

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

October 22, 1996

DAANEN & JANSSEN, INC. : CONTEST PROCEEDINGS  
Contestant :  
v. : Docket No. LAKE 95-180-RM  
: Citation No. 4318581; 12/16/94  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH : Docket No. LAKE 95-181-RM  
ADMINISTRATION (MSHA), : Citation No. 4318582; 12/16/94  
Respondent :  
: Docket No. LAKE 95-182-RM  
: Citation No. 4318583; 10/06/94  
:  
: Docket No. LAKE 95-183-RM  
: Citation No. 4318584; 10/06/94  
:  
: Bay Settlement Mine  
: Mine ID No. 47-03045  
:  
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. LAKE 95-290-M  
Petitioner : A. C. No. 47-03045-05501-M  
v. :  
: Docket No. LAKE 95-313-M  
DAANEN & JANSSEN, INC., : A. C. No. 47-03045-05502  
Respondent :  
: Docket No. LAKE 95-352-M  
: A. C. No. 47-03045-05503  
:  
: Bay Settlement Mine

DECISION

Appearances: Christine Kassak, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, and Ernest K. Alvey, Conference and Litigation Representative, Duluth, Minnesota for the Secretary;  
Eric E. Hobbs, Esq., and John J. Kalter, Esq., Michael, Best, & Friedrich, Milwaukee, Wisconsin, for Contestant/Respondent.

Before: Judge Barbour

These consolidated contest and civil penalty proceedings arise under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§815, 820) (Mine Act or Act). They involve four citations issued by the Secretary's Mine Safety and Health Administration as the result of a fatal accident that occurred at the Bay Settlement Mine, a limestone quarry mined by Daanen & Janssen, Inc. (Daanen & Janssen or the company). The quarry is located in Brown County, Wisconsin.

Three of the citations were issued pursuant to section 104(a) of the Act (30 U.S.C. §814(a)) and one was issued pursuant to section 104(d)(1) (30 U.S.C. §814(d)(1)). All of the citations allege that Daanen & Janssen violated specified mandatory safety standards for surface metal and nonmetal mines and that the violations were significant and substantial contributions to mine safety hazards (S&S violations). In addition, the section 104(d)(1) citation alleges that the violation was the result of Daanen & Janssen's unwarrantable failure to comply with the standard (unwarrantable violation). The Secretary seeks civil penalties for each alleged violation ranging from \$81 to \$5,000.

Daanen & Janssen challenges the validity of the citations, asserting the alleged violations did not occur; or, if they did, were not the result of the company's negligence and that the inspector's S&S and unwarrantable findings are invalid. The company also challenges the civil penalty proposals.

A hearing was conducted in Green Bay, Wisconsin. Subsequently, counsels filed helpful briefs.

THE ISSUES

1. Whether the violations existed as alleged.
2. Whether the inspector's S&S and unwarrantable findings are supported by the evidence.
3. The amount of the civil penalties that must be assessed for any violations found, taking into account the applicable statutory civil penalty criteria.

STIPULATIONS

At the commencement of the hearing, the parties stipulated as follows:

1. [T]he ... Commission has jurisdiction over this proceeding.
2. [T]he Bay Settlement Mine is a limestone mine located in [Scott], Wisconsin.
3. [T]he ... [m]ine is operated by Daanen & Janssen ... and another operator, Northeast Asphalt, Incorporated.
4. Daanen & Janssen and its ... [m]ine [are] subject to the jurisdiction of the ... Act.
5. [T]he [m]ine's operations affect interstate commerce.
6. [T]he ... [m]ine worked approximately 65 hours in the fourth quarter of 1994.
7. Daanen & Janssen worked approximately 35,349 hours at all of its mines during the fourth quarter of 1994.

\* \* \*

19. [T]he proposed penalties of each citation will not affect Daanen & Janssen's ability to continue in business.

20. [T]he certified copy or MSHA assessed violations history [Joint Exh. 2] accurately reflects the history of Daanen & Janssen for two years prior to October 6, 1994 (Tr. 12-14, See also Tr. 15).

The parties also stipulated with respect to the authenticity of certain exhibits (Tr. 13-14, 15), that the number of hours worked at the mine in the fourth quarter of 1994 was "very small" (Tr.14-16), and that Daanen & Janssen exhibited good faith in abating the alleged violations (Tr. 176-177). In addition, the Secretary's counsel agreed that the company's applicable history of previous violations was "small" (Tr. 15).

#### THE ACCIDENT, THE INVESTIGATION, AND THE CITATIONS

At the quarry, limestone is extracted and stockpiled on the quarry floor where it is loaded into haulage trucks by front-end loaders (loader). As a result, loaders and trucks are the types of mobile equipment most commonly used.

All such mobile equipment reaches the quarry floor via an access road that runs approximately 520 feet from the rim to the floor. The road is 22 feet wide and is "bermed" on both sides. The road has an overall grade of approximately 10 percent, but the descent is not even. The road becomes more level for a brief distance near its mid point, and then resumes its steep decent.

The berms are composed of boulders, stones and granulated material. The granulated material is used as "fill" around and between the boulders and stones. The berms are from 3 to 4 feet wide. They vary in height, but are approximately 48 inches at their highest.

On the morning of October 6, one loader, driven by Richard VanVonderen, was operating at the quarry. Four haulage trucks waited to be filled. To reach the waiting trucks, VanVonderen drove the loader down the access road. He got about one third of the way down, when the loader drifted to the far left (the west side) of the road and twice hit the left berm. The loader traveled approximately 34 feet more, ran through and over the left berm, fell 40 feet to the quarry floor, and overturned.

The only eye witness to the accident was Mark Bray, a foreman of the other company that mined at the quarry. He saw the loader traveling down the road. He looked away briefly and when he looked back, he saw the loader go over the edge of the road and fall to the quarry floor.

Bray ran to the loader. He called out, but received no answer. He returned to his work station, got another employee, and they ran back to the loader. They found VanVonderen out of the operator's seat and up against one of the columns of the loader's cab. Bray ran to telephone for help. He also called the company to report the accident.

Within minutes, county rescue personnel arrived at the scene. They examined VanVonderen and detected no vital signs. He was taken by ambulance to a local hospital where he was pronounced dead. An autopsy revealed internal injuries and broken forearms.

That same day, Thomas Pavlat, an MSHA investigator, was assigned by the agency to investigate the accident. Initially, there was confusion concerning whether OSHA or MSHA had jurisdiction and both began investigations. However, it was decided that jurisdiction lay with MSHA, and Pavlat conducted the only complete federal investigation of the incident.

Pavlat's investigation had two stages, from October 6-14, 1994, and from November 8-11, 1994. During these periods Pavlat estimated that he spent a total of 5 1/2 days at the quarry.

As a result of the investigation Pavlat served the company with the four citations here at issue. Citation No. 4318581 (Joint Exh. 1A) charges a violation of 30 C.F.R. § 56.14130(h) in that the seat belt of the loader did not meet the requirements of Society of Automotive Engineers (SAE) Schedule J386. Citation No. 4318582 (Joint Exh. 1B) charges a violation of 30 C.F.R. § 56.14101(a)(3) in that the service brake slack adjustors for both rear brakes were "frozen" and did not work. Citation No. 4318583 (Joint Exh. 1C) charges a violation of 30 C.F.R. § 56.9101 in that VanVonderen "did not or could not maintain control" of the loader. Finally, Citation No. 4318584 (Joint Exh. 1D) charges a violation of 30 C.F.R. § 56.9300(a) in that the left berm was not substantial enough to provide VanVonderen with the opportunity to regain control of the loader.

DOCKET NO. LAKE 95-180-RM  
DOCKET NO. LAKE 95-290-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Penalty</u>
4318581	56.14130(h)	12/16/94	\$ 81

The citation states:

The seat belt provided for the ... front-end loader ... did not meet the requirements of SAE J386, Operator Restraint Systems for Off-Road Work Machines. The seat belt and seat were not tethered to the floor of the loader cab as required by the manufacturer. The provided seat belt was side mounted and the seat was hinged on the front. The operator could be forced forward into the cab in the event of a severe accident (Joint Exh. 1-A).

Section 56.14130(h) states in pertinent part:

Seat belts shall meet the requirements of SAE J386. "Operator Restraint Systems for Off-Road Work Machines".

SAE J386, is incorporated by reference into the standard, and its requirements are therefore mandatory. The purpose of SAE J386 is to provide minimum performance and test requirements for operator restraint systems (see Sec. Exh. 1 at 1. Purpose).

#### THE VIOLATION

At the hearing, Pavlat explained that he cited the violation because "of the type of seat that was in this [loader]. It was hinged on the front with a locking device in the back, and there wasn't a tether provided to restrain the seat from going forward in the event of an impact or whatever circumstances may force that seat" (Tr. 39, see also 114-115). He also testified there was another condition that he believed was a violation of SAE J386 -- "[t]he seat belt ... was not provided with a sticker, which J386 requires it to have" (Tr. 39). (Pavlat did not include this condition in the descriptive portion of the citation.)

To establish a violation of section 567.14130(h), the Secretary must prove a violation of SAE J386. SAE J386 is divided into three parts. Part I contains definitions, Part II contains seat belt assembly requirements, and Part III contains machine-related requirements for the testing and performance of seat belt assembly attachments, tether belts, and seat belt assembly installations. Pavlat maintained the company failed to meet three of the definitions in Part I, one of the seat belt assembly requirements of Part II, and one of the machine related requirements of Part III (see Tr. 113-116).

The definitions cited by Pavlat are those for "Anchorage," "Extension (Tether) Belt," and "Operator Restraint System" (Tr. 114-115, 116). The problem with relying on these definitions is that they do not state mandatory requirements with which an operator must comply. "Anchorage" is defined as, "The point where the seat belt assembly and/or extension (tether) belt is mechanically attached to the seat system or machine" (Gov. Exh. 1 at 3.2). "Extension (Tether) Belt" is defined as, "Any strap, belt, or similar device ... that aids in the transfer of seat belt loads" (Id. at 3.6). "Operator Restraint System" is defined as, "The total system composed of the seat belt assembly, seat system, anchorages, and extension (tether belt, if applicable) which transfers the seat belt load to a machine" (Id. at 3.9).

Because these definitions contain no language requiring an operator to do or not to do something, I must exclude the definitions as a basis for finding a violation.

I also must exclude the machine related performance standard of Part III that Pavlat referenced. Part III 5.1.2. states, "If the means of attachment joining the seat assembly to the seat system cannot withstand the seat belt assembly load of Part III, paragraphs 5.2.2., 5.2.3. or 5.2.4., extension (tether) belts may be used" (Gov. Exh. 1) (emphasis added).

It is clear Pavlat believed safety considerations dictated that the seat be tethered (Tr. 39, 44, 114-115). However, it also is clear, as counsel for Dannen & Janssen pointed out during cross examination and on brief, that the language of the requirement is permissive not mandatory (Tr. 181, 183; Resp. Br. 6). Under the conditions specified in Part III 5.1.2., an operator "may" not "shall" use a tether belt. Moreover, even if I read the SAE standard to require the use of a tether belt, the Secretary did not establish "the means of attachment" could not withstand the specified seat belt assembly load requirements.

The remaining part of SAE J386 that Pavlat believed the company violated is Part II 4.1.5. (Tr. 116). It states:

MARKING (LABELING) - Each seat belt assembly and/or section of belt assembly shall be permanently and legibly labeled with year of manufacture, model or style number, and name or trademark of manufacture or importer, and shall state compliance with SAE J386 JUN85. Part II (Gov. Exh. 1).

Pavlat testified the seat belt did not have such a label (Tr. 39, 45, see also Tr. 115). Although this condition was not charged in the body of the citation, counsel for the company did not object at the hearing or on brief to its inclusion in the record and to testimony concerning it. I therefore conclude Daanen & Janssen neither was surprised nor prejudiced by the testimony and that the Secretary effectively amended his pleadings to allege that the Company's failure to comply with Part II 4.1.5. was a part of the violation. Further, because Daanen & Janssen presented no evidence to refute Pavlat's contention that the required label was missing, I find that the loader's seat belt assembly was not labeled as required by Part II.4.1.5. In this respect, and in this respect alone, the company violated section 56.14130(h).

## S&S and GRAVITY

The concept of S&S is well understood. For the purpose of this violation, it is sufficient to note two holdings of the Commission. First, that a violation is properly designated S&S, "if, based upon the particular 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" (Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)); and second, that the question of whether any particular violation is S&S must be based on the particular facts surrounding the violation (Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987)).

Because the sole allegation the Secretary established is that Daanen & Janssen violated section 56.14130(h) by failing to comply with the labeling requirement of SAE J386, I conclude the violation was not S&S. The lack of a proper label does not mean that the seat belt assembly was unsafe or did not functionally meet the SAE requirements. Perhaps the assembly violated the requirements, perhaps it did not. The Secretary's evidence does not support finding either way.

Indeed, Pavlat did not even know if VanVonderen was wearing a seat belt when the accident occurred (Tr. 56-57). VanVonderen was found outside of his seat, the seat belt was not torn, and there was no evidence that it failed during the accident (Tr. 132). Further, Pavlat agreed that the coroner's report indicated VanVonderen's injuries were inconsistent with seat belt use (Tr. 133).

Based upon these particular facts, I find that the labeling violation was not reasonably likely to contribute to a hazard of a reasonably serious nature and therefore that the violation was not S&S.

I also find that the violation of section 56.14130(h) was not serious. It long has been held that to determine the gravity of a violation for purposes of penalty assessment, the violation should be analyzed in terms of its potential hazard to the safety of miners and the probability of the hazard occurring (Robert G. Lawson Coal Co., 1 IBMA 115, 120 (May 1972)). While the lack of a required label presented a potential hazard to miners if there was a basis to infer the seat belt or its assembly could not adequately restrain the vehicle operator, the facts allow no such inference here. Since I am unable to find a potential hazard, I cannot gauge its probability.



NEGLIGENCE

Pavlat believed the company's negligence was moderate (Tr. 55, 57), and I agree. The SAE requirement clearly states that the seat belt assembly must be labeled properly. The lack of such a label was visually obvious. The loader belonged to Daanen & Janssen, and the company should have known of the violative condition and corrected it. In failing to do so, it failed to meet the standard of care required (Tr. 251).

CIVIL PENALTY ASSESSMENT

This was not a serious violation, and the company was moderately negligent in allowing it to exist. The other civil penalty criteria to which counsels either stipulated or otherwise agreed (the company's small history of previous violations, its small size, its good faith abatement of the violations, and the fact that the penalties proposed would not affect its ability to continue in business) do not warrant a large penalty. Therefore, I conclude that a penalty of \$50 should be assessed.

DOCKET NO. LAKE 95-181-RM  
DOCKET NO. LAKE 95-313-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Proposed Penalty</u>
4318582	56.14101(a)(3)	12/16/94	\$ 1,000

The citation, which was issued pursuant to section 104(d)(1) of the Act, 30 U.S.C §814(d)(1), states:

The ... front end loader ... had been operated while the rear service brake slack adjusters on both wheels were not functional. The adjusters were "frozen" and could not be adjusted any more. Verbal and written evidence, including the weekly vehicle defect review reports, dated 8/19/94, 9/9/94 and 9/16/94 indicated the company production manager was aware of the brake conditions. The reports were reviewed by the manager and he verbally indicated the loader was scheduled for brake maintenance when another loader in the shop was completed and removed. The loader was damaged beyond repair in an accident. It could not be determined if the condition of the brakes contributed to the accident because of the damage to the loader and conflicting testimony concerning the quality of the loader brakes. This is an unwarrantable failure (Joint Exh. 1-B).

Section 56.14101(a)(3) requires that, "All braking systems installed on ... [self-propelled mobile] equipment shall be maintained in functional condition."

#### THE VIOLATION

There was essential agreement among the witnesses regarding the function and purpose of loader's service brake system and of the system's slack adjusters.

Richard Sobieck is Daanen & Janssen's assistant mechanic. He repairs machinery and equipment used at the quarry. He explained that the loader's service brake system has two brake shoes for each wheel and that each shoe has one adjuster bolt. There are eight adjuster bolts in all (Tr. 239; see also Tr. 451 (testimony of Robert Svenson)). The adjuster bolts are turned manually, and the brake shoes move closer to the brake drum when the bolts are turned.

The shoes are moved to compensate for wear on the brake linings (also referred to as the brake pads). In this way, the shoes continue to be applied evenly to the brake drums and to exert the maximum amount of stopping power for the brake system (See Tr. 111, 390).

Robert Svenson is the former chief engineer of the company that manufactured the loader's brakes. Prior to his retirement in 1982, Svenson had 35 years of experience in brake design and manufacture. Svenson testified that the frequency at which the adjuster bolts need to be turned depends upon the rate at which brake linings wear (Tr. 452). Because wear is inevitable when brakes are applied, the only way to forego use of the adjuster bolts is never to use the brakes, or continually to install new brake shoes.

Pavlat testified that during the investigation he learned VanVonderen reported to the company there was a problem with the brakes. According to Pavlat, these reports were made "over an extended period of time" (Tr. 96, see also Tr. 116). The "problem" was that the slack adjusters were "frozen" and would not turn (Tr. 109). As a result, the brakes shoes at times did not fully engage the drums and the brakes did not hold as they should.

The reports to which Pavlat referred were completed weekly by VanVonderen. Then, the reports were given to Daanen & Jassen's assistant mechanic, Richard Sobieck, to review. Following that, Daanen & Janssen's production supervisor, Aaron Kinney, read them. (Tr. 101-102).

VanVonderen's report dated August 19, 1994, indicated that all of the systems of the loader were in good condition and that the overall condition of the loader was satisfactory, but it also contained a note added by Sobieck that the loader "needs brakes all around" (Gov. Exh. 9). Sobieck explained that he did not mean that the loader actually needed new brakes, but rather that the adjuster bolts on the braking system needed to be changed because they were frozen (Tr. 222, 241). Sobieck made the notation after going to the mine on August 20, and inspecting the brakes. (He inspected the loader because VanVonderen told him it was pulling to the left (Tr. 242).)

Sobieck was able to free and to move the slack adjusters on August 20, and to thereby adjust the brakes. However, once he made the adjustments, he could not again turn the bolts. They were frozen.

Sobieck testified that he told Kinney about the problem and that Kinney planned to fix or replace the bolts in October when space would become available in the repair shop. (Tr. 229, see also Tr. 102 (Pavlat's testimony)). Therefore, the adjuster bolts were not changed or otherwise unfrozen from August 20, to the date of the accident.

While there is ample evidence that the slack adjusters did not work at the time of the accident, there is no basis to find that anything else was wrong with the loader's braking system. For reasons that were never fully explained, MSHA's investigation did not include an inspection or examination of the brakes, or of what was left of them. (Tr. 107). The alleged violation was based upon what Pavlat was told and upon his review of the company's inspection reports. Except for allegations regarding the adjuster bolts, no testimony was offered by the witnesses that the brakes were in any other way defective. Therefore, the question of whether there was a violation of section 56.14101(a)(3), turns upon whether the presence of the frozen slack adjustors meant that the loader's braking system was not maintained in functional condition.

Section 56.14101(a)(3) is, as the standard's wording makes clear, a maintenance standard. It describes how an operator is required to maintain all braking systems -- i.e., "in functional condition." It does not mandate that brakes meet specific performance requirements.

Although Daanen & Janssen argues that this distinction is "nonsensical," "given the [s]tandard's plain language equating compliance with the braking system's function or performance" (Op. Br. 12 (emphasis in original)), I do not agree. Daanen & Janssen's argument equates section 56.14101(a)(3) with

sections 56.14101(a)(1) and 56.1410(a)(2), thereby making section 56.1410(a)(3) redundant. Also, its argument ignores the "plain language" of the standard.

The adjective "functional" connotes something being able to perform its regular function, that is, it connotes something being able to work as intended (see Webster's Third New International Dictionary 921 (1986) (Webster's)). Under section 56.14101(a)(3), the "something" that must be functional is the braking system, which is made up of numerous component parts. For the system to work as intended all of its component parts must work.

The wording of section 56.14101(a)(3) clearly distinguishes it from preceding sections 56.14101(a)(1) and 56.14101(a)(2). They describe how service and parking brake systems must perform, i.e., they must be "capable of stopping and holding the equipment with its typical load on the maximum grade it travels" (30 C.F.R. §§ 56.14101(a)(1) and 56.14101(a)(2)).

The Secretary recognizes this distinction in his Program Policy Manual (PPM), which states:

Subsection (a) [of section 56.14101] is divided into three parts. Part (1) ... sets a minimum performance standard for service brake systems on self-propelled mobile equipment. Part (2) sets a minimum performance standard for parking brakes on self-propelled mobile equipment. Part (3) sets a maintenance standard for all braking systems on self-propelled equipment.

Standard [56].14101(a)(1) should be cited if a service brake system is not capable of stopping and holding the equipment with its typical load on the maximum grade it travels.

Standard [56].14101(a)(2) should be cited if the parking brakes are not capable of holding the equipment with its typical load on the maximum grade it travels.

Standard [56].141012(a)(3) should be cited if a component or portion of any braking system is not maintained in functional condition even though the braking system is in compliance with (1) and (2) above (PPM Vol IV 55-55(a) (emphasis added)).

The Secretary argues that this interpretation deserves deference (Sec. Br. 19-22), but this claim is beside the point. Chevron teaches that where the wording of a statute, or in this

case of a standard, is clear, the question of deference need not be reached. Rather, effect must be given to the clear and unambiguous language (Chevron, U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 842-43).

The adjuster bolts were integral parts of the loader's braking system. They were frozen and inoperable. I therefore conclude the loader's braking system was not maintained in functional condition and that this was a violation of section 56.14101(a)(3).

#### S&S AND GRAVITY

In Mathies Coal Co, 6 FMSHRC 1, 3-4 (January 1984), the Commission set forth four things the Secretary must prove in order to sustain an S&S finding:

(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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 Austin Power Co. v. Secretary, 861 F.2d 99, 104-105 (5th Cir. 1988) (approving Mathies criteria).

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

Finally, an S&S determination must be made in the context of continued normal mining operations (National Gypsum, 3 FMSHRC 327, 329 (March 1981); Halfway, Incorporated, 8 FMSHRC 8 (January 1986)).



The Secretary proved three of the four Mathies elements. There was a violation of the mandatory safety standard and the violation contributed to a discrete safety hazard. The brake lining wore as the loader was used. At some point, the brakes would have to be adjusted to be able to slow down or stop the equipment. Because the adjuster bolts on the rear brakes were inoperable, the rear brakes could not be adjusted using the bolts unless the bolts were replaced or otherwise fixed. As mining continued this subjected the loader operator and others working in the vicinity of the loader to hazards resulting from the loader operator being unable to slow or stop. Further, if an accident occurred, it was reasonably likely to result in the serious injury of the loader operator, of other miners, or of both.

However, the Secretary failed to prove there was a reasonable likelihood the hazard contributed to would result in an injury. There is no evidence to the contrary, and I credit Sobieck's testimony that after he last turned the slack adjusters on August 20, 1994, the brakes worked properly (Tr. 238-239). Joseph Judeikis, assistant to the chief of the MSHA Approval and Certification Center, agreed that if slack adjusters are adjusted to within acceptable limits and are then frozen, the braking system will still work (Tr. 392). As he put it, the slack adjusters "are not necessary at a given point in time if the brakes are adjusted to allow the [braking] system to perform" (Tr. 422). Svenson added that the brakes will continue to work properly "until such time as lining [wear] takes place or lining or drum wear takes place to the extent that [another] adjustment has to be made" (Tr. 454).

Sobieck estimated that a brake adjustment on a loader at the mine lasts for about 1 year of use or about 3,000 hours before the brakes have to be readjusted. Svenson observed that this time period was "not uncommon" for off-road equipment (Tr. 257, 453). Judeikis, on the other hand, believed that under normal usage, an adjustment on a loader lasts approximately 1 ½ to 2 months, and Judeikis stated that he had no reason to think the loader involved in the accident was subject to other than normal use (Tr. 410, 412).

I credit Sobieck's estimate. As the mechanic who made such adjustments, he was familiar with the way in which the loader was used at the quarry. Judeikis, on the other hand, made clear that his knowledge of how the loader was used was not first hand (Tr. 412). He forthrightly admitted that he could not state that Sobieck's time estimate was unreasonable. ("I can't speculate as to whether or not ... [approximately one year] would be a reasonable time for that particular machine in its

particular operating environment. That really is a function of the loader operator, the quality of the mining and the operating conditions that the loader is subject to" (Tr. 396)).

Further, no evidence was introduced that there were unusual circumstances at the quarry that would cause the brakes to wear more quickly. Indeed, Judeikis stated that the fact that a loader was operated on a grade did not necessarily mean that its brakes would wear more quickly. The loader operator might control the speed of the loader through gear selection and therefore not need to use the brakes as frequently (Tr. 394, 396).

Sobieck told Pavlat the company planned to take the loader to the shop for repair by the end of October (Tr. 102), and Sobieck confirmed this was the company's intention (Tr. 257-258, 259). There is no evidence to support finding this was a fabrication, and I find that, indeed, the company intended to replace or repair the adjuster bolts by the end of October.

I have found that the brakes were last adjusted on August 20 and that they worked as required up until the time of the accident. Also, I have accepted Sobieck's testimony that the brakes would not need to be adjusted for up to a year from the August 20, 1994. Finally, I have accepted the company's testimony that as mining continued, the adjuster bolts would have been repaired or replaced by the end of October 1994. Obviously, this would have been well before the brakes needed to be readjusted. Therefore, I conclude that as mining continued, it was not reasonably likely that the frozen adjuster bolts would have lead to an injury causing accident.

I also conclude that this was not a serious violation. As noted, the evidence requires finding that the frozen adjuster bolts did not affect the ability of the brakes to stop the loader, and in the normal course of mining, would not have affected that ability before the bolts were replaced or repaired. Thus, while it is true that at some point this violation could have become serious, even life threatening, that point was not reached nor reasonably could have been expected to be reached within the relevant time frame of this case.

#### UNWARRANTABLE FAILURE AND NEGLIGENCE

Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act" (Emery Mining Corporation, 9 FMSHRC 1997 (December 1987); Youghioheny & Ohio Coal Co., 9 FMSHRC 2007



(December 1987)). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care" (Emery, 9 FMSHRC at 2003-04).

Clearly, Sobieck knew that the adjuster bolts were inoperable and needed to be changed. Indeed, Sobieck testified that when he wrote on the September 6 inspection report that the brakes were "bad again. Cannot adj[ust] anymore," he did so to remind himself that when the loader ultimately was taken to the shop for repairs, the adjusting bolts needed to be changed because they could not be adjusted (Gov . Exh. 12; Tr. 219, 243, 256). Sobieck further testified that on September 12, he instructed VanVonderen to check the "service brakes not good" box on the inspection forms in order again to remind management that new adjustor bolts needed to be installed (Tr. 255). Kinney, Daanen & Janssen's production manager, reviewed these forms (Tr. 230, 267-269).

Kinney testified that he recalled Sobieck telling him that one of the front slack adjustors was frozen but that Sobieck was able to free it. He did not recall Sobieck telling him anything about the rear brakes and rear slack adjusters. (Tr. 269-270). However, Sobieck testified that prior to the accident he told Kinney that the adjuster bolts needed to be replaced (Tr. 232).

I believe that Sobieck advised Kinney that the rear slack adjusters were inoperable. I find it highly unlikely that Sobieck told Kinney about an adjuster bolt he was able to keep in working condition, yet failed to tell him about those he could not free. Indeed, Kinney stated he knew that "when it was convenient" the loader would have to be taken to the repair shop "and we would work on the adjustors, and ...replace them or free them or whatever" (Tr. 304), which certainly implies he knew the adjuster bolts did not function. For these reasons, I find that the management of Daanen & Janssen, through Kinney, knew that the rear slack adjustors were inoperable.

In the face of its knowledge that the slack adjustors required replacement or repair, Daanen & Janssen elected to put off the work until late October. I have found that despite the frozen adjuster bolts, the brakes reasonably could have been expected to function adequately for up to 1 year from August 20, 1994. In view of this finding, I conclude, that Daanen & Janssen was not indifferent to the violation. Its decision to replace or repair the adjuster bolts at a time when it was convenient--i.e., in late October 1994--was reasonable in light of the minimal risk the violation posed to the loader operator and to others. Therefore, the violation was not the result of Daanen & Janssen's unwarrantable failure to comply with the standard.

Although the company was not guilty of a serious lack of reasonable care in allowing the violation to exist, it was negligent. Kinney knew of the violation. There was at least a possibility -- however minimal -- that the loader would be used other than normally and that the inability of the slack adjusters to function would affect the brakes before the end of October. In electing to put off replacing or repairing the slack adjusters, the company assumed the risk that continuing to use the loader would endanger the loader operator and/or others. The risk was slight, but it was there, and Daanen & Janssen was negligent in assuming it.

CIVIL PENALTY ASSESSMENT

The violation was not serious. The record does not support finding that the violation contributed in any way to VanVonderen's death. The violation was not caused by Daanen & Janssen's unwarrantable failure to comply. The company was slightly negligent. Given the small size of the company, its small history of previous violations and the fact that the other civil penalty criteria do not warrant either increasing or decreasing the resulting penalty, I find that a civil penalty of \$300 should be assessed.

DOCKET NO. LAKE 95-182-RM

DOCKET NO. LAKE 95-352-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Proposed Penalty</u>
4318583	56.9101	12/16/94	\$ 5,000

The citation states in pertinent part:

[A] front end loader operator was fatally injured on October 6, 1994, when the ... loader he was operating went through the berm and off the edge of a 40 foot elevated roadway. The loader operator did not or could not maintain control of the equipment while it was in motion, and went through the berm and over the road edge.

In issuing the citation, Pavlat found the violation to be S&S and due to Daanen and Janssen's moderate negligence.

Section 56.9101 states:

Operators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with

conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used.

#### THE VIOLATION

The record allows for no other plausible explanation for the accident than that VanVonderen failed to control the moving loader. (Certainly, there is no suggestion he drove intentionally off the road).

Daanen & Janssen offered speculative testimony as to why he failed to maintain control. It suggested that wasps got into the cab and distracted him (Tr. 318, 339, 470). It also suggested that he might have looked over his shoulder and lost track of where he was going (Tr. 317-318).

For his part, the Secretary, through Pavlat, suggested excessive speed as the cause, a suggestion founded upon what Bray reportedly told Pavlat of VanVonderen's driving habits (Tr. 68-69). However, Pavlat's recollection of what he was told was not confirmed by Bray, and Pavlat himself never observed VanVonderen operating the loader (Tr. 135).

These speculations, even if established, at most would explain why there was a violation, they would not excuse it. The accident itself speaks to the violation. As Pavlat noted, the loader was for no apparent reason on the far left side of the road. (There was no other vehicle on the road.) It twice bumped the berm. It traveled another 34 feet, went over the berm and off of the road's left edge (Tr. 68). These things would not have happened if VanVonderen had maintained control while the loader was in motion.

Although Daanen & Janssen points to Pavlat's testimony that he did not "know for a fact that [VanVonderen] was out of control" (Op. br. 32 citing to Tr. 137), I do not find this compelling or conclusive. Of course Pavlat did not "know for a fact." The only person who knew with absolute certainty was VanVonderen. Violations can be found by induction. Here, the record provides no other logical explanation for the accident than that VonVonderen failed to maintain control, and I conclude that the violation occurred as charged.

In reaching this conclusion, I recognize there is an argument to be made that section 56.9109 contemplates the equipment operator be conscious while operating the moving vehicle, and that proof he or she is not, obviates the violation. However, I do reach this argument because the evidence does not permit finding VanVonderon was unconscious. If anything, the

injuries to his forearms (Tr. 133) and the fact that he was sitting up straight when the loader went off the edge (Tr. 359), suggest exactly the opposite.

#### S&S AND GRAVITY

The violation was both S&S and very serious. The failure to maintain control of the loader while it was in operation on a road with deep drop offs on both sides and with a grade of approximately 10 percent was reasonably likely to result in an injury of a reasonably serious nature; and, in fact, resulted in death.

#### NEGLIGENCE

Pavlat described the negligence of Daanen & Janssen as "moderate" (Tr. 80). He based this assessment on Bray's reported statement that VanVonderen had a history of operating the loader at excessive speeds and that it was "commonplace" for him to speed (Tr. 148, 150). However, there is insufficient evidence to support Pavlat's assessment.

Bray was called as the Secretary's witness and Bray never was asked whether he had any knowledge of VanVonderen's driving habits and if so, what those habits were. Aside from Bray, Pavlat identified by name no other person who gave him information about VanVonderen's alleged propensity to speed. Further, Bray was not a reliable judge of speed. He was asked if he was able to tell how fast a loader was going when he saw one being operated, and he replied he could not (Tr. 351).

Moreover, even if I could find that VanVonderen had a propensity to speed, the record contains no indication that Daanen & Janssen knew or should have known about it. Pavlat testified that VanVonderen "pretty much worked by himself" (Tr. 80). Kinney testified he never saw VanVonderen driving at what Kinney considered excessive speed (Tr. 334), and when counsel for the Secretary asked Bray whether Bray ever observed VanVonderen operating the loader with excessive speed when Kinney was present, Bray responded, he had not (Tr. 357-358). Finally, there is no suggestion Daanen & Janssen was deficient in training or disciplining VanVonderen.

Therefore, I conclude that Daanen & Janssen was not negligent.

CIVIL PENALTY ASSESSMENT

The violation was a direct cause of VanVonderen's death. It was both S&S and very serious. The violation was not the result of the company's negligence. The company is small, as is its history of previous violations. The other civil penalty criteria warrant neither increasing nor decreasing the penalty assessed. I conclude that a penalty of \$400 is appropriate.

DOCKET NO. LAKE 95-183-RM  
DOCKET NO. LAKE 95-352-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>	<u>Proposed Penalty</u>
4318584	56.9300(a)	10/6/94	\$ 5,000

The citation states in pertinent part:

The ... front end loader operator was fatally injured when the loader he was operating went through a berm and off the edge of a 40 foot elevated roadway ... The loader pushed out the boulders and some of the other materials used for berm prior to going over. The boulder material used for the berm failed to impede or moderate the force of the loader, which would have provided the operator an opportunity to regain control of the vehicle. Some of the remaining berm was below mid axle height on the equipment involved in the accident (Joint Exh. 1D).

Section 56.9300(a) states:

Berms ... 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.

Section 56.9000 defines a "berm" as:

A pile or mound of material along an elevated roadway capable of moderating or limiting the force of a vehicle in order to impede the vehicle's passage over the bank of the roadway.

THE VIOLATION

The essence of the alleged violation is that the berm failed to impede the loader from going over the edge of the road. "Impede" is defined as, "to interfere with or to get in the way of the progress of" (Webster's 1132). It is a word containing

the same concept of delaying and inhibiting as the word "restraining." Referring to the berm standard for surface coal mines (30 C.F.R. § 77.1605(k)) -- a standard wherein a "berm" is defined as "a pile or mound of material capable of restraining a vehicle" (30 C.F.R. § 77.2(d)), the Commission stated that "[r]estraining a vehicle" does not mean ... absolute prevention of overtravel ... under all circumstances". Rather, it means "reasonable control and guidance of vehicular motion" (United States Steel Corporation., 5 FMSHRC 3 at 6, n.6 (January 1983)).

Because I conclude that the meanings of "berm" in the metal and nonmetal mine berm standard and the surface coal mine berm standard are the same, I find that "to impede the vehicle's passage over the bank of the roadway," the berm need not prevent overtravel but must allow for reasonable control and guidance of vehicular motion.

This is precisely the way in which Pavlat interpreted the standard. He consistently testified that he found a violation of section 56.9003(a) because, in his judgement, the berm did not hinder sufficiently the loader's motion to allow VanVonderen to regain control.

However, Pavlat's proper interpretation does not establish a violation. The Commission also has held that under a standard such as section 56.9300(a), the adequacy of a berm must:

.... be evaluated in each case by reference to an objective standard of a reasonably prudent person familiar with the mining industry and in the context of the preventive purpose of the statute. [T]he Secretary is required to present evidence showing that the operator's berms ... do not measure up to the kind that a reasonably prudent person would provide under the circumstances. This evidence could include accepted safety standards in the field of road construction, considerations unique to the mining industry, and the circumstances at the operator's mine. Various construction factors could bear upon what a reasonable person would do, such as the condition of the roadway in issue, the roadways elevation and angle of incline, and the amount, type, and size of traffic using the roadway (United States Steel Corporation, 5 FMSHRC at 5).

Neither Pavlat nor any other of the Secretary's witnesses presented such evidence. Pavlat speculated that the composition and the dimensions of the berm were the cause of its inability to impede the loader. He described the berm as not having a consistent composition and as having "multiple heights" (Tr. 82).

He suggested that the inclusion of smooth bottomed stones and boulders in the berm may have contributed to the alleged violation because the smooth bottoms made the rocks more susceptible to sliding (Id.). He speculated that the berm should have been wider and composed of something other than the stones used (Tr. 83-84, 88).

However, Pavlat did not know what that something else should have been. When I asked him, the following exchange took place:

Judge: And what should [the berm] have been made up with?

Pavlat: I think there were gaps between the berm. There wasn't a solid stone. Additional height. We talk about a mid axle height. Now that's not the basis of this citation, but volume -- we're talking about the minimum requirements. Considering the nature of the roadway the vehicle was traveling --I think there should have been twice as much berm there.

Judge: Well, is it the materials themselves that constitute the violation or is it the amount of the materials?

Pavlat: I don't feel as though you can separate it. It's both.

Judge: So in your opinion, could Daanen & Janssen have complied by using the same type of rock ... only had more of it?

Pavlat: Wider, wider area, possibly could have done it. I don't know specifically what would have done it ... . I know this didn't (Tr. 84-85).

Later, the company's counsel asked Pavlat about this testimony.

Counsel: In ... response to one of the Judge's questions you testified that you don't really know what could have been or would have been enough with respect to the berm to do the job; is that true?

Pavlat: True.

Counsel: Then how would the company know?

Pavlat: I don't know (Tr. 187).

The combination of speculation and lack of knowledge offered to prove the alleged violation does not provide a basis for finding what kind of berm a reasonably prudent person would have provided under the circumstances. Therefore, I conclude that the Secretary did not prove a violation of section 56.9300(a).

ORDER

DOCKET NO. LAKE 95-180-RM  
DOCKET NO. LAKE 95-290-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318581	56.14130(h)	12/16/94

The Secretary is **ORDERED** to modify the citation by deleting the S&S finding. Daanen & Janssen is **ORDERED** to pay a civil penalty of \$50 within 30 days of the date of this decision.

DOCKET NO. LAKE 95-181-RM  
DOCKET NO. LAKE 95-313-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318582	56.14101(a)(3)	12/16/94

The Secretary is **ORDERED** to modify the citation by deleting the S&S finding and to change the authority under which the citation is issued to section 104(a) of the Act (30 U.S.C. § 814(a)). Daanen & Janssen is **ORDERED** to pay a civil penalty of \$300 within 30 days of the date of this decision.

DOCKET NO. LAKE 95-182-RM  
DOCKET NO. LAKE 95-183-RM  
DOCKET NO. LAKE 95-352-M

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318583	56.9101	12/16/94

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Date</u>
4318584	56.9300(a)	10/6/94

Daanen & Janssen is **ORDERED** to pay civil a penalty of \$400 (Citation No. 4318583) within 30 days of the date of this decision and the Secretary is **ORDERED** to vacate Citation No. 4218584 within 30 days of the date of this decision.

Upon receipt of the payments and upon modification and



vacation of the citations, these proceedings are DISMISSED.

David F. Barbour  
Administrative Law Judge

Distribution:

Christine Kassak, Esq., Office of the Solicitor, U.S. Department  
of Labor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604  
(Certified Mail)

Eric E. Hobbs, Esq., John J. Kalter, Esq., Michael, Best, &  
Friedrich, 100 East Wisconsin Avenue, Milwaukee, WI 53202-4108  
(Certified Mail)

Ernest K. Alvey, Conference and Litigation Representative,  
515 West 1<sup>st</sup> Street, No. 228, Duluth, MN 55802 (Certified Mail)

dcp