inc.,* 24 FMSHRC 915, 922-23 (Oct. 2002) (ALJ); *Chrisman Ready-Mix, Inc.,* 22 FMSHRC 1256, 1259-61 (Oct. 2000) (ALJ). Consequently, this citation is vacated.

H. Citation No. 7938407

Bak Construction withdrew its contest of this citation at the hearing and agreed to pay the Secretary's proposed $60.00 penalty. (Tr. 344).

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Crusher No. 3 was not issued any citation in the 24 months preceding August 26, 2004. Bob Bak Construction is a small mine operator. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Bak Construction's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(I), I assess the following civil penalties:

Citation/Order No.	30 C.F.R. §	Penalty
CENT 2005-139-M		
7915395	56.14130(g)	$275.00
7938404	56.14130(i)	275.00
CENT 2005-162-M		
7915400	56.11002	80.00
7915396	56.14132(a)	Vacated
7938402	56.14107(a)	60.00
7938403	56.14107(a)	Vacated
7938407	56.4402	60.00
CENT 2006-009-M		
7915397	46.6(a)/46.9(c)(2)(i)	Vacated
	TOTAL PENALTY	$750.00

For the reasons set forth above, the citations and orders are **AFFIRMED** or **VACATED**, as set forth above. Bob Bak Construction is **ORDERED TO PAY** the Secretary of Labor the sum of $750.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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