

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 29, 1998

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 98-1-M
Petitioner : A. C. No. 13-01916-05505
v. :
 : Knock's Sand & Gravel
KNOCK'S BUILDING SUPPLIES, :
Respondent :

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Gary Papenheim, Esq., Parkersburg, Iowa, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Knock's Building Supplies, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges 15 violations of the Secretary's mandatory health and safety standards and seeks a penalty of \$2,289.00. For the reasons set forth below, I affirm 12 citations, vacate three citations and assess a penalty of \$3,139.00.

Background

Knock's Building Supplies operates a limestone, sand and gravel mine near Clarksville, Iowa. Sand and gravel are removed from a pit by means of a dragline¹ and hauled to the wash plant by truck. The material is then dumped onto a hopper. A feeder conveyor belt takes it out of the hopper to the main screen wash plant. Oversized material goes through a crusher, inch and a

¹ A dragline is a type of excavating equipment that casts a rope-hung bucket a considerable distance; collects the dug material by pulling the bucket toward itself on the ground with a second rope; elevates the bucket; and dumps the material on a spoil bank, in a hopper, or on a pile. American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 167 (2d ed. 1997).

quarter rock falls through a screen and onto a rock conveyor where it goes to another screen which sorts out the pea gravel onto a pea gravel conveyor. Sand falls all of the way through to a sand screw which loads the sand onto a sand stacker conveyor taking the sand to the sand stockpile.

Three employees operate the mine, a dragline operator, a truck driver and the wash plant operator. Markley Knock, the mine owner, hauls sand and gravel between the mine and the concrete ready-mix plant and lumberyard in Parkersburg, Iowa. The concrete plant is operated by Markley's sons, Kenneth and Mike. Mike also goes out to the mine periodically. In the spring of 1997, Mike's son, Jeremy, was the wash plant operator and foreman at the mine.

MSHA Inspector Clarence Theilen arrived at the mine about 1:00 p.m. on May 20, 1997, to conduct an inspection. He inspected on the afternoon of the 20th and the morning of the 21st when he left the mine site because he was feeling pressure in his chest similar to the pressure he had felt when he had a heart attack several years previously. Because of his heart problem, the inspection was completed on May 28, 1997, by Inspectors William Owen and Jimmie L. Davis. Fifteen citations were issued to Knock's as a result of the inspections.

A hearing was held on March 11 and 12, 1998, in Allison, Iowa. The citations will be discussed in the order that they were presented at the hearing.

Findings of Fact and Conclusions of Law

Citation No. 7812661

The citation alleges a violation of section 56.11001 of the Secretary's Regulations, 30 C.F.R. ' 56.11001, because: AThe five planks on the south side of the elevated work platform on the load out surge bins for the wash plant was [*sic*] rotted out on both ends[,] [c]reating a potential fall hazard for a miner who may step on [the] end of [the] rotted planks. [The] [w]ork platform is about 10 feet above grade. This condition does not permit safe access to all areas of [the] work platform. This area is serviced once a day on [the] west side of [the] work platform.@ (Govt. Ex. 21.) Section 56.11001 provides that: ASafe means of access shall be provided and maintained to all working places.@

The evidence revealed that the only time anyone went onto the platform was to pull the levers to dump the surge bins. The levers are located in the center of the platform. Therefore, the working place is the center of the platform. The Commission has held, in construing an identically worded regulation, that:

[T]he standard requires that each Ameans of access@to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a Ameans of access@ within the

meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

Homestake Mining Company, 4 FMSHRC 146, 151 (February 1982); *The Hanna Mining Company*, 3 FMSHRC 2045, 2046 (September 1981).

The Secretary has not shown that the area at the ends of the planks on the platform was a route to the working place. In fact, the evidence shows that to reach the levers a miner goes up a ladder and across the center of the platform. There is no reasonable possibility that a miner would go up the ladder and around the edge of the platform. Accordingly, I conclude that the Secretary has not proved that the operator violated section 56.11001 and will vacate the citation.

Citation No. 7812662

This citation alleges that: AThe haul road from pit to plant was not adequately bermed in three places for a length of about 150 feet on the north side of the haul road along the pit. There is a drop off of about 15 feet into water in [the] pit. [The] haul road is approximately 25 to 30 feet wide in this area. [The] berm was less than 12 inches high in places along this area. [The] [a]xle of [the] Ford 8000 haul truck is 20 inches.@ (Govt. Ex. 22.) This is charged to be a violation of section 56.9300(b), 30 C.F.R. ' 56.9300(b), which requires that A[b]erms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.@

The inspector testified that the berm along the haul road, in the area that he cited, had no berm at all in some places, and no where along that stretch was the berm higher than 12 inches. While Robert Viers, the dragline operator, quibbled about how long the area was where the inspector indicated that the berm was inadequate, he did not deny that the berm was inadequate and he did admit stopping work and building up the berm.

Based on the essentially un rebutted testimony of Inspector Theilen, I conclude that the company violated section 56.9300(b) as alleged. Consequently, I affirm the citation.

Citation No. 4421680

This citation alleges that: AMr. Markley Knock, owner and operator of Knock's Sand and Gravel, refused to allow an authorized representative of the Secretary to continue an inspection started on 5-20-96 [sic], pursuant to section 103(a) of the Federal Mine Safety and Health Act of 1977 (mine act). Mr. Knock informed me at 0845 that I had 30 minutes to finish the inspection and leave mine property. Mr. Knock was informed that he was getting himself in trouble.@ (Govt. Ex. 23.) The citation states that this was a violation of section 103(a) of the Act, 30 U.S.C. ' 813(a).

Section 103(a) of the Act provides, as pertinent to this case, that:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of . . . (4) determining whether there is compliance with mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person In carrying out the requirements of clause[] . . . (4) of this subsection, the Secretary shall make inspections . . . of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary . . . or any authorized representative of the Secretary . . . shall have a right of entry to, upon, or through any coal or other mine.

In *Waukesha Lime and Stone Co.*, 3 FMSHRC 1702 (July 1981), the Commission held that a refusal to permit an inspection violated section 103(a) of the Act. In *Calvin Black Enterprises*, 7 FMSHRC 1151 (August 1985), the Commission found that when inspectors were told that they were trespassing and needed written permission from the operator to inspect, they were effectively prevented from entering the mine.

In this case, Markley Knock testified that the following exchange took place:

AWhat are you doing here again?@ I said, AWhat are you looking for?@ He said, AOh, nothing. Things in general,@he said. And I said, AHow long you going to be here?@ And he said, AProbably all day.@ I said, AOh, no, you ain't.@ I said, AIf you got something you got to look at, you go ahead and do it and I'll give you a half-hour and I want you to leave.@

(Tr. 337.) Markley Knock did not testify that he did not mean what he said to the inspector, nor did he claim to be surprised when the inspector left shortly thereafter. Consequently, I conclude that, just as in the *Calvin Black* case, this was an effective refusal to permit Inspector Theilen to continue his inspection in violation of section 103(a).

Citation No. 7812663

Inspector Theilen testified that after leaving the mine, he returned to his motel and called his supervisor, Judy Peters, to tell her what had happened. Some time later, she called him back, told him to issue a citation for denial of entry and to return to the mine and continue his inspection. He returned to the mine about 2:30 p.m. and again met with Jeremy Knock. He stated that Jeremy Knock then presented him with a bill for \$465.00 for ADown time 5 hrs. 3 men@ and ALost Production.@ (Govt. Ex. 7-A.) He further testified:

We was [*sic*] going to go out and I was going to look through the electrical load center. And on the way out Jeremy and I were proceeding out there and Mr. [Markley] Knock pulled up in a truck and he came over and talked to me and he says, AWho is this Judy Peters? She told my wife you have the authority to shut us down.@ And he said, AYou better not shut us down, because I got a shotgun and I know how to use it.@

(Tr. 35.)

The inspector testified that after this confrontation he attempted to continue the inspection, but he started developing pressure in his chest. He stated that after leaving the mine site, he stopped by the side of the road and took a nitroglycerin pill. After that he felt all right and returned to his motel. He was instructed not to try to continue the inspection, but to return home and have his heart checked out.

As a result of this second confrontation, the inspector issued Citation No. 7812663 alleging a second violation of section 103(a) of the Act because:

Upon return to mine for continuation of inspection after denial of entry at 08:45 [*sic*], the mine operator presented inspector with a bill for down time and lost production. He also informed inspector that if M.S.H.A. tried to shut his mine down, that he had a Shotgun and knew how to use it. The mine operator had already been informed by the District Office of section 103(a) of the mine act. The Inspector tried to finish the inspection. Due to the continued intimidation and harassment impeding the inspection, the Inspector discontinued this inspection. Inspector issued completed citations to Foreman and left site.

(Govt. Ex. 24.)

Markley Knock did not deny telling the inspector that he had a shotgun and knew how to use it. Nor did he claim that he was joking, as one witness tried to insinuate, when he said it. He did contend, however, that he made the statement at the time of the first confrontation, denying that there was a second one, and he stated that he did not have a shotgun with him and had no intention of carrying out the threat.

I find the inspector's version of the facts to be the most believable. His version is corroborated by the dates and times on the citations and by his notes made that same day. On the other hand, Markley Knock's memory was questionable. He thought that the inspection had already gone on for 4 days when the confrontation took place, although Inspector Theilen was only there a total of 2 days. In addition, Markley Knock, although admitting that he had prepared a bill for lost work and production to be given to the inspector, could not remember when he had done so and when it was given to the inspector.² Even more significantly, the Respondent never called Jeremy Knock as a witness, even though he was present during the confrontations.³

Accordingly, I conclude that these threats were part of a continuing harassment of the inspector and were in violation of section 103(a) of the Act. I will affirm the citation.

Citation No. 7812230

Inspectors Owen and Davis returned to the mine on May 27, 1997, to complete the inspection begun by Inspector Theilen. That afternoon, Inspector Owen served Citation No. 7812663 on the operator. They conducted their own inspection on May 28.

Inspector Owen issued Citation No. 7812230 for a violation of section 56.14107 of the Regulations, 30 C.F.R. ' 56.14107. It alleged that: AA guard was not provided to prevent persons from contacting the rotating sheaves and pinch point hazards of the v-belt drive, on the

² In other testimony at the hearing, and in his notes, the inspector stated that Markley Knock asked who the hell was Judy Peters and added the words By God to his statement about the shotgun. Markley Knock vehemently denied that he would he would say such stuff. However, on the very next page of the transcript he testified that We'd try our damndest to correct it. (Tr. 346.) It strains credulity to believe that someone would be offended to be accused of using the words hell and By God and yet would casually use a similar word, Adamndest, while testifying in a court proceeding.

³ He was working in Waverly, Iowa, at the time of the hearing, which I judicially note was no more than 20 miles from the hearing site.

wash screen. This hazard was accessible due to a buildup of spillage from the feed conveyor, which allowed access to the work deck along this side of the screen. Persons do not normally travel in the plant area during operations.@ (Govt. Ex. 25.)

Section 56.14107 states: A(a) Moving machine 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.@

The inspector testified that the only reason he believed that a violation had occurred in this case was that spillage from the feed conveyor made it possible to climb up onto the work deck. Absent the spillage, he opined that the belt drive came within section (b) of the regulation. The problem with this theory is that even with the spillage present, this was not a walking or working surface. As the inspector noted in the citation, people did not normally travel in that area during operations.

Therefore, I conclude that the spillage did not convert what was not normally a walking or working area into one. Accordingly, I conclude that section 56.14107 was not violated in this instance and will vacate the citation.

Citation No. 7812231

This citation also alleges a violation of section 56.14107 because: AGuarding was not provided to prevent persons from contacting the rotating sheaves and pinch point hazards of the v-belt drive, and the pinch point hazards of the head pulley on the raw material feed conveyor. This hazard was accessible due to a buildup of spillage from the feed conveyor, which allowed access to the work deck along this side of the screen. Persons do not normally travel in the plant area during operations.@ (Govt. Ex. 26.)

This citation describes another guarding violation in the same area as the previous one. For the reasons that I concluded that Citation No. 7812230 was not a violation, I conclude that this citation is not a violation. Consequently, I will vacate the citation.

Citation No. 7812232

This citation alleges a violation of section 56.14132(b)(1), 30 C.F.R. ' 56.14132(b)(1), because: AAn automatic reverse alarm was not provided for the Ford F-800 dump truck being utilized to haul raw material from the pit to the wash plant, and to stockpile finished material. Very little reverse travel is required in the normal traffic pattern of this truck. During normal operations all three employees are in mobile equipment, making foot traffic a limited occurrence.@ (Govt. Ex. 27.)

Section 56.14132(b)(1) requires that: AWhen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have--(i) An automatic reverse-activated signal alarm; (ii) A wheel-mounted bell alarm which sounds at least once for each three feet of reverse movement; (iii) A discriminating backup alarm that covers the area of obstructed view; or (iv) An observer to signal when it is safe to back up.@

The inspector testified that the truck had an obstructed view to the rear and that it did not have a backup alarm. The company's witnesses did not dispute his testimony except to imply that he may have cited a truck that was not in operation. They did not, however, specifically state that he cited the wrong truck, and he specifically stated that he cited the truck that was in operation, not the one that was being repaired.

I conclude that the company violated section 56.14132 in this instance and will affirm the citation.

Citation No. 7812233

This citation alleges a violation of section 56.14100(a), 30 C.F.R. ' 56.14100(a), because: AThe operator of the Ford F-8000 dump truck did not conduct a proper pre-operational inspection of his vehicle, as indicated by the fact that no record of the lack of an operational automatic reverse alarm was available. This highway licensed vehicle was put into service to replace the regular stockpile truck which was out of service for repairs. The regular stockpile truck was provided with a back up alarm.@ (Govt. Ex. 28.) Section 56.14100(a) requires that: ASelf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.@

The inspector testified that Awhen I found the truck did not have an operational automatic backup alarm, I asked the driver if he checked his truck over, if he had done his preoperational check as required by MSHA. And he had no concept of what I was talking about.@ (Tr. 114.) When asked about the company's policy on pre-operational inspections, Mike Knock stated:

I tell the employees, the truck drivers, that they have to grease it, grease their driveline once a day. The other stuff, the steering and stuff, has to be greased once a week. They have to check their oil every day, make sure their rear end has got grease in them and their transmission. And they do that on a weekly basis. But they more or less -- the truck driver, he drives that truck every day. Just about by driving he can tell whether there's something wrong with it or not and then he'll fix it.

(Tr. 295.)

Obviously, the truck driver was not the only employee of the operator who had no conception of the requirements of section 56.14100(a). Accordingly, I conclude that the company violated that regulation and will affirm the citation.

Citation No. 7812235

This citation alleges a violation of section 56.18006, 30 C.F.R. ' 56.18006, in that: ANew employees at this mine were not indoctrinated in safety rules and safe work practices. This condition was indicated by the failure to recognize hazards, such as an unsafe walking surface at bins (citation #7812661), inadequate berms on a haulage roadway (citation #7812662), failure to conduct workplace examinations (citation #7812236), by both the new foreman, and the new truck driver.@ (Govt. Ex. 29.) Section 56.18006 provides that A[n]ew employees shall be indoctrinated in safety rules and safe work procedures.@

The evidence indicates that Jeremy Knock was a new foreman and that the truck driver was also new. Since neither of them testified, it is un rebutted that they did not have the first idea what the rules required. In response to a question about what training Mike Knock had given to his son, Jeremy, he stated:

He was just instructed that safety came first. Always shut down the plant when they worked on it. In fact, in that little shed that sits underneath the electrical poles there's a main switch in there. Any time we work on that plant, that main switch is pulled and that door is closed so that there's no way that that plant can start up on its own, because the main power is pulled. And I always told him to make sure you do that, and they always did.

(Tr. 296-97.) Clearly, they had not been given any training in safety rules and safe work procedures. Consequently, I conclude that the operator violated section 56.18006.

The inspector found this violation to be A significant and substantial.@ A "significant and substantial" (S&S) violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of mandatory safety standard; . . . (2) a discrete safety hazard--that is,

a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Buck Creek Coal, Inc. v. MSHA, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In *United States Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further 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.*, 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, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (December 1987).

The inspector testified that he found that this violation would be reasonably likely to contribute to a serious injury

[B]ecause historically people without knowledge of basic safety work practices place themselves and others in dangerous positions and situations out of ignorance. They simply by being unaware of things end up placing themselves in places that result in serious accidents. Several of the situations which were present were likely to have resulted in fatal accidents and were so rated in their citation, so a rating of fatal and reasonably likely.

(Tr. 120.) In addition, the Secretary presented MSHA Accident Investigation Reports of fatal injuries that had occurred because employees had not been indoctrinated in safety rules and safe work procedures. (Govt. Exs. 13 & 14.)

Based on this evidence, I conclude that the violation was significant and substantial.
Citation No. 7812236

This citation alleges a violation of section 56.18002(a), 30 C.F.R. ' 56.18002(a), because: An inspection of all working places was not conducted daily at this single shift operation, for conditions which could adversely affect the health and safety of the miners. This new foreman was not aware of this requirement. No records of examinations were available at this mine site. Section 56.18002(a) requires, in pertinent part, that: A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health.

Inspector Owen testified that he asked Jeremy Knock who was conducting the workplace inspection each day and that Jeremy indicated that he was unaware of the requirement for an inspection or what it entailed. The inspector also related that there were no records available of such inspections having been conducted. Therefore, I conclude that the operator violated section 56.18002(a) as alleged.

The inspector found this violation to be significant and substantial. He testified that there were a multitude of items found at the mine site, which an inspection should have discovered, and which were reasonably likely to result in a serious injury. Based on this evidence, I conclude that the failure to conduct a work place inspection was significant and substantial.

Citation No. 7816252

Inspector Jimmie Davis issued this citation alleging a violation of section 56.12028, 30 C.F.R. ' 56.12028, because A[t]he mine operator could not provide an up to date and correct record of the continuity and resistance test for the mine electrical system. (Govt. Ex. 31.) Section 56.12028 provides that: AContinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

When the inspector asked Jeremy Knock whether such testing had been done, Jeremy did not know. Nor could he produce a record of when it had last been done. Clayton Kampman of Kampman Electric was called and came to the mine site and performed the tests while the inspector was present. No defects were found.

Mr. Kampman testified at the hearing that he had no record of when he had previously performed continuity and resistance testing for the grounding system, but believed that he usually did it at the spring start-up. The spring start-up is in March or April.

Mike Knock testified that the testing had been done in June 1996 and that the results were posted on the bulletin board. I give no weight to this testimony. If such testing had been performed in June 1996 and it was posted on the bulletin board, then I find it hard to believe that

Jeremy Knock, the inspectors and Mr. Kampman could have missed it. Further, this document, if there is such a document, was in the control of the operator and no plausible explanation was given for its not being offered at the hearing. In addition, it is at odds with Mr. Kampman's recollection of when he normally performed the tests. Certainly, it makes a lot more sense to conduct the tests at the spring start-up than 3 months after work has resumed. Finally, the regulation requires that the record be shown to the Secretary's representative on request and there is no evidence that this has ever been done.

Accordingly, I conclude that the operator violated section 56.12028 and will affirm the citation.

Citation No. 7816253

This citation alleges a violation of section 56.12004, 30 C.F.R. § 56.12004, because:

The electrical conductors, for the three phase, 480 volt 20 H.P. crusher motor, was not of sufficient size and current carrying capacity. The conductor was an 14/4 AWG S.O. cord. This size of cord is rated for 11 amps, maximum. The 20 H.P. motor draws 29 amps according to the information plate located on the motor. Continued use of the small cord could break down the insulation and this could create a fire or shock hazard from the over heated cord. This could result into [*sic*] a fatality to employees in the area. Three employees normally work at this operation.

(Govt. Ex. 32.) Section 56.12004 requires, in pertinent part, that: "Electrical conductors shall be of a sufficient size and current-carrying capacity to ensure that a rise in temperature resulting from normal operations will not damage the insulating materials."

The Respondent does not dispute the facts of the allegation, but defends on the grounds that the cord has been on the motor ever since the operator has owned the mine, that the crusher motor normally does not run at top speed, and that the company has never been cited before for this specific violation. None of these invalidate the citation; accordingly, I will affirm it.

Citation No. 7816254

This citation alleges a violation of section 56.12004 since: "The electrical cord, on the 110 volt portable air compressor located in the shop, was found to be in an unsafe condition. The mechanical protection on the cord was cracked and this exposed the inner conductors. With the mechanical protection damaged the current carrying conductors could be damaged and this could expose employees to shock hazards which could be fatal. The air compressor is used as needed."
(Govt. Ex. 33.) Section 56.12004 requires, in pertinent part, that: "Electrical conductors exposed to mechanical damage shall be protected."

The operator does not dispute the facts of this citation, but asserts that the inner wires were still insulated and that there is no water in the shop area. While these claims may be relevant to whether the violation is S&S, which has not been alleged, they have no bearing on whether the violation occurred. Therefore, I will affirm the citation.

Citation No. 7816255

This citation alleges a violation of section 56.12025, 30 C.F.R. ' 56.12025, inasmuch as: AThe portable 110 volt high speed grinder, located in the shop, was not grounded. The #16 electrical cord had a two-prong male plug on it. With this type of plug the grinder could not be grounded. If used in this condition and an electrical fault occurred it would expose the employee to a shock hazard. With the case of this grinder being metal this could be fatal. The grinder is used as needed.@ (Govt. Ex. 34.) Section 56.12025 provides, in pertinent part, that: AAll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.@

The company's defense to this citation is that the grinder did not work. The inspector testified that if he had been told at the time that the grinder did not work, *and that had been verified*, then he would not have issued the citation. The grinder was found on a shelf with nothing about it to indicate that it would not operate. No one told the inspector that the grinder did not work. There is no way now to verify whether it did or did not work at the time. Since nothing was said and the grinder appeared to be operable, I will affirm the citation.

Citation No. 7816256

Finally, this citation alleges a violation of section 56.14201(b), 30 C.F.R. ' 56.14201(b), because:

The feed conveyor, located under the bin, was not provided with a visible or audible warning device. The entire length of this conveyor could not be seen from the starting switch. If someone was near the conveyor, and it was started without a warning, he could be pulled into the moving conveyor, and this could result into [*sic*] an [*sic*] fatality. The plant normally operates eight hours per day five days per week with three employees.

(Govt. Ex. 35.) Section 56.14201(b) requires, in pertinent part, that: AWhen the entire length of the conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started.@

The company does not dispute that the entire length of the conveyor could not be seen from the starting switch. The citation was terminated after the inspector learned that the company had a pre-startup procedure in which the plant operator visually checks to see where the other two plant employees are before starting the equipment. The company avers that since this has always been the policy, the citation should not have been issued.

This argument fails for two reasons. First, no one bothered to tell the inspector what the policy was when the citation was issued.⁴ Second, the regulation does not provide for a visual check, but requires a visual or audible warning. The inspector, as he admitted at the hearing, should not have terminated the citation for the reason he did. Accordingly, I will affirm the citation.

Civil Penalty Assessment

The Secretary has proposed penalties of \$2,139.00 for the 12 citations I have affirmed. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated that the proposed penalties will not affect the Respondent's ability to continue in business; that the operator demonstrated good faith in abating all of the violations, except Citation Nos. 4421680 and 7812663; that the Respondent is a very small mine operator with fewer than 5,000 hours worked during 1997; and that during the 24-months preceding the inspection, the operator had been inspected for a total of three inspection days and was not cited for any violations. (Jt. Ex. 1.) All of the citations, except Citation Nos. 4421680 and 7812663, involve technical non-serious violations of the regulations for which the level of negligence was no more than moderate. For those violations, I agree with the Secretary's proposal of minimal civil penalties.

Citation Nos. 4421680 and 7812663 are much more serious violations. The Secretary's right to inspect mines without obstruction or interference goes to the heart of the Mine Act. It is hard enough to conduct an inspection without having put up with deliberate obstruction from the operator. As the Commission stated in *Calvin Black*, at 1157, **AMSHA** inspectors are not required to force entry or to subject themselves to possible confrontation or physical harm in order to inspect.® While I agree that a penalty of \$500.00 is appropriate for the first violation, I find that \$1,000.00 is too low for the second one and assess a penalty of \$2,000.00.

Threatening an inspector with a shotgun is extremely serious. The operator's claim that he did not have a shotgun and did not intend to carry out the threat does not lessen the seriousness

⁴ I find that the company's failure to call Jeremy Knock as a witness in this case significantly undercuts its defenses on most of the citations because he was the only company representative present when the citations were issued. The other company witnesses can only speculate as to what happened.

of the violation. The inspector did not know that the operator did not have a shotgun, in his truck or elsewhere, and he did not know that Mr. Knock did not intend to carry the threat out. Inspector Theilen took the threat seriously enough that he began having chest pains. Therefore, I find this violation, which was intentional, to be of the highest gravity. It is only the size of the company and the mine, and the fact that the Respondent has a good history of prior violations, that keep the penalty from being higher than it is.

The penalty for each citation is as follows:

<u>Citation No.</u>	<u>Penalty</u>
7812661	Vacated
7812662	\$ 50.00
4421680	\$ 500.00
7812663	\$2,000.00
7812230	Vacated
7812231	Vacated
7812232	\$ 50.00
7812233	\$ 50.00
7812335	\$ 111.00
7812236	\$ 128.00
7816252	\$ 50.00
7816253	\$ 50.00
7816254	\$ 50.00
7816255	\$ 50.00
7816256	<u>\$ 50.00</u>
Total	\$3,139.00

ORDER

Accordingly, Citation Nos. 7812661, 7812230 and 7812231 are **VACATED**, Citation Nos. 7812662, 4421680, 7812663, 7812232, 7812233, 7812235, 7812236, 7816256, 7816253, 7816254, 7816255 and 7816256 are **AFFIRMED** and Knock Building Supplies is **ORDERED TO PAY** a civil penalty of **\$3,139.00** within 30 days of the date of this decision. On receipt of payment, this case is **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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