FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 23, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 98-72-M
Petitioner	:	A. C. No. 20-03003-05504
v.	:	
	:	Cherry Valley Pit
HERITAGE RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: Gay F. Chase, Esq., Office of the Solicitor, U. S. Department of Labor, Chicago, Illinois for Petitioner;
Frederick J. Boncher, Esq., Schenk, Boncher & Prasher, Grand Rapids, Michigan for Respondent.

Before:Judge Barbour

In this civil penalty proceeding, brought under section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815(d)), the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of a $40,000 civil penalty against Heritage Resources, Inc. (Heritage or the company) for an alleged violation of 30 U.S.C. §56.14107(a), a mandatory safety standard for surface metal and nonmetal mines requiring that "moving machine parts . . . shall be guarded to protect persons from contacting . . . pulleys . . . and similar moving parts that can cause injury."

The proceeding is the result of the Secretary's investigation of a fatal accident that occurred on May 2, 1997, at Heritage's Cherry Valley Pit, a surface sand and gravel operation. The accident involved Samuel Oakes, a 27 year old miner who functioned as the pit foreman.[1] Oakes was killed when he was pulled into the pinch point of a conveyor belt's rotating idler roller.

[1]Although there was a dispute at the hearing concerning Oakes' status as a foreman, the dispute was more apparent than real. Oakes lacked the title, but the company vested in him the traditional duties of a foreman. Oakes was responsible for running the Cherry Valley facility (Tr. 217, 219, 382). He had the authority to supervise other workers (Tr. 219). In addition, he had defacto control over hiring and firing. (Kirk Velting, Heritage's vice president, secretary, and treasurer testified that he relied on Oakes' advice concerning personnel matters and "pretty much did what [Oakes] wanted" (Tr. 384)).

In addition to alleging a violation of section 56.14107(a), the Secretary asserted the violation was a significant and substantial contribution to a mine safety hazard (S&S). The Secretary also asserted the alleged violation was the result of the company's high negligence and its unwarrantable failure to comply with the standard.

Heritage denied the violation. Alternatively, it argued that the violation was not the result of its "high" negligence. The company maintained that any negligence on its part consisted solely of relying on the assurances of the company providing the conveyor system that all necessary and proper guards were in place.

The case was heard in Grand Rapids, Michigan. Subsequently, counsels filed helpful briefs.

STIPULATIONS

The parties stipulated as follows:

> 1. The Commission has jurisdiction over the proceeding.
>
> 2. The [mine] extracts sand and gravel and is located in Caledonia, Kent County, Michigan.
>
> 3. The [mine] is owned and operated by Heritage. . . and [is] . . subject to the jurisdiction of the [Mine Act].
>
> 4. The [mine's] operations affect interstate commerce.
>
> 5. Both [the company] and its [mine] worked approximately 7295 hours during . . . January 1, 1996 to December [31], 1996.[2]
>
> 6. Citation [No.] 4316701 was properly served by a duly authorized representative of the Secretary . . . upon an agent of Heritage . . . on the date indicated (Tr. 13-14).

THE MINE

The pit includes an area where sand and gravel is mined and a plant where the material is

[2]Based upon these numbers, counsel for the Secretary characterized the company's size as small (Tr. 14).

washed, screened, and crushed. The plant also includes various conveyors that carry materials to the screens and washers, and that take finished materials to the stockpiles. In addition, the plant has an on-site electrical control center where power to the conveyors and to other facilities is activated (see Gov. Exh. 1).

After material is extracted, it is loaded into a haulage truck, taken to the plant area, and dumped into the feed hopper. The material passes through a grizzly, and travels by conveyor belt to the double deck primary screen. After the material is screened, it goes to the crusher, which is located behind the primary screen. From there, the material travels via a short conveyor belt to the washers. From the washers it passes by conveyor belt to the rinse screen where the material is given a final cleaning. From the rinse screen, it moves on three conveyors (the stacker conveyors) that radiate from the rinse screen. The material moves along the stacker conveyors to the discharge ends of the belts where it falls into the stockpiles (see Gov. Exh. 1).

The electrical control center is located at ground level immediately adjacent to the left front of the primary screen facility when facing the facility from the feed hopper (Tr. 24, 27-28; Gov. Exh. 1). The conveyor belt from the feed hopper to the primary screen passes within a very few feet of the control center. Although miners are not supposed to walk under the conveyor belt to get to the control center, there is no barrier to prevent them from doing so.

Heritage purchased its conveyors and other equipment from Central Michigan Tool and Equipment (CMTE) (Tr. 225). Heritage maintained that when it bought the equipment, the company understood the equipment would be "in compliance with all applicable standards" (Tr. 239). Kim Velting, the president of Heritage, put it this way, "When I buy a piece of equipment, I expect it to meet all codes and regulations" (Tr. 240). In the company's view, everything that was required by law and regulation was to be provided by CMTE so all that Heritage needed to do was operate the equipment (Tr. 340-341, 369-370, 398).

At the time of the accident five miners worked at the Cherry Valley Pit (Tr. 397).

THE ACCIDENT

On the morning of May 2, the miners reported for work as usual. It was raining, and everything was wet. Shortly after mining began, B.J. Welton drove a loaded haulage truck to the feed hopper to dump a load of sand. He began backing the truck toward the hopper. In the truck's rear view mirror Welton could see Oakes gesturing to him. However, Welton was concentrating on dumping the load, and as he maneuvered the truck into position, Welton lost sight of Oakes. Once Welton had the truck where he wanted it, he activated the bed of the truck and began to dump the sand (Tr. 33-34).

As he did so, he noticed that the conveyor belt from the feed hopper to the primary screen facility was running erratically. Welton shut down the truck and got out. He walked toward the primary screen (Tr. 34). As he approached the screen he saw Oakes "hanging from the return

idler" roller of the conveyor belt (Tr. 34; see Gov. Exh. 1 at "x"). The conveyor belt runs over the roller and there is a pipe above the belt. The clearance between the belt and the pipe is four or five inches (Tr. 37). Oake's right arm was caught between the roller and the belt, and Oakes was struck in the pinch point created by the roller, the belt, and the belt structure. He was in up to his shoulder, and his head was jammed against the moving conveyor (Tr. 97-98, 283).

Welton started yelling for help. Dick Brant, a miner who was working on the other side of the crusher, heard Welton and came running to see what was wrong. In addition, Mark Van Blaricum, a tire company employee working at the mine, also ran to the scene. The men managed to shut off the conveyor by going to the electrical control center and turning off the power. Then, they tried to pull Oakes out of the pinch point. They could not, and Welton ran to call the rescue squad (Tr. 35, 38). After contacting "911", Welton raced back.

In the meantime Bill Kingsbury, a temporary employee, also arrived on the scene. The men cut some of Oakes' shirt and sweater "to give him some airway" (Tr. 38). Then, Van Blaricum got a cutting torch. He burned away part of the conveyor belt structure freeing Oakes (Tr. 39, 284). The men tried to revive Oakes, but they were not successful (Tr. 39).[3]

THE INVESTIGATION

On May 3, Paul Blome, a MSHA supervisory mine inspector, received a telephone call from the MSHA assistant district manager. He told Blome about the accident and asked Blome to go to the pit (Tr. 23-14, 106). On May 5 (a Monday and the next work day), Blome, who was accompanied by MSHA supervisory inspector Fred Tisdale, went to Cherry Valley. The inspectors interviewed some of Heritage's employees, and they inspected the accident site.

Blome and Tisdale arrived around 3:30 p.m. (Tr. 121). The first person they met was miner Todd Stevens. They told Stevens who they were and explained the purpose of their visit. They asked Stevens to contact Kirk Velting, and to tell him they were at the pit.[4] The inspectors

[3]Oakes died of asphyxiation. Examination of Oakes' body revealed that he also suffered a dislocated right shoulder.

[4]When Velting heard the inspectors were present, he came to the mine, but he was too upset to go to the accident scene and he went home. Later that evening, an MSHA inspector called and asked him to return. He did, and he viewed the area where Oakes was killed (Tr. 323-324).

proceeded to the accident site. They examined the site, made measurements, and took pictures.

The inspectors first measured the idler roller. It was 51 inches long and 5 inches in diameter. The conveyor belt above the roller was 48 inches wide (Tr. 127-128, Gov. Exh. 6 at 4, Gov. Exh. 12). The pipe that was located above the belt and to the rear of the roller extended from one side of the belt structure to the other. As previously mentioned, there was approximately four to five inches of clearance between the top of the roller and the pipe (Tr. 149-150; Gov. Exh. 12). The belt moved at a very fast speed. The inspectors believed if a person were caught by the belt or roller, the speed of the belt would pull the person's body into the pinch point and the lack of clearance would make it virtually impossible for the person to extricate himself or herself without at least losing an arm (Tr. 70, see also Tr. 469). The idler roller was not guarded at the time of the accident, and the inspectors detected no evidence it ever had been guarded (Tr. 162). They considered the unguarded roller to be very hazardous.[5]

In addition to measuring the roller and the clearance, Blome measured the perpendicular distance from the ground to the top of the roller. Using a tape measure, he found that it was 71 inches. Blome and Tisdale testified that Blome measure from a level area of the ground (Tr. 41, 45, 47-48, 49, 135-136, 163-164, 517-518), but they agreed there also was a pile of sand under the roller. The sand fell from the belt, as the belt passed over the roller.

The inspectors also observed a "path" under the conveyor and adjacent to the area beneath the roller. The path was approximately one foot wide. It consisted of "hard packed" sand and dirt (Tr. 81-82). The path lead to the electrical control panel (Tr. 53-54, see also Tr. 146; Gov Exh. 11(2)). Tisdale believed it was the closest path for "[a]nybody from any part of the plant that wanted to . . . do anything to that control panel" (Tr. 156). Given the nature of the compacted sand and dirt, Blome thought the path "had been beaten down for some time" (Tr. 81-82).

The inspectors further noted the conveyor belt structure rested on two 14 inch I-beams that ran parallel to the belt. The distance between the beams was approximately 63 to 71 inches (Tr. 171). The area between and on both sides of the beams was filled with sand and dirt so that, expect where sand piled under the roller, the ground level under the belt structure and adjacent to it just covered the tops of the I-beams (Tr. 101, 146, 300 (see Gov. Exh. 11(2))). According to Kirk Velting, the distance from the top of the I-beams to the pinch point was 81 inches (Tr. 368).[6] Kirk Velting testified the ground was supposed to be kept level with the top of the I-beams (Tr. 343).

The path passed over and between the beams and under the conveyor. There was a

[5]The inspectors were not alone in this belief. Even Heritage's guarding expert, Michael Music, considered the idler roller dangerous if contacted (Tr. 470).

[6]In addition, Music measured the distance and found that it was 81 inches (Tr. 433).

dispute among the witnesses whether the path passed under the pinch point, as the inspectors seemed to believe, or passed three to five feet away from the area under the pinch point, as Heritage's witnesses believed.

As a result of the investigation, Blome and Tisdale concluded the company violated section 56.14107(a), and Blome issued Citation 4316701. It states:

> A fatal accident occurred at this mine when a foreman became entangled in a conveyor belt and was asphyxiated. The victim walked underneath the . . . conveyor, which was operating, and contacted the unguarded rotating idler located about 71 inches above ground level. Management knew or had reason to know mine employees travel under this conveyor on a regular basis, yet failed to take corrective action (Gov. Exh. 2).

THE VIOLATION

As noted, section 56.14107(a) requires "[m]oving machine parts shall be guarded to protect persons from contacting" the listed parts "and similar moving parts that can cause injury." When section 56.14107(a) was promulgated, the Secretary stated the standard applied where moving machine parts "can be contacted and cause injury" because the standard's purpose was "to protect persons from coming into contact with hazardous moving machine parts . . . [in order] to prevent contact with [the] . . . parts" (53 F.R. 32509 (1988)).

The Secretary also stated that there were two ways in which to meet the requirements of the standard. Either the hazardous moving machines parts could be guarded physically by installing material guards over or around the parts, or they could be guarded "by location", that is by placing the parts at least seven feet above walking or working surfaces.[7] The Secretary rejected an interpretation of the standard that required guarding only to protect against inadvertent, careless, or accidental contact. Rather, the secretary made clear that guarding also was to protect against deliberate or purposeful actions (53 F.R. 32509 (1988)).

Interpreting the words of regulation, the Commission held that the phrases "may be contacted" and "may cause injury" "import the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness" (Thompson Brothers Coal Co., Inc., 6 FMSHRC 2094, 2097 (September 1984)). The Commission stressed that the construction of safety standards involving miners' behavior "cannot ignore the vagaries of human conduct" (Id.). Thus, all exposure and injury variables are relevant to the question of whether the standard has been violated, including

[7] See 30 C.F.R. § 56.14107(b) (guards not required "where the exposed moving parts are at least seven feet away from walking or working surfaces").

the accessibility of the machine parts, work areas, work duties, and predictable and unpredictable conduct by miners (Id.).

Applying the Secretary's purpose and the Commission's analytical principals to the facts, I conclude Heritage violated section 56.14107.

First, I find the idler roller, was a "moving machine part" similar to those listed in the regulation, and I reject Heritage's arguments to the contrary (Tr. 443-444, 447-448). Although Music was of the opinion that "similar moving parts" means "[p]arts similar to [those listed in the standard] . . . where a belt changes direction or goes . . . nearly around a pulley" (Tr. 475), Music's view is too restrictive to effectuate the purpose of the regulation. True, there are differences between the listed parts and the subject idler roller. For example, the idler roller did not have power applied to it and only a small portion of the belt touched the roller. However, the listed parts in large measure are included in the standard because they present the danger of a miner becoming caught in a pinch point created by the revolving part and moving belt. The same hazard was presented by the subject return idler roller making it "similar" under the standard.

Second, the idler roller was a part that "may cause injury". The very limited space between the top of the roller and the metal pipe, the speed of the belt, and the identical direction in which the belt and the roller turned, meant that once caught in the pinch point, a person was unlikely to free himself or herself without being severely injured or worse (Tr. 37, 149-150; Gov. Exh. 12). I credit the inspector's testimony in this regard (Tr. 67), and I again note that even Music found the configuration of the roller, pipe, and belt "obviously dangerous" (Tr. 470).

Third, the idler roller was equipment that "may be contacted". In reaching this conclusion, I have considered the accessibility of the roller, the proximity of the nearby travel area, the proximity of Oakes' even closer work area, and the fact that miners do not always act protectively in their own interests.

I find the path that passed in close proximity to the roller was used by miners. Both Blome and Tisdale saw the path. While there were numerous people in the area between the accident on Friday and the arrival of the inspectors on Monday, people who assisted in removing Oakes from the scene, the inspectors believed the path was so compacted it had been used frequently before the accident. I credit their firsthand observation, especially since the path lead to the electrical control panel which was used from time to time and because the path provided a short route to the panel for miners on the west side of the operation (Tr. 31, 53-54, 81-82, 154, see also Tr. 146; Gov. Exh. 1, Gov. Exh. 11(2)).

I agree with Heritage, however, that the path did not pass directly under the roller. In my opinion, the fact that sand tended to fall from the belt and roller and to pile under the roller, made it unlikely miners repeatedly walked under the roller. Rather, they deviated away from the sand pile and the roller.

But, they did not deviate much. I credit Kirk Velting testimony that a change in course of as little as three feet or as much as five feet would have resulted in a miner coming directly under the roller (Tr. 247-248, 326). (In other words, I find that the path passed within three to five feet of the area directly under the roller.) Although miners were not supposed to use the path to walk under the conveyor (Tr. 278, 302), the compacted nature of the path and the testimony of one of Heritage's miners that it was used despite the company's contrary policy, meant there were occasions when miners traveled in close proximity to the unguarded and exposed roller (Tr. 279-280, see also Tr. 455).

Did miners using the path walk within seven feet of the unguarded roller? Heritage argued they did not because the diagonal distance (the "hypotenuse") from the surface of the path (the closest "walking surface") to the idler roller was more than 7 feet (Tr.436, see also Tr. 452). The problem with the company's theory is that the record does not support its geometric calculation. Blome was the person who physically measured the distance from the ground to the roller at the time closest to the accident. Tisdale was with Blome. Tisdale saw Blome make the measurement. Both men testified the distance was approximately 71 inches.[8] Their testimony was consistent with the fact that at the time of the accident there was a point under the roller where sand had accumulated. I find the sand raised the ground level under the roller approximately 10 inches above the top of the I-beams. With the distance between the ground and the roller being 71 inches, the diagonal distance to the edge of the path would have been under seven feet when the base distance was three feet eight inches or less, which means that there were points along the path where the roller was not guarded by location.

More importantly, Oakes's duties at times required him to work in even closer proximity to the unguarded roller than if he had used the path. Kirk Velting testified that he instructed Oakes to remove the sand that piled under the roller and to keep the sand level with the I-beams (Tr. 349, 392-3). As Oakes shoveled the sand he would have come increasingly close to the roller and he would have ended his work almost directly under the roller, if not directly under it.

Heritage argues that Oakes would not have worked under the roller while the belt was running because sand would have fallen on him (Tr. 326), and he would have been "picking sand out of [his] . . . pants the rest of the day" (Tr. 474). However, miners do not always do what is comfortable, and James Weldon testified that Oakes did not always stop the conveyor when work was done under it (Tr. 291). Moreover, there was testimony that wet sand tended to accumulate on the belt and roller more quickly than dry sand (Tr. 348, 455). If a miner were in a hurry to clean the roller, the lack of a guard would have increase the temptation to reach up and to hasten the clean up process (See Tr. 348). Such rank disregard for safety is one of the "vagaries of human conduct" the Commission instructed its judges to considered.

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[8]Tisdale actually testified the distance was 72 inches (Tr. 135-136), but Blome made the measurement, and I accept his testimony as accurate.

Heritage also argued that the Secretary, in her Program Policy Manual (PPM), specifically exempted rollers like the subject idler roller from the standard. Heritage pointed to a statement in the PPM that "[c]onveyor belt rollers are not to be construed as 'similar exposed moving machine parts' under the standard" (IV PPM 55(a), Resp. Exh. B). However, as the Secretary's guarding expert, Richard Feehan, the Chief of MSHA's Metal and Nonmetal Division, testified, the full statement makes clear that conveyor belt rollers are exempted only when they are protected by skirt boards. The complete sentence states, "Conveyor belt rollers are not to be construed as 'similar exposed moving machine parts' under the standard and cannot be cited for the absence of guards and violation of [section 56.14107(a)] where skirt boards exist along the belt" (Id.). If, as argued by Heritage, conveyor belt rollers were exempted from the standard, the presence of skirt boards would be irrelevant. In other words, as Feehan stated, the PPM means "exactly what it says", in that "inspectors cannot cite these rollers where there is a skirt board" (Tr. 505).

I also find persuasive Feehan's testimony concerning a publication entitled MSHA's Guide to Equipment Guarding for Metal and Nonmetal Mining (Gov. Exh. 13). The booklet was authored by MSHA, and it is intended to help mine operators and miners understand the guarding requirements. On page 9 of the publication there is an illustration of a miner with both arms caught between the conveyor belt and the upper surface of a return idler roller (Gov. Exh. 13 at 9). Above the illustration the publication states the reason for guarding return idler rollers is to prevent injuries such as that illustrated and "It is reasonable to expect . . .[such] . . . accidents where the idlers are less than seven feet above the walking surface" (Tr. 112; Gov. Exh. 13 at 9). The publication also states that idler rollers "should be guarded if someone could be injured while working or passing underneath the belt" (Gov. Exh. 13 at 9).

Music's testimony that the Guide refers to the guarding of return idler rollers as a way to meet the requirements of 30 C.F.R. §56.11001 and to provide "safe means of access . . . to all working places", simply is not credible. The Guide specifically refers to section 56.14107(a), not to section 56.11001 (Gov. Exh. 13 at 3).

For all of these reasons I conclude that section 56.14107(a) applied to the subject roller and that the roller should have been guarded.

S&S AND GRAVITY

A violation is significant and substantial, if based on 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 (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December 18, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard

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

The Secretary met her burden of proof with regard to elements 1, 2 and 4. There was a violation of the cited standard. The failure to guard the idler roller contributed to the danger a miner would be caught in the pinch point. (Indeed, it is the very thing that happened.) Further, the tight nature of the pinch point and the speed the conveyor belt made it likely that once caught, the miner could not extricate himself or herself, and the miner would be severely injured or killed.

As with most cases in which the validity of a S&S finding is an issue, the crucial question is whether the Secretary established the reasonable likelihood that the hazard contributed to would result in an injury. I find she did. Miners had access to the vicinity of the unguarded roller in that they used the path adjacent to the roller, as shown by the path's compacted nature. More importantly, Oakes was instructed to control the sand pile under the roller by leveling it from time to time. This brought him into the immediate vicinity of the roller. Although the distance between the roller and the ground may have varied depending upon the size of the pile, at 71 inches the roller easily was within the reach of Oakes, who was 5 feet 8 inches tall (Tr. 40), and of other miners too.

I recognize that the height of the roller meant that Oakes and other miners were not going to trip or fall into the pinch point. However, there was credible testimony that miners, including Oakes, worked and traveled under conveyors while their belts were running (Tr. 278-280, 291, 302). This, together with the fact that sand was not supposed to be allowed to build up under the roller, meant there was an incentive to keep sand off the belt and the roller. Although Kirk Velting testified there was no reason to reach into the pinch point to clean the roller because wet sand eventually would fall from the roller when it dried (Tr. 348), the fact that the roller was within reach, the fact that it was unguarded, the fact that access to it was not restricted, the fact that miners, including Oakes, traveled and worked under belts while they were running, the fact that Oakes was assigned to keep the sand from piling under the roller, all meant it was reasonably likely a careless miner would reach into the pinch point and disaster would result.

In addition to being S&S, the violation was serious. The hazards confronting the miners because the roller was not guarded were those of dismemberment or death and the possibility of the hazards coming to fruition was all too real.

UNWARRANTABLE FAILURE AND NEGLIGENCE

The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care

(Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

The Commission has identified several factors to consider when analyzing whether a violation resulted from unwarrantable failure: among them are "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether [the] operator has been placed on notice that greater efforts are necessary for compliance" (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 (October 1993)).

Here, it was clear a guard was required. The minimum distance between the ground and the roller was 71 inches, and the maximum distance was 81 inches, depending on the height of the sand. Therefore, the roller obviously was less than seven feet from the surface. From time to time Oakes was required to work in immediate proximity to the roller. Further, miners, including Oakes, traveled and worked under the conveyors while the conveyors were operating. These factors alone are sufficient to indicate the company failed to exercise the care required of it when it did not guard the idler roller.

But, this was not the full extent of the company's neglect. The record confirms that Heritage abdicated its responsibilities by relying completely upon the vendor of the equipment, CMTE, to make certain there was compliance with all applicable standards (Tr. 239, 398). As Kirk Velting stated, Heritage expected CMTE to deliver a "turnkey operation", one in which Heritage's only obligation would be to operate the equipment (Tr. 398). While CMTE knew this and while CMTE intended to insure compliance as it understood the standards (Tr. 489, 494), Heritage's reliance on CMTE is not exculpatory. Rather, it represents inexcusable indifference to the regulations and to the company's responsibilities under the law. Typical of this indifference is the fact that although the company clearly was engaging in the extraction and preparation of sand and gravel — activities obviously falling within the jurisdiction of the Act — it was not until after the accident that Kirk Velting understood MSHA had jurisdiction over the pit (Tr. 379). Yet Kirk Velting was the company official who was daily at the mine and who interacted the most with the miners. I believe the company's indifference to its responsibilities lead directly to its violation of section 56.1704(a) and that the company's failure was indeed unwarrantable.

In addition, the company was highly negligent. A company engaging in mining and in commerce is presumed to understand that it is regulated, that regulation requires compliance with published standards, and that responsibility for compliance first and foremost lies with itself. The burden is on the company in this regard. Heritage offered no evidence that it made the slightest effort to assume this burden.

CIVIL PENALTY CRITERIA

I have found the violation was serious and the result of the company's more than ordinary neglect of its lawful obligations. In assessing a civil penalty, the Act mandates I consider also Heritage's history of previous violations, the size of its business, the effect of the penalty on Heritage's ability to continue in business, and its good faith in attempting to comply rapidly after being charged (30 U.S.C. §820(i)).

Three of these criteria may be considered in short order. The Cherry Valley Pit had no history of previous violations, the company is a small operation (See n. 2 supra), and the company exhibited its good faith in complying by installing a guard around the roller shortly after the citation was issued (Gov. Exh. 2).

The remaining criterion is the effect of the penalty on Heritage's ability to continue in business. The burden of proof is on Heritage, and "[i]n the absence of [such] proof . . . it is presumed that no . . . adverse [e]ffect [will] occur" (Sellersburg Stone Co., 5 FMSHRC 287, 294 (March 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984); (citing Buffalo Mining Co., 2 IBMA 226, 247-248 (September 1973)); accord Spurlock Mining Co., 16 FMSHRC 697, 700 (April 1994); See also Steel Branch Mining, 18 FMSHRC 6, 15 (January 1996)).

At the hearing, Heritage argued the proposed penalty adversely would affect its continuation (Tr. 242, 307). As evidence, Heritage offered a monthly income statement for September 1998 (Resp. Exh. J). Amplifying on the meaning of the statement and on the company's fiscal condition, company president Kim Velting testified the source of capital keeping Heritage in business was the money earned from its sales. For the first six months of 1998 the company had sales of $761,550.40 (Tr. 308; Resp. Exh. J). Indeed, its gross profits as of September 30, 1998, were $536,555.44 (Tr. 312; Resp. Exh. J). However, as summer ended and fall began, contracts the company anticipated were not forthcoming due to delays in state road construction projects (Tr. 308). As a result of the slow down in income and other factors, the company's gross profits were not adequate to offset its expenses and the "bottom line" at the end of September was a loss of $47,983.11 (Resp. Exh. J). This came at a time when the company needed to build up financial reserves to "cover" the winter months when it would be all but shut down (Tr. 305; Resp. Exh. J). (During the winter, the only activity at the pit was the use of one front end loader to load customers' trucks from stockpiles (Tr. 320).) Kim Velting noted that despite its greatly curtained winter operations, the company had to meet ongoing financial obligations in the form of salaries, workers' compensation payments, and attorney's fees (See Tr. 305-306). He believed it possible the company would "go under" if the proposed penalty was assessed (Tr. 307).

Because Heritage did not then have available to it all of the financial materials it believed relevant to the issue of its ability to continue in business, the record was left open to allow the company to submit the material and for the Secretary to respond (Tr. 524). Subsequently, the company submitted, among other things, a Federal income tax return for 1997, a financial report signed by Kim Velting and dated November 30, 1998, and an unaudited income statement showing the company's financial position from April 1, 1998 to November 30, 1998 (See letter

from Boncher to [Barbour] and attachments).[9]

A review of the material reveals that in 1997, the company reported income of $1,195,665 and total deductions, not including an operating loss deduction, of $1,113,252 . When its net operating loss deduction is included, the company showed a taxable income of $0.00. In addition, the company showed income ("net sales") of $1,011, 407.99 from April 1, 1998 to November 30, 1998, a gross profit of 736,158.83, and other income of $8,402.72. However, after deductions for operating and other expenses, the company showed a loss for that period of $76,320.95 (See letter from Boncher to [Barbour] and attachments).

In his financial report Kim Velting stated that as of December 29, 1998, the company was "showing an approximate $80,000 loss" but that "in the interest of full disclosure, the land investment portion of the business recently settled a substantial claim which will allow the corporation to continue." He added that, "It may be best to simply discontinue the mining portion of the business rather than to subsidize it. This decision is currently being considered" (See letter from Boncher to [Barbour] and attachments).

The Secretary argues the company's post hearing materials are "either unaudited or incomplete" and "therefore . . . must be viewed with a high degree of skepticism" (Sec. Br. 32). Nonetheless, she notes they indicate the company paid Kim Velting and Kirk Velting combined salaries of $110,480.00 in 1977 and of $102,320 through November of 1998. More significantly, they indicate that the company holds real estate valued at $718,000 (Sec. Br. 33). Further, the Secretary points out that although the financial statement ending November 30, 1998, reflects a loss of $76.320.95, depletion and depreciation charges totaling $308,000 were taken against income and that without them, the company would have shown a net profit of over $230,000 (Sec. Br. 34). In short, the Secretary maintains that penalty proposed will not affect the company's ability to continue in business.

I agree. Taking the company's most recent financial materials at face value, I find that an assessment of even the maximum penalty allowed by law will not adversely affect the company's continuation. Like the Secretary, I find compelling reports of the company's real estate and real estate-related assets. The fact that the company has investments in land worth well over half a million dollars and Kim Velting's candid disclosure of the settlement of a "substantial claim" that will allow the company to continue, requires the conclusion that whether or not the company chooses to continue the mining portion of its business, the company will remain a going concern even with the added liability arising from this case.

[9]Because the company's taxable year ended after the record closed, this was the most recent information available.

ASSESSMENT OF CIVIL PENALTY

I recognize that the penalty proposed by the Secretary relates directly to the fact that Oakes died as a result of the accident. Had he not been caught in the pinch point and killed, the proposal would have been much lower. I also recognize that the evidence supports finding that Oakes shared in the blame for his death. The height of the roller meant that Oakes could not have fallen or stumbled into the pinch point. The only way he could have been caught was for him intentionally to bring his arm or hand dangerously close to the belt or roller, and for some reason to snag his clothing or to catch his hand (Tr. 294, 341-342, 462). Further, he did this although he knew the belt was running. He acted in flagrant disregard of his own safety.

Oakes was functioning as the supervisor (See n. 1 supra), but gross disregard by supervisors of their own responsibilities mitigates the fiscal consequences of the operator's negligence only if the negligence puts the supervisor alone at risk and if the operator took reasonable steps to avoid the particular class of accident (Nacco Mining Co., 3 FMSHRC 849-850 (April 1981)).

While Oakes acted at his own peril, the record does not support finding that Heritage took reasonable steps to avoid conveyor belt accidents. Miners knew that Oakes at times worked under the belt while it was running (Tr. 291). Moreover, Kirk Velting knew that prior to his death Oakes engaged in two very dangerous work practices ─ standing on the edge of the log washer while it was running and stepping on the screen deck to try to dislodge stuck material (Tr. 32, 345, 385-386). Despite the hazardous practices Kirk Velting limited Oakes' discipline to an oral reprimand (Tr. 385).

I believe that more than an oral reprimand was required to emphasize the importance of safe work practices, and the company did not establish it did more. For example, the company had no formal program to instruct either management personnel or miners in the rudiments of safety (Tr. 214, 216). It began such a program only after the accident. Further, although Kim Velting believed a handbook describing the company's "safety program" was given to employees prior to the accident (Tr. 213), neither Kim Velting nor Kirk Velting could point to any formal instruction of employees in the hazards of unguarded pulleys or rollers and the alleged handbook was not offered into evidence.

Given all of these factors, I conclude a substantial penalty is warranted. However, I believe the Secretary's proposal is excessive in view of the small size of the company and the fact that the Cherry Valley Pit had not been previously inspected and, hence, the company had no history for prior violations. Accordingly, I find that a penalty of $20,000 is appropriate.

ORDER

Heritage is **ORDERED** to pay to the Secretary a civil penalty of $20,000 within 30 days of the date of this decision. Upon receipt of the payment, this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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