FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 30, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-253-M
Petitioner	:	A. C. No. 20-01579-05513
v.	:	
	:	Millington Pit & Mill
MILLINGTON GRAVEL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois for Petitioner;
Fred S. Ward, owner, *pro se*, Millington Gravel Company, Millington, Michigan.

Before:Judge Barbour

This civil penalty proceeding arises under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C.§815(d)) (Mine Act or Act). The Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a civil penalty against Millington Gravel Company (Millington or the company) for an alleged violation of 30 C.F.R. § 56.11001, a mandatory safety standard for surface metal and nonnmetal mines requiring that "a safe means of access shall be provided and maintained to all working places." The Secretary alleges the violation occurred at the company's Millington Pit and Mill, a gravel and stone extraction and processing facility located in Tuscola County, Michigan. The Secretary also alleges that the violation was due to Millington's high negligence. She proposes the company be assessed a civil penalty of $500.

Millington denies that it violated the standard and alternatively argues that the proposed penalty is excessive.

The case was heard in Saginaw, Michigan. At the conclusion of the hearing the parties waived the submission of briefs (Tr. 54).

THE CONTROVERSY

The dispute is the result of MSHA's inspection of a mine facility that is used to screen sand and stone. The facility is large and multileveled. The material is sorted according to size.

On its upper level (upper deck) are walkways around its outer perimeter. Near the end of the north walkway the inspector found a hole in the walkway floor. The parties are at odds over whether the damaged walkway violated the cited standard.

THE EVIDENCE

Ronald J. Baril, Sr. is a MSHA inspector who works in the agency's Lansing, Michigan office. Baril has inspected mines for the past 23 years. On June 3, 1998, he went to the Millington Pit and Mill.

Sand and stone is extracted at the mine. It is moved by front end loader to a hopper. From the hopper, a series of conveyor belts carry the material to processing equipment where it is washed and sized. The processed material then is stockpiled and sold (Tr. 13, 35).

The mine was described by Baril as a "very small" facility (Tr. 13). Barill believed that the no more than two miners were employed there (Tr. 13).

After arriving at the mine, Baril went to the mine office where he met Frederick Ward, Millington's owner. Baril and Ward began a pre-inspection conference. As a part of the conference Baril was required to check various records that are maintained by the company. Baril found that the records were in order (Tr. 11).

Baril then joining Robin Dege, a mine employee who described himself as the plant superintendent. Baril and Dege walked to the area of the mine where sand and stone are processed (Tr. 13, 34-35). The men stopped at the screening facility.

At the upper level of the facility, material is dropped by conveyor belt onto the top screens where it is shaken and where it starts the process of falling through other screens with increasingly smaller grids. Baril and Dege first viewed the screening facility from ground level. Then, they proceeded up a ladder leading to the upper deck (Tr. 14). Once on the top, Baril inspected the walkway around the perimeter of the deck. The walkway was constructed of metal grating, and it provided access to the top screens and to the facility's upper mechanical parts.

Baril noticed that the walkway was completely railed along all of its sides and was well maintained on its west side. However, when he traveled to the north side, he observed that at the eastern end of the walkway, a section of the floor had separated from the rest of the grating. The floor was bent at a 45 degree angle toward the ground. The result was an opening in the floor that measured two feed wide by four feet long (Tr. 16, 18; see Exh. P-1).

Dege told Baril the walkway had been damaged by a rock, and that the hole had existed for "over a year" (Tr. 16, 17). Baril asked Dege if miners often traveled in the damaged area of the walkway, and Dege said that they did not (Tr. 17). As Baril recalled, Dege maintained that the only miners who went to the area were those who "had to go up there to change screens" (Id.). Baril also questioned Dege as to the distance between the walkway and the ground below. According to Baril, Dege estimated that it was "about 20 feet" (Tr. 18). Finally, Baril noted that there were no barricades across the walkway to block access to the damaged area (Tr. 20).

As a result of what he saw and what he learned from Dege, Baril cited Millington for a violation of section 56.11001. He believed the condition of the walkway floor indicated that there was no safe access to an area where miners occasionally had to work changing the screens (Tr. 19). However, because miners were on the upper deck on "very rare occasions", he also believed it was unlikely that there would be an accident due to the condition of the walkway (Tr. 24).

Baril further found that Millington was highly negligent in allowing the violation to exist. He based the finding on the fact that Dege told him the walkway floor had been damaged for at least a year (Tr. 23). Despite the finding, Baril believed the company honestly did not realize the condition of the walkway was a violation of the regulation. Rather, in view of the infrequent visits of miners to the walkway, the company simply did not feel that it was important to repair the damage (Tr. 24).

Baril gave the company two days to correct the condition. Millington's response was more rapid. It corrected the situation the same day by railing-off the damaged area (Tr. 25, see Gov. Exh. P-1).

Dege also was called as a witness by the Secretary. Dege was asked how often the upper deck screens were changed. He testified that they were replaced every two years, depending on how much the mine was operated (Tr. 36). Later, he appeared to quality this testimony when he maintained they were changed every year and a half to two years (Tr. 39).[1] In addition, he testified that although another miner worked at the mine, he, Dege, was the person who usually went to the upper deck (Id.).

Dege agreed that there was a hole in the walkway. He further agreed that Baril accurately described its location and its size, and that access to the damaged area of the walkway was not barred (Tr.37, 41). He stated that the distance from the walkway to the ground was between 15 and 20 feet (Tr. 37). Dege was asked why the walkway was not repaired, and he replied, "Neglect I guess. We didn't go up there that often . . . [s]o I didn't figure it was that important to fix it" (Tr. 37).

[1]Although Ward, who also testified, asserted the upper deck screens changed "maybe once or twice" in 30 years (Tr. 44), I regard his testimony as hyperbole. Dege was the person to whom Ward assigned the on-site management of the operation, Dege had acted in that roll for 13 years, and Dege knew how the mine functioned (Tr. 35).

THE CITATION

Citation No.	Date	30 C.F.R. §	Proposed Penalty
4106469	6/3/98	56.11001	$500

The citation states:

> The roller screen deck along the north walkway at the N.E. end of this deck, a 4 foot length of 2 feet wide metal floor was found bent down on a 45 degree angle.
>
> Although this section is beyond where servicing may be performed on an infrequent basis, an employee could trip & fall 20 feet to the ground below. The company stated that this condition existed for about one year (Gov. Exh. P-2).

THE VIOLATION

To prove a violation of section 56.11001, the Secretary must establish the area involved was a "means of access" to a "working place" and that the means of access was not "safe". To demonstrate the cited area was a "means of access", the Secretary show that there was a reasonable possibility a miner would use the area involved as a way to reach or to leave a working place (see Homestake Mining Co., 4 FMSRHC 146, 151 (February 1982); The Hanna Mining Co., 3 FMSHRC 2045, 2046 (September 1981)). To show the means of access was not "safe", the Secretary must prove that a reasonably prudent person familiar with industry standards, and the factual circumstances surrounding the allegedly unsafe condition, would have recognized a hazard warranting correction (See, e.g., Alabama By-Products Corporation, 4 FMSHRC 2128, 2129 (applying the "reasonably prudent person test" to a standard requiring machinery and equipment to be maintained in "safe operating condition" (30 C.F.R. §75.1725(a)). Finally, the Secretary's proof also must meet the regulatory definition of "working place"; in other words, it must lead to the conclusion that the damaged part of the walkway was "a place in or about a mine where work is being performed" (30 C.F.R. §56.2).

There can be no question that the cited walkway area was unsafe. The opening was large enough to allow a miner to fall through. If a miner fell, there was nothing to prevent him or her from dropping straight to the ground below. Dege testified the drop would have been between 15 and 20 feet. (Tr. 37). At either distance, the result could have been a serious injury.

The critical question is whether the Secretary established that there was a reasonable possibility a miner would use the area involved as a way to reach or to leave a working place -- that is as a way to reach or to leave a place where work is or would be performed. I conclude that she did. As Dege's testimony established, although the screens were changed infrequently, at intervals of between 18 to 24 months, Dege had to go "up there" to do the work (Tr. 37, 39).[2]

[2]The totality of Dege's testimony made clear that the rate at which the screens were changed depended on the length of time the screening facility operated. Operations at the mine

Dege's testimony is consistent with Baril's version of what Dege told him -- that "the only timepeople would have to go up there is to change the screen" (Tr. 17). The fact that the cited portion of the walkway was used rarely does not detract from the fact that on those occasions when the screens were changed, it served as a means to reach or to leave a working place.[3]

GRAVITY AND NEGLIGENCE

The gravity of a violation is determined by focusing on the effect of the hazard if it occured (Cf. Consolidation Coal Co., 18 FMSHRC 1541, 1550 (September 1996)). Here, there was primarily one miner (Dege) who was in danger of inadvertently falling through the hole in the walkway when he used the walkway while changing the screens. Should he have lost his balance or have slipped and fallen through the hole, Dege easily could have been seriously injured. Accordingly, I find the violation was serious.

NEGLIGENCE

I also find that the violation was result of minimal negligence on Millington's part. The chance that Dege, or that anyone else, would have fallen through the hole was remote at best. Dege was aware of the hole and of its location, which means that on those very few occasions when he would have been in the damaged area, he would have been forewarned about the hazard. In addition, the damaged area visually was obvious, which would have served as an additional reminder of the hazard.

It is true that for at least a year the company knew about the violation and did nothing to correct it (Tr. 37). Its failure, as Dege recognized, showed a lack of care (Tr. 37). However, given the very remote chance the hazard would have resulted in an actual accident, I conclude the company's lack of care was minimal.

---

varied with the seasons and the weather, I therefore find that his testimony the changes occurred at rates of between a year and a half to two years to be more credible than his testimony that the screens were changed every two years (See Tr. 36).

[3]While the citation itself states that the damaged area was "beyond where servicing may be performed on an infrequent basis", the word "servicing" refers to routine maintenance of the facility's mechanisms — something that did not require use of the damaged area — rather then to the changing of the facility's screens.

OTHER CIVIL PENALTY CRITERIA

The company is very small (Tr. 13), and it has a moderate history of previous violations (Tr 31; Gov. Exh. P-3 (indicating 9 citations issued between June 3 1996 and June 3, 1998)). In addition, the company abated the violation in half the time given by the inspector.

Finally, I note that although Ward stated payment of the proposed penalty would put the company out of business, he offered no proof in this regard, and I find that the size of penalty assessed will have not affect adversely the company's continuing operation.

PENALTY ASSESSMENT

I conclude that despite the serious nature of the violation, the company's minimal negligence, its small size, its moderate previous history, and its expedited abatement of the violation warrant the assessment of a civil penalty of $50.

ORDER

Within 30 days of the date of this decision, Millington will pay the Secretary $50 for its violation of section 56.11001 as set forth in Citation No. 4106469, and upon payment of the assessed penalty this proceeding is **DISMISSED.**

David F. Barbour
Administrative Law Judge

Distribution:

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

Fred S. Ward, Millington Gravel Company, 4566 Birch Run Road, Millington, MI 48746 (Certified Mail)

\nt