FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 10, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2008-287-M
Petitioner	:	A.C. No. 14-01477-136068
	:	
	:	Docket No. CENT 2009-061-M
	:	A.C. No. 14-01477-165617-01
	:	
	:	Plant 1
	:	
	:	Docket No. CENT 2008-334-M
	:	A.C. No. 14-01478-139550
v.	:	
	:	Docket No. CENT 2008-574-M
	:	A.C. No. 14-01478-150353
	:	
	:	Plant 2
	:	
	:	Docket No. CENT 2008-285-M
	:	A.C. No. 14-01597-136070
	:	
NELSON QUARRIES, INC.,	:	Docket No. CENT 2008-487-M
Respondent	:	A.C. No. 14-01597-143393
	:	
	:	Docket No. CENT 2008-564-M
	:	A.C. No. 14-01597-146991
	:	
	:	Plant 4

DECISION

Appearances: Ronald S. Goldade and Hillary A. Smith, Conference & Litigation Representatives, Mine Safety and Health Administration, Denver, Colorado, and Jennifer A. Casey, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Paul M. Nelson, Nelson Quarries Inc., Jasper, Missouri, for Respondent.

Before: Judge Manning

These cases are before me on seven petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"),

against Nelson Quarries, Inc., 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 ten citations issued by MSHA under section 104(a) of the Mine Act at three plants operated by Nelson Quarries. The parties presented testimony and documentary evidence at the hearing held in Topeka, Kansas.

At all pertinent times, Nelson Quarries operated quarries in southeastern Kansas. The quarries mine limestone and then crush and screen the material for sale. The operations are portable and do not necessarily operate twelve months a year.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. CENT 2008-287-M; Plant 1

On July 24, 2007, former MSHA Inspector Chrystal Dye issued Citation No. 6421431 alleging a violation of section 56.14131(a). (Tr. 18; Ex. G-1). The citation alleges that the driver of the Dresser Haulpak truck was not wearing his seat belt when he drove it from the parking space to the north side of the plant. Inspector Dye determined that an injury was reasonably likely and that any injury would likely be fatal. She determined that the violation was significant and substantial ("S&S") and that the negligence was moderate. The safety standard provides that "[s]eat belts shall be provided and worn in haulage trucks." The Secretary proposes a penalty of $975.00 for this citation.

Inspector Dye testified that when she asked James Shaw, the driver of the truck, to open the door, he was not wearing his seat belt. (Tr. 19). He drove about a quarter of a mile from the parking lot to where she was standing without wearing a seat belt. (Tr. 27). She determined that the violation was S&S because Shaw would be hauling rock with the truck later in the shift. The road from the plant to the pit contained inclines and declines as well as other traffic. There had also been a lot of rain in eastern Kansas in the summer of 2007. She testified that if Shaw were to hit bad road without wearing a seat belt, he could have been seriously injured. (Tr. 20-21). She testified that MSHA's program policy manual and a history of fatal accidents support her S&S finding. (Tr. 22-25; Exs. G-2, G-3). Because Nelson Quarries has a policy that requires equipment operators to wear seat belts, she determined that the negligence was moderate. (Tr. 25).

There was no dispute that Shaw was not wearing a seat belt. I find that the Secretary established a violation but that, under the particular facts of this case, the violation was not S&S. 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).

The truck had been parked all morning because it had been tagged out for repairs. (Tr. 31). At the request of Inspector Dye, Shaw drove the truck from the parking area to the area where she was inspecting trucks for the sole purpose of permitting her to inspect it. Patrick Clift, a foreman for Nelson Quarries, testified that he flagged Shaw down and asked him to temporarily stop driving his own truck so he could drive the subject haul truck to Inspector Dye. (Tr. 37). The ground was level in that area. (Tr. 32). When Inspector Dye later inspected the haul truck that Shaw was actually driving that day, he was wearing his seat belt. Although Clift told the inspector that the subject haul truck would be used later that day, it was actually taken back to the parking lot for further repairs. (Tr. 33). It was never Clift's intention that Shaw would change trucks that day. Shaw continued to drive the truck he had been assigned at the start of the shift. (Tr. 37-38). Clift was surprised when he learned that Shaw was not wearing a seat belt because he is a good employee who always wears his seat belt.

Shaw testified that he normally wears his seat belt. (Tr. 43). He also testified that when he was asked to drive the subject haul truck to Inspector Dye, he parked the truck he was driving, got in the other truck and drove it about 50 feet to the inspector. This was not an ordinary event and he forgot to put on his seat belt. (Tr. 27, 43-44). He left the truck he had been operating with the motor running because he was going to get back in it to continue hauling rock that day.

I agree with the Secretary that, under ordinary circumstances, the failure of a haul truck driver to wear a seat belt creates a serious safety hazard. In this instance, however, the truck was driven a short distance, up to a quarter mile, over level terrain. Shaw was not going to be hauling rock with that truck because he was only driving it to the inspector. I credit the testimony of Clift and Shaw on this citation. It was not reasonably likely that Shaw would be involved in an accident that would result in a serious injury. The violation was not S&S. I also find that the operator's negligence was low. The evidence establishes that Shaw normally wears a seat belt and that he forgot in this instance because he was asked to perform an unusual task. A penalty of $100.00 is appropriate for this citation.

B. CENT 2009-061-M; Plant 1

At the conclusion of the hearing, the parties agreed to settle the two citations at issue in this docket. (Tr. 354-55). This docket involves Citation Nos. 6321528 and 6321529. Respondent agreed to withdraw its contest of Citation No. 6321528 and pay the proposed penalty. The Secretary agrees to modify Citation No. 6321529 to delete the S&S determination. Respondent agrees to pay the proposed penalty for that citation as well. The settlement is approved.

C. CENT 2008-334-M; Plant 2

1. On September 5, 2007, MSHA Melvin Lapin issued Citation No. 6421143 alleging a violation of section 56.14211(b). (Ex. G-6). The citation states that two employees were working on the Dresser Haulpak truck at the ready line with the box in the raised position. The box was not blocked against motion to prevent the box from falling and the wheels of the truck were not blocked with a chock. One employee was under the box on the truck's frame adding hydraulic oil to the tank and the other employee was under the truck. Inspector Lapin determined that an injury was highly likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[p]ersons shall not work on top of, under, or work from a raised component of mobile equipment until the component has been blocked or mechanically secured to prevent accidental lowering." The standard also requires that the equipment "be blocked or secured to prevent rolling." The Secretary proposes a penalty of $3,700.00 for this citation.

Inspector Lapin testified that he began a regular inspection of Plant 2 on September 5 and that he was accompanied by his supervisor, Joe Steichen. After they stopped at the scale house to introduce themselves, they started to drive to the plant to meet up with Jeff Benedict, the lead man. On the way to the plant, they saw a dump truck with its box raised. They decided to see why the box was raised. The "box" is the truck bed that carries rock. As they got closer, they saw a miner between the raised box and the frame of the truck. It looked like he was pouring oil into the hydraulic tank for the truck. There was another miner under the truck next to the right wheels. Lapin got out of the MSHA vehicle to see if there was any kind of support for the box. (Tr. 82). When he saw that the box was not supported or blocked against motion, he issued an oral imminent danger order and told the miner under the box to move away from the truck. (Ex. G-5). He subsequently learned that the miner under the box was Billy Doolittle and the miner under the truck was Nate Schmidt. When Doolittle did not remove himself, Lapin put his hand on Doolittle's shoulder and again ordered him to get out from under the box. (Tr. 83). Doolittle was kneeling on the truck's framework just behind the cab. Lapin testified that Doolittle was in a position on the frame that, if the box were to fall, it would fall directly on him. Lapin assumed that the hydraulic system had a leak because new oil does not normally have to be added to a closed system. (Tr. 84, 105). Lapin also noticed that the wheels of the truck were not chocked.

Lapin issued two citations to Nelson Quarries as a direct result of the practice he observed. Citation No. 6421143 alleges that the box was not blocked against motion and the

wheels were not chocked to prevent it from rolling. Inspector Lapin testified that he was concerned for Doolittle's life because he was working directly under the box of the truck. He was concerned about Schmidt because he was working under the truck just inches from the right drive wheel. The truck was manufactured with a hole on each side of the frame supporting the box and on each side of a frame on the truck body. When the box is in a raised position, the holes line up so that a "safety bar" or "retaining pins" can be inserted. (Tr. 92-93, 108; Exs. G-7, G-11). Inspector Lapin testified that if a safety bar had been inserted in these holes, the box would have been adequately "blocked or mechanically secured to prevent accidental lowering" in conformance with the safety standard. (Tr. 105-06). Although there apparently were safety bars at the plant, Jeff Benedict could not locate one on September 5. (Tr. 93-94). The shop manual for the dump truck specifically states: "Do no allow anyone beneath the [dump box] unless 'body-up' retaining cables or pins are installed." (Ex. G-7 p. 3). The operator's manual for the truck provides instructions on the storage and use of "body-up pins" and states: "Do not work under raised body unless body safety cables, props, or pins are in place to hold the body in the up position." (G-8, G-9).

Inspector Lapin testified that Doolittle could have been fatally injured. He based this conclusion on a number of factors including MSHA Fatalgrams he has reviewed. (Tr. 100-; Ex. G-12). He admitted, however, that he knows of no fatal accidents caused by a falling box on a Dresser haul truck. (Tr. 139). The inspector believed that the bed of the truck could have fallen because hydraulic systems can fail. (Tr. 144). In addition, a gust of wind could have come up and moved the truck because the raised box would act as a sail and the wheels were not chocked. Although the parking brake was apparently set, the wheels were not against a berm.

As discussed in more detail below, Inspector Lapin has extensive experience with mobile equipment. He testified that the box on a dump truck can unexpectedly come down. (Tr. 103). The truck was not locked and the controls for the box were near the door. Someone could enter the cab of the truck and accidently knock the controls for the box. The inspector determined that it was highly likely that Doolittle would be injured given his position on the frame of the truck under the raised box. (Tr. 115-120). Supervisory Inspector Steichen agreed with Inspector Lapin's characterization of the violation. (Tr. 150).

Paul Nelson testified about the design of the Dresser haul truck. He said that it uses an electro-hydraulic system that operates a pilot system to control the hydraulics on the truck. (Tr. 215-17). An electric solenoid is used to engage a small hydraulic system, called the pilot system, that actually operates the main hydraulic system. The advantage is that it is easier to operate and it eliminates much of the "mechanical linkage that can wear out and cause problems." (Tr. 216). This system provides a greater measure of safety because, if you lose pilot pressure, the oil is trapped in the hydraulic cylinders which holds the bed up. (Tr. 217; Ex. R-334-D8). The only way for the bed to come down is if you have a fault in the system such as a blown O-ring or hydraulic line. Nelson testified that it is very unlikely for the bed to come down from a raised position on this particular model of Dresser truck. (Tr. 218). He said that the safety pins should be installed, but the system used on this type of Dresser truck is very reliable and an accident was unlikely. Nelson also testified that the bed of the truck is designed so that,

as the bed is raised, its center of gravity is almost vertical with the hinge for the bed with the result that very little force is needed to hold the bed up. It is close to being balanced. (Tr. 220). This fact makes it even more unlikely that the bed will come down unexpectedly. Nelson also testified that it is his understanding that the hydraulic tank is on the side of the truck frame and that the tank for the transmission fluid was between the frame members. Thus, Doolittle may have been adding transmission fluid.

I find that the Secretary established an S&S violation of the safety standard. Inspector Lapin is a journeyman heavy equipment mechanic. (Tr. 103). He worked for 29 years for a sand and gravel company in Oregon. During much of that time he worked in the shop, first as a trainee, then as a lead man, and finally as a foreman. (Tr. 76-78). Lapin performed maintenance on a wide variety of mining equipment including front-end loaders, bulldozers, dump trucks, and a dragline. He was subsequently a production foreman at the quarry. I find that Inspector Lapin was a very credible witness on matters relating to heavy equipment and I give his testimony great weight. There is no doubt that the Dresser Haulpak truck used by Nelson Quarries is well designed, as testified to by Mr. Nelson. That design, however, does not eliminate the hazard of working under the raised bed of the truck. As the Commission has stated, the Secretary is not required to prove that it is more probable than not that the cited condition will result in an accident. Her burden is to establish that it is reasonably likely that the *hazard contributed to* by the violation will result in an injury of a reasonably serious nature. Based on the evidence presented by the Secretary, it is clear that the violation contributed to a serious risk that the bed of the truck would fall and kill Mr. Doolittle. Hydraulic and other systems on mining equipment can fail in unexpected ways and the cited safety standard was written to protect miners in such instances.

I also find that the negligence of the operator was moderate. It is clear that it is company policy that miners block the raised bed of dump trucks before performing maintenance on them. In addition, Doolittle's negligence cannot be directly imputed to the company. Nevertheless, a safety bar could not be located in the vicinity of the ready line, even after Benedict looked. That indicates that, although Nelson Quarries understands the importance of blocking raised equipment, it does not always give its employees the tools to protect themselves. A penalty of $3,700.00 is appropriate.

2. On September 5, 2007, Inspector Lapin issued Citation No. 6421144 alleging a violation of section 56.18006. (Ex. G-13). The citation alleges that the company failed to indoctrinate a newly hired employee (Mr. Doolittle) in safety rules and safe work procedures. Based on discussions with Doolittle, the inspector determined that Doolittle was unaware of the requirement to block the box after it was raised. Inspector Lapin determined that an injury was highly likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[n]ew employees shall be indoctrinated in safety rules and safe work procedures." The Secretary proposes a penalty of $3,200.00 for this citation.

Inspector Lapin testified that when he asked Billy Doolittle about the use of a safety bar, Doolittle acted as if he did not know what a safety bar was. (Tr. 94-96). When the inspector showed Doolittle where the safety bar would be inserted, he still did not act as if he knew what the inspector was talking about. The inspector testified that he did not use the term "body-up pin" with Doolittle, but that when he showed Doolittle the holes for the safety bar or pins, Doolittle did not then say anything to indicate that he knew what the holes were for. (Tr. 108-09, 142). Doolittle had worked at the plant for a little less than two weeks. (Tr. 128). He told the inspector that he had received a few hours of training at one of the company's other plants. Based on his interview with Doolittle, Lapin testified that he did not believe that Doolittle had been adequately trained on the task of blocking the box and truck against motion. (Tr. 96, 124-25). If Doolittle had been indoctrinated in safety rules and safe work practices, he would have known that he should not work under the raised bed of the truck without first blocking it against motion. (Tr. 126).

Inspector Lapin also testified that he looked at the company's training records. In addition to other records, he saw training records for Doolittle and Schmidt. (Tr. 129). Although Doolittle may have received new miner training, Lapin believed that such training was inadequate since he did not know how to block the bed of the truck against motion. *Id.* The inspector determined that a serious accident was highly likely because inadequate training can result in serious accidents. (Tr. 130, 132-33). Steichen testified that he agrees with this assessment. (Tr. 152). Steichen testified that when he asked Doolittle if he knew how to block the box, he replied "no." (Tr. 151; Ex. G-15).

Patrick Clift testified that he provided Doolittle and Schmidt with the MSHA required training. (Tr. 155-56). In particular, Clift showed them the safety features on a Dresser dump truck, including the safety pins, and instructed them on maintenance procedures. Clift testified that he made sure that they understood what he was telling them by asking them questions. (Tr. 157). Clift said that he stressed the use of safety pins with these two miners during his training. *Id.* He testified that he showed Doolittle where the pins were to be inserted to support the bed and explained that they must be used when the bed is in the air. (Tr. 167-68). Clift signed new miner and task training records for these two miners. (Tr. 158; Ex. R-334-D4, D5, D6 & D7). Clift stated that he has been training miners for about four years. None of the training that Clift performed occurred at Plant 2. Nelson Quarries uses similar Dresser and Caterpillar trucks at its plants. Clift testified that Doolittle and Schmidt would have been given additional training when they started working at Plant 2.

Nathan Schmidt is a truck driver at Plant 2. He testified that he was given training by Patrick Clift along with Mr. Doolittle. He testified that Clift showed them the safety pins and told them that they must be used when the bed is raised. (Tr. 175). Schmidt said that he did not know that Doolittle had not pinned the truck bed on September 5. (Tr. 177). Schmidt also testified that he knew that the truck bed should be blocked against motion before anyone works under it. (Tr. 180). He also testified that Darick Johnson, a loader operator who has worked for Nelson Quarries since 2000, was in the same area putting hydraulic fluid into his loader. (Tr. 182). Mr. Johnson testified that he was in the oil trailer when the MSHA inspectors arrived.

(Tr. 188). Johnson also testified that on another occasion, prior to this inspection, he helped Doolittle install safety pins for the bed of his truck. (Tr. 193, 207). He did not know why safety pins could not be located when the MSHA inspectors were present. (Tr. 207).[1]

There have been very few decisions interpreting the cited safety standard. In *Weathers Crushing, Inc.*, 22 FMSHRC 1032 (Aug. 2000) (ALJ), a miner who was hired to operate a rock crusher was killed a little more than two hours after he had begun working at the plant. The mine operator only provided on-the-job training for about thirty minutes before he was told to operate the crusher. He was apparently instructed to use a sledge hammer to break up any rock that obstructed the crusher. MSHA determined that the head of the sledge hit the miner in the face as he was attempting to dislodge a rock. The administrative law judge held that the mine operator violated the safety standard because it merely "familiarized [the miner] with unsafe work procedures, after which he was essentially cast adrift." 22 FMSHRC at 1039.

In the present case, Inspector Lapin issued the citation because it did not appear to him that Doolittle knew that he should block the bed of the truck against motion and chock the tires before beginning work. The inspector was especially concerned because, when he showed Doolittle the holes at the back of the truck where a safety bar or pin could be inserted, Doolittle did not seem to know what he was talking about. This conduct indicated to the inspector that he had not been indoctrinated in safety rules and safe work procedures.

Patrick Clift testified that Doolittle took the required new miner training and that he was also given task training on trucks. The records corroborate this testimony. (Ex. R-334-D5 & D7). This training was completed on August 27, 2007. Doolittle was task-trained on 35 ton Caterpillar trucks, 35 ton Dresser trucks, and 50 ton Dresser trucks. The Secretary did not establish that the company's training program violated the provisions of 30 C.F. R. Part 46. Clift testified that he instructed Doolittle on the use of safety pins when performing maintenance on dump trucks. (Tr. 157). At the hearing, the Secretary questioned the adequacy of the training because it was performed at a different plant. Although I would tend to agree that some training would by necessity need to be at the plant where a new miner would be working, it escapes me how training on the safety features and procedures of a truck would be different at another plant. The Dresser trucks were the same in all relevant respects.

Does the Secretary establish a violation of this safety standard by introducing evidence to show that a new miner did not appear to know how to safely perform the task he was assigned? Inspector Lapin testified that Doolittle did not seem to know that the bed should have been blocked against motion. Does this fact establish that Doolittle was not properly instructed on safety rules and safe work procedures? Inspector Steichin testified that Doolittle told him that he did not know how to block the box. (Tr. 151). In the other cases involving this standard, it was

[1] Mr. Doolittle no longer works for Nelson Quarries and he did not testify at the hearing. Doolittle was replaced by someone else because he was incarcerated. (Tr. 162).

quite clear that the new miner in question had not been trained.[2] In this case, on the other hand, there is evidence that Doolittle had been trained on the use of safety pins or bars, but that he failed to follow correct safety procedures. Many violations under the Mine Act are a direct result of a miner failing to follow safe procedures when performing a task. Clearly, a citation alleging a violation of training rules would not be appropriate whenever a newly hired miner fails to follow an MSHA standard or a company safety rule.

Although this citation presents a very close issue, I find that the Secretary did not establish a violation. I credit the testimony of Patrick Clift. I find that the testimony of Mr. Clift rebuts the Secretary's *prima facie* case. His testimony is corroborated by the training records and the testimony of Schmidt. Doolittle had been properly trained but he was not an attentive or safety-conscious employee because he failed to follow the company's safety procedures when performing maintenance on the Dresser truck. The evidence shows that he had been indoctrinated in these safety procedures but he chose to ignore them. This citation is vacated.

D. CENT 2008-574-M; Plant 2

On February 2, 2008, MSHA Inspector James Timmons issued Citation No. 6421756 alleging a violation of section 56.9300(a). (Ex. G-18). The citation alleges that there were no berms present on the east or west side of the ramp entering the pit. It states that there was a drop-off of about 5 feet down on each side of the roadway and there was evidence that the road had been used in the cited condition. Inspector Timmons 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 the negligence was moderate. The safety standard provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $263.00 for this citation.

Inspector Timmons testified that he observed that there were no berms on the east and west side of the ramp entering the pit. (Tr. 291). He stated that there was a five-foot drop-off from the edge of the roadway to a pond below. Using a stick he measured the water to be about three feet deep at that point. (Tr. 292). He believed that the drop-off was sufficient to overturn a vehicle. He determined that the violation was S&S because it was the primary roadway between the pit and the plant. Large trucks and other vehicles use this roadway on a regular basis. (Tr. 300). The road was about 20 feet wide at the cited location. There were tire tracks near the edge of the roadway. (Ex. G-19). The inspector testified that if a large piece of equipment were to go off the side of the road into the water, it is reasonably likely that the results would be fatal. (Tr.

[2] In *Knock's Building Supplies*, 20 FMSHRC 535, 543 (May 1998) (ALJ), a truck driver and his foreman, who were both new employees, were not aware of the applicable MSHA standards and it was clear that no training on safety rules and safe work procedures had been given. In *Root Neal & Company* , 22 FMSHRC 94, 105 (Jan. 2000) (ALJ), it was clear that the miner was asked to perform an installation and repair task that he had not been trained to do.

294, 296; Ex. G-19). The unbermed area along the roadway was about 25 to 30 feet long. (Tr. 299).

Inspector Timmons marked the negligence as moderate rather than high because Benedict told him that a new drainage culvert had been installed under the road in that area the day before and the berm had not yet been replaced. (Tr. 295, 302). The inspector testified that berms should have been constructed as soon a feasible during the road reconstruction. (Tr. 319).

Patrick Clift testified that the tire tracks that the inspector observed were likely from a loader that was used to spread out additional base rock along the road. (Tr. 329). New rock base would have been applied after the culvert was cleaned out. Clift also testified that the drop-off was not as great as the inspector believed it to be. (Tr. 332-34). He also said that, because the roadway was level in the cited area, it had not been bermed in the past. (Tr. 335). Berms had been constructed on the ramp itself, but once the road flattened out near the culvert, berms had never been present. (Tr. 341).

I find that the Secretary established an S&S violation of the safety standard. Although it is not entirely clear how far down the ramp the berm had previously been constructed, I find that berms were required at the cited area. The drop-off was significant and it was right at the bottom of the ramp where the road begins to curve. (Ex. R-574-D1). The Secretary established that the grade and depth of the drop-off was sufficient to cause a vehicle to overturn or endanger persons in mobile equipment. The equipment operator could be seriously injured or killed. Assuming continued mining operations, it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature. I credit the Secretary's evidence on this citation. A penalty of $263.00 is appropriate.

E. <u>CENT 2008-285-M; Plant 4</u>

On November 15, 2007, Inspector Timmons issued Citation No. 6421702 alleging a violation of section 56.14131(a). (Tr. 53; Ex. G-4). The citation alleges that the operator of the 773 Caterpillar haul truck was observed operating the truck at the dump ramp without wearing his seat belt. The operator told the inspector that he had been trained to wear the seat belt, but that he forgot to put it on. Inspector Timmons 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 the negligence was moderate. The safety standard provides that "[s]eat belts shall be provided and worn in haulage trucks." The Secretary proposes a penalty of $308.00 for this citation.

Inspector James Timmons testified that Earl Priest, the operator of the Caterpillar 773 haul truck, was not wearing his seat belt. (Tr. 53). Timmons testified that he stopped Priest as he was coming down the ramp from the crusher because he wanted to ask him where the foreman was. Priest was not wearing a seat belt. Priest told him that he got out of the truck for a moment while he was at the crusher and he forgot to put it back on when he returned to the truck. (Tr. 62, 66). Inspector Timmons determined that the violation was S&S because there was other

mobile equipment in the area, the driver was coming down a ramp from the crusher, and he was heading toward the pit to pick up more rock. (Tr. 55). The inspector testified that, without a seat belt, Priest could have been seriously injured or killed in the event of an accident. The inspector determined that the operator's negligence was moderate because the company has a seat belt policy. As far as he knows, the two seat belt citations at issue in these cases are the only seat belt citations ever issued to Nelson Quarries.

Priest testified that he normally wears his seat belt because the floor of the pit is very rough and he would get "knocked around pretty good" if he were not wearing his seat belt. (Tr. 65). He stated that he was hauling rock from the pit to the crusher on November 15. Priest acknowledged that Nelson Quarries has a policy requiring that seat belts be worn at all times. (Tr. 69; Ex. R-285-2). He was not disciplined for failing to wear a seat belt.

I find that the Secretary established an S&S violation of the safety standard. There is no dispute that Priest was not wearing his seat belt when he drove down the ramp from the crusher. The Secretary established that it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Priest dumped the rock at the crusher and proceeded down ramp on the way to the pit. Had he not been stopped by the MSHA inspector, he would have driven into the pit. Priest acknowledged that the floor of the pit was rough and that a seat belt was necessary to prevent injury. I find that the company's negligence was slightly less than moderate because the company had a seat belt policy. Priest's negligence should not be imputed to the company because he was an hourly worker. A penalty of $275.00 is appropriate.

F. CENT 2008-487-M; Plant 4

At the beginning of the hearing, Nelson Quarries agreed to withdraw its contest of the citations at issue in this docket. (Tr. 10-11). The settlement is approved.

G. CENT 2008-564-M; Plant 4

On November 19, 2007, Inspector Timmons issued Citation No. 6421704 alleging a violation of section 62.120. (Ex. G-16). The citation alleges that the results of a full shift sample taken on that date showed that the driver of the Caterpillar haul truck received an action level noise dose of 88 percent. The citation noted that the noise level exceeded the action level dose of 50 percent of the personal exposure level (PEL). The miner was not enrolled in a hearing conservation program. Inspector Timmons determined that an injury was unlikely but that any injury would likely to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The health standard provides that "[i]f during any work shift a miner's noise exposure equals or exceeds the action level the mine operator must enroll the miner in a hearing conservation program that complies with § 62.150 of this part." The Secretary proposes a penalty of $100.00 for this citation.

Inspector Timmons issued the citation after conducting a noise survey at the quarry. He issued the citation because he believed that the noise level exceeded the action level for the driver of the Caterpillar halt truck, Rick White. (Tr. 234). If a miner exceeds the action level, the mine operator must enroll him in a hearing conservation program that complies with section 62.150. The exposure level met the action level threshold because it was above 80 dBA but was below the PEL of 90 dBA. (Tr. 235). The dosimeter indicated that the driver had been exposed to a time-weighted average sound level of 88.5 dBA. The term "action level" is defined as "[a]n 8-hour time-weighted average sound level (TWA) of 85 dBA, or equivalently a dose of 50%, integrating all sound levels from 80 dBA to at least 130 dBA." (Section 62.101). The operator of the truck was hauling rock and the window on the driver's side was open. (Tr. 255). Other trucks were being operated on the same day, but only Rick White was found to be above the action level for noise. (Tr. 261, 263, Ex. R-564-D1).

At the hearing, Inspector Timmons described how he took the measurement using a dosimeter. (Tr. 238-46). He followed standard MSHA procedures, except he placed the noise microphone in a different location than is prescribed in MSHA's "Metal and Nonmetal Health Inspections Procedures Handbook." (Ex. G-17). The Handbook instructs inspectors to attach the mike to clothing on the miner's shoulder that would normally be between the principal noise source and the miner's ear. *Id. at* 2-3. The Handbook states that, based on the recommendations of the manufacturer, the mike should be "located at the top of the shoulder midway between the neck and end of the shoulder, with the microphone diaphragm pointing in a vertical upward direction." *Id.* at 2. Inspector Timmons attached the mike to the miner's collar in a position that was almost vertical. (Tr. 241). Inspector Timmons testified that Richard McCutcheon, industrial hygienist for the Rocky Mountain District, advised him that it would be appropriate to attach the mike to the collar. (Tr. 241-42, 252). When the microphone is attached to clothing on the miner's shoulder when he is operating mobile equipment, it could come off or the wind screen on the mike could fall off when the miner puts on his seat belt. (Tr. 243). McCutcheon told him that there would be a minimal difference in the dBA reading if the microphone were placed on the miner's collar.

Patrick Clift testified that, after a dosimeter was placed on Rick White and he had been driving around for a while, Inspector Timmons asked him to stop so that the dosimeter could be checked. Clift was with the inspector at that time. Clift testified that he became very concerned when he saw where the mike was placed. He said that Mr. White is a boisterous, talkative man with a full beard. (Tr. 269-70, 280). Clift said that the microphone was rubbing against his beard. Clift testified that when the inspector said that it looked like the driver might be reaching the action level, Clift raised these concerns with the inspector. (Tr. 270). Clift asked Rick White to talk. According to Clift, the dosimeter shot up from 75 into the 115 to 120 range because the mike was right on his neck. It went back down when he stopped talking. Clift told the inspector that the placement of the mike against his neck and beard was throwing off the results. (Tr. 271-72, 281-82). Clift also testified that the Caterpillar truck that Rick White was driving was a relatively new truck. (Tr. 270). Another similar Caterpillar truck was operating that day doing work that was noisier, but the dosimeter on the driver of that truck did not register noise that was

close to the action level. (Tr. 272-74). The other truck drivers at the plant did not have beards. (Tr. 277).

I find that this citation should be vacated. I credit the testimony of Mr. Clift that the microphone for the dosimeter was rubbing against Rick White's beard and neck. Inspector Timmons placed the microphone so close to his neck that his beard was rubbing against it. The placement of the microphone on Mr. White immediately adjacent to his neck raises serious questions as to the validity of the sample. The Handbook specifically requires that the microphone be placed midway between the neck and the end of the shoulder. The Handbook also states that if "unusual conditions arise during the sampling period then the sample may have to be voided." (Ex. G-17 p. 3). Although Inspector Timmons' practice of placing dosimeter microphones on the collar of miners he is testing for noise exposure may be acceptable in other situations, I find that it was not appropriate when he tested Mr. White. The citation is vacated. Nelson Quarries is, of course, required to comply with the provisions of section 62.110.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Seven citations were issued at Plant 1 on July 24, 2007, in addition to the citation at issue in this case. (Ex. G-26). At Plant 2, 17 citations were issued on September 5, 2007, in addition to the citations at issue in this case and 7 citations were issued in 2005. *Id.* Plant 4 had a history of about 22 paid violations in the two years prior to November 19, 2007. *Id.* Nelson Quarries is a rather small operator and its quarries are small. All of the violations were abated in good faith. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. If I did not discuss gravity or negligence with respect to a citation, then the inspector's determinations are affirmed. 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 No.	30 C.F.R. §	Penalty
CENT 2008-285-M, Plant 4		
6421702	56.14131(a)	$275.00
Citation No.	30 C.F.R. §	Penalty
CENT 2008-287-M, Plant 1		

6421431	56.14131(a)	$100.00
CENT 2008-334-M, Plant 2		
6421143	56.14211(b)	3,700.00
6421144	56.18006	Vacated
CENT 2008-487-M, Plant 4		
6421645	50.30(a)	100.00
6421646	50.30(a)	100.00
CENT 2008-564-M, Plant 4		
6421704	62.120	Vacated
CENT 2008-574-M, Plant 2		
6421756	56.9300(a)	263.00
CENT 2009-061-M, Plant 1		
6321528	56.12032	308.00
6321529	56.20003(a)	460.00
	TOTAL PENALTY	$5,306.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $5,306.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**. Payment shall be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning
Administrative Law Judge

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RWM