FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

July 28, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 99-17-M
Petitioner	:	A. C. No. 44-06897-05502 ASI
v.	:	
	:	Low Moor
LOPKE QUARRIES, INC.,	:	
Respondent	:	

DECISION

Appearances: Daniel M. Barish, Esq., Office of the Solicitor, U. S. Department of Labor, Arlington, Virginia, for Petitioner;
R. Henry Moore, Esq., Buchanan Ingersoll, PC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

This case is before me on a Petition for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Lopke Quarries, Inc., pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petition alleges nine violations of the Secretary's mandatory health and safety standards and seeks a penalty of $55,500.00. A hearing was held in Harrisburg, Pennsylvania. For the reasons set forth below, I vacate four orders, modify one citation and one order, affirm one citation and three orders and assess a penalty of $22,500.00.

Background

Lopke Quarries, Inc., operates portable rock crushing plants at various locations throughout the eastern half of the United States. In 1997, Lopke was hired by Vulcan Materials to run such an operation at Vulcan's Low Moor Mine, near Covington, Virginia. Lopke began operating in November 1997 and later increased the size of its plant in April 1998. The plant consists of an impactor, which is known as the primary plant, and a double roll crusher and screen, called the secondary plant. Finished product is taken from the plants by conveyor belts and deposited in discrete piles depending on the type of rock. Front-end loaders move the rock from the piles below the conveyors to the area where it is stored for delivery.

Joe Spitzer was hired by Lopke to be superintendent of the Low Moor plant. He began working in January 1998. Spitzer was not able to produce enough crushed stone to meet Lopke's

expectations. He took a week off from the job in late April. In early May, Peter Lockwood, a Lopke superintendent, was sent by the company to see if he could assist Spitzer in getting the plant to meet production standards. Joe McCormack, another superintendent, was also sent to the site to provide advice.

On May 15, 1998, Lockwood was injured on the site. MSHA Inspector James E. Goodale was sent to the mine to investigate the accident. After investigating the accident, Goodale returned to the mine on May 20, to conduct a regular inspection of the mine. Based on his inspection, he issued 14 citations or orders to Lopke. The company contested nine of them, which were the subject of this hearing. The orders and citations will be discussed in the order of their issuance.

Findings of Fact and Conclusions of Law

Citation No. 7713969

This citation alleges a violation of section 56.12008 of the Secretary's Regulations, 30 C.F.R. § 56.12008, because: "The power wires entering the junction box for the 480 volt electric motor of the feeder for the impact crusher were not substantially bushed to prevent electric shock. This area was located at the primary plant. The wires were pulled out the box [*sic*]." (Govt. Ex. 3.) Section 56.12008 requires that:

> Power wires and cable shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings.

The parties have stipulated that Citation No. 7713969 accurately sets out a violation of section 56.12008, which the company committed. (Stip. No. 10, Jt. Ex. 1.) Accordingly, I conclude that Lopke violated the section as alleged.

Citation No. 7713973, Order Nos. 7713974 and 7713975

This citation and two orders involve violations of section 56.11001, 30 C.F.R. § 56.11001, for three different conveyor belts. Citation No. 7713973 alleges that:

> Safe access was not provided to service and maintained [*sic*] the conveyor belt and head pulley of the 57's belt. The foreman stated that he has walked up the elevated belt in the past, also other employees, no safety belt or harness and line being used. The belt was elevated approximately four to fifteen feet above

> ground level. The belt was approximately fourty [*sic*] five feet long. A fall of person hazard exist [*sic*] in this area. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 4.) Order No. 7713974 contains essentially the same language, except for the height and length of the belt and that it deals with the "Fines stacker belt." (Govt. Ex. 5.) Order No. 7713975, for the "8's belt" likewise is the same, except for height and length. (Govt. Ex. 6.)

Section 56.11001 provides that: "Safe means of access shall be provided and maintained to all working places." The company argues that the Secretary did not prove these violations because it did provide a safe means of access to the tops of the conveyors and because the Secretary did not show that the belts provided access to working places. I find that the company violated this regulation.

It is undisputed that at the time the citation and orders were issued none of the conveyor belts, which had been in operation since April 1998, was equipped with handrails or safety cables and that neither a ladder nor a man-lift was being used to access the heads of the belts. When asked how the belt conveyors were serviced, Spitzer testified: "I and everybody else walked up the belt to grease and check the head pulley." (Tr. 195.) This was the same response he gave when Inspector Goodale asked him the question during the inspection. He stated that a safety belt was not used when he and other employees walked up the belt. Spitzer said that the bearings in the head pulley had to be greased at least once a week, that each belt's gearbox had to be checked once a month and that the electric motors had to be checked once a year.

Jason Lewandrowski testified that he became the plant operator at Low Moor in the early part of May 1998. He stated that he serviced the belts once before the citation and orders were issued and that when he did, he used a safety harness and line which he attached to the framework of the conveyor belt. He maintained that he crawled up the belts and had to unhook the safety line and re-attach it several times.

The Commission has held, in construing a regulation worded identically to section 56.11001, that:

> [T]he standard requires that each "means of access" to a working place be safe. This does not mean necessarily that an operator must assure that every conceivable route to a working place, no matter how circuitous or improbable, be safe. For example, an operator could show that a cited area is not a "means of access" with the meaning of the standard, by proving that there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace.

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

Lopke asserts that it provided a safe means of access to the head pulley by making a safety belt or harness and safety line available. It disputes that any employee walked up the belt without such safety equipment by attacking the credibility of its superintendent, Joe Spitzer. The Respondent maintains that Spitzer may have been in a frustrated mental state during the inspection because he was unhappy with his pay, the company kept pushing him for more production, he viewed Lockwood as his replacement and he had a confrontation with McCormack. All of this, the company argues, makes his testimony inherently suspect.

The problem with this argument is that it requires speculation into Spitzer's state of mind and conclusions about that state of mind that are not corroborated by any other evidence. In the first place, no one directly contradicted Spitzer's statement that he and others had gone up the conveyor belts without safety belt or harness. None of the witnesses, save Spitzer, had been at the mine before early May 1998. So no one but Spitzer could testify what happened prior to that time.

Secondly, none of the witnesses, except McCormack, testified that they observed anything unusual about Spitzer's manner or behavior at the time of the inspection. McCormack characterized him as being "uptight, talking loud and then he gave me a little punch." (Tr. 366.) He speculated that Spitzer was that way because McCormack was giving him advice concerning the impending inspection and raising production levels. Being uptight in such a situation when you are the one in charge of the plant does not seem that unusual. It is a stretch to conclude that because of this Spitzer intentionally gave false information to the inspector and then repeated it at the trial.

Thirdly, Lockwood and McCormack were present at the mine during the inspection and Lockwood, at least, assisted in abating these violations the next week by installing handrails. Yet, there is no evidence that anyone from the company ever challenged these violations at that time either by advising the inspector that Spitzer's information was suspect or stating that during the period they were at the mine, the head pulleys were accessed with the use of a safety harness.

Fourthly, the matters causing Spitzer's frustration are the types of matters that commonly frustrate many superintendents in Spitzer's position. Beyond the frustrations, Lopke has made no showing that Spitzer bore any animus toward the company, particularly to the extent that he would attempt to sabotage it. Further, it is hard to believe that, if he did have such strong feelings toward Lopke, he would have accepted the company's offer of another position several weeks after he left Low Moor.[1] Indeed, it is hard to believe that, if the company thought that Spitzer had intentionally admitted to violations that did not occur, they would offer him such a job.

---

[1] Spitzer quit in June 1998 and was gone for a month. Lopke contacted him and offered him the position as superintendent of its Rockbridge plant.

Finally, I observed Spitzer's demeanor and manner while testifying and it did not appear that he was dissembling, bore a grudge against Lopke, or was testifying untruthfully. Consequently, I find that he was a credible witness and give great weight to his testimony.

Turning to the Respondent's claim that the belts were not working places when the inspector observed them, because the mine was not in operation at that time, I find this argument to be without merit. Section 56.2, 30 C.F.R. § 56.2, defines a working place as "any place in or about a mine where work is being performed." It is undisputed that work is performed on the head pulleys of the conveyor belts; the pulleys' bearings have to be greased at least once a week, the gearbox has to be checked once a month, and the electric motor has to be checked once a year. All of this work is performed at the head pulley during a mining shift.

The company too narrowly construes the definition when it argues that the work has to actually be being performed in the view of the inspector. The law is well settled that it is not a defense that the inspector was not present when the violation occurred. *Emerald Mines Co. v. FMSHRC*, 863 F.2d 51 (D.C. Cir. 1988); *Nacco Mining Co.*, 9 FMSHRC 1541 (September 1987). Furthermore, if the validity of such an argument were upheld, mine operators could avoid liability for violations merely by shutting down operations whenever an inspector arrived for an inspection. Such an interpretation would undermine the purposes of the Mine Act. *Emerald Mines*, 863 F.2d at 58. Therefore, I reject the argument.

Clearly, walking up the belt is an obvious route to the head pulley and, thus, it was incumbent on the company to make it safe. The company did not do this.[2] Accordingly, I conclude that the Respondent violated section 56.11001 in these three instances.[3]

Significant and Substantial

The Inspector found these violations to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

---

[2] Although not necessary to this decision, it is questionable whether the method of using the safety harness testified to by Lockwood and Lewandrowski was, in fact, a safe means of access.

[3] The fact that the "57's" belt had grease lines allowing the head pulley bearings to be greased from the ground does not mean that the company did not violate the regulation on this belt. Neither the gearbox nor the electric motor could be checked from the ground. Furthermore, Spitzer testified that he walked up *all* of the belts.

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

With regard to these violations, violations of the safety standard have already been found. The inspector testified that walking up the belts created a hazard of falling off of them. Common sense, as well as the inspector's testimony, indicates that a fall from belts which are four to eighteen feet above the ground will result in a reasonably serious injury, if not death. Consequently, I conclude that these violations were "significant and substantial."

Unwarrantable Failure

The citation and orders allege that these violations resulted from the company's "unwarrantable failure" to comply with the regulation.[4] The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence by a mine operator in relation to a violation of the Act. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2010 (December 1987). "Unwarrantable failure is characterized by such conduct as 'reckless disregard,' 'intentional misconduct,' 'indifference' or a 'serious lack of reasonable care.' [*Emery*] at 2003-04; *Rochester & Pittsburgh Coal Corp.* 13 FMSHRC 189, 193-94 (February 1991)." *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1627 (August 1994); *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

The Commission has established several factors as being determinative of whether a violation is unwarrantable:

[4] The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

> [T]he extent of a violative condition, the length of time it has existed, whether the violation is obvious, or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1129 (July 1992). The Commission has also examined the operator's knowledge of the existence of the dangerous condition. *E.g.*, *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994) (affirming unwarrantable failure determination where operator aware of brake malfunction failed to remedy problem); *Warren Steen*, 14 FMSHRC at 1126-27 (knowledge of hazard and failure to take adequate precautionary measures support unwarrantable determination).

Cyprus Emerald Resources Corp., 20 FMSHRC 790, 813 (August 1998).

The evidence on these violations is that miners had been walking up the belts since they were erected in April 1998. Spitzer, the mine superintendent, observed miners walking up the belts without safety devices and, in fact, he walked up the belts without safety devices. Spitzer was aware that this was unsafe. He had suggested to higher management that handrails be installed on the belts. In addition, one of Vulcan's supervisors told Spitzer and Lockwood that handrails should be installed on the belts and this was relayed to higher management. The failure to provide safe means of access to the head pulleys was at best indifference and at worst a serious lack of reasonable care. Accordingly, I conclude that these violations resulted from Lopke's unwarrantable failure to comply with the regulation.

<u>New Holland skid-steer loader</u>

Two orders were issued concerning the company's New Holland skid-steer loader. Order No. 7713976 alleges a violation of section 56.14100(b), 30 C.F.R. § 56.14100(b), because:

> Defects affecting safety on self propelled mobile equipment were not corrected in a timely manner to prevent the creation of an hazard to persons. The safety devices for the seat and seat belts provided on the New Holland skid-steer loader company number L-30 were not maintained in a functional condition. The wires for the components were broken allowing the operator to exit the loader while it is still running. The foreman has operated this loader in the

> past with the unsafe condition existing. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 7.) Section 56.14100(b) requires that: "Defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Order No. 7713977 charges a violation of section 56.14100(a), 30 C.F.R. § 56.14100(a), in that:

> The New Holland skid-steer loader company number L-30 was not inspected before putting into [*sic*] operation. Safety defects were found on the loader. The foreman stated he has operated the loader and never conducted an inspection. The loader is used at the plant areas. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 8.) Section 56.14100(a) provides that: "Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator on the shift."

Order No. 7713976

Inspector Goodale testified that when he inspected the New Holland loader he had the operator remove his seatbelt and stand up. He related that the safety device connected to the seat and seatbelt that was supposed to lock up the hydraulics so that the loaders lift arms could not be raised or lowered or the loader moved did not work when the operator stood up. He discovered that the wires were broken underneath the seat. The inspector stated that the purpose of the device was to prevent the operator from being struck by the loader's bucket when he exited the driver's cage.

Inspector Goodale further stated, and the other witnesses confirmed, that none of the miners, including Spitzer, was aware that the loader was equipped with such a device. He also testified that such a safety device is not required by the Secretary's regulations and that there were signs posted on the arms of the roll cage warning the operator not to get out of the cage without turning the loader off.

The Respondent argues that this was not a defect affecting safety because the regulations do not require such a device to be present and because of the warning signs. Lopke also argues that the Secretary did not show that it failed to correct the defect in a timely manner since it had to be aware of the defect to correct it.

The Commission has held, with regard to the predecessor to this regulation,[5] that the phrase "affecting safety," "has a wide reach and the 'safety effect of an uncorrected equipment defect need not be major or immediate to come within that reach.'" *Ideal Cement Co.*, 13 FMSHRC 1346, 1350 (September 1991) (citations omitted). Under this definition, I have little trouble concluding that the failure of the interlock device to activate, when the seatbelts were unfastened and the operator stood up, was a defect affecting safety.

On the other hand, the company is correct that the Secretary did not show that the defect was not corrected in a timely manner. In order to correct a defect, the operator must first be aware that a defect exists. In this case, the uncontradicted evidence is that no one at the mine was aware that the loader had a interlock device. (Tr. 81, 151, 214, 323.) Therefore, no one was aware that the device was defective. Further, in view of the facts that, (a) not all skid-steer loaders are equipped with such a device, (b) the Secretary does not require that skid-steer loaders be equipped with such a device, and (c) the broken wires were hidden under the seat, and, thus, not in plain view, I do not find the miners' lack of knowledge to be unreasonable.

In order to show that the defect was not corrected in a timely manner, the time starts running from the time the operator became aware of the defect, or, as is not present in this case, should have become aware of it. The Secretary did not present any evidence on this issue. Indeed, it is not discussed at all in the Secretary's brief. Therefore, while the evidence demonstrates that this was a defect affecting safety, there is no evidence concerning whether it was corrected in a timely manner. Consequently, the Secretary has failed to prove the violation and the order will be vacated.

Order No.7713977

The company has conceded that the loader was not inspected. (Jt. Ex. 1, Stip. 11.) Accordingly, I conclude that the Respondent violated section 56.14100(a).

Significant and Substantial

The order alleges that this violation was "significant and substantial." The Secretary argues that this is so because the loader operator could be "crushed" by the bucket when exiting the loader. (Sec. Br. at 21.) While that was certainly a possibility, I find that it was not reasonably likely to occur. The evidence is undisputed that the only defect found on the loader was the non-functioning interlock device. The evidence is also undisputed that there were signs on the loader's cage warning the operator to turn the loader off before getting off of it and that the Respondent's miners routinely followed this practice. Adding this to the facts that not all skid-steer loaders have such a device and that the Secretary does not require that they be

[5] 30 C.F.R. § 56.9002 (1987) provided: "Equipment defects affecting safety shall be corrected before the equipment is used."

equipped with such a device, and I conclude that the failure to inspect the loader was not "significant and substantial."

Unwarrantable Failure

The order charges that the violation resulted from an "unwarrantable failure." The evidence in this case is that the New Holland skid-steer loader was the only piece of self-propelled equipment that was not inspected in accordance with section 56.14100(a). Both Spitzer and Lockwood testified that because the New Holland loader was used for "clean-up" it was not mining equipment and, therefore, did not have to be inspected. There is no evidence that this belief, although clearly mistaken, was not held in good faith. Accordingly, while this was negligent conduct, it does not rise to the level of aggravated conduct necessary for a finding of "unwarrantable failure." The order will be modified appropriately.

Dresser 555b Front-end Loader

Order No. 7713679

This order alleges a violation of section 56.14101(a)(2), 30 C.F.R. § 56.14101(a)(2), because:

> The parking brakes provided on the Dresser 555b company number L41 front end loader would not hold on the maximum grade it travels when tested by the mine inspector. The grade the loader was tested was approximately twelve to fourteen percent. The loader is used at the plant and stock pile areas. The operator of the loader has been reporting this condition to the foreman. The foreman engaged in conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 9.) Section 56.14101(a)(2) provides that: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels."

The inspector testified that he tested the loader's parking brakes as follows:

> I said well, let's do a brake test. So the loader operator backed the loader back up to the side of me, and I looked at him. And I said put it in gear. Let it coast down the hill. Don't use your foot brake, and pull your parking brake. See if it's going to stop you.
>
> When he pulled his parking brake, it just kept on coasting. It slowed down a little bit, but then it started to speed up. So I said

> okay, stop. So, you know, he applied his foot brake. I said let's do it one more time. So he backed back up the hill. And I said apply your parking brake. When he backed up the hill and applied his parking brake, it started to coast back down the hill again.

(Tr. 93-94.) He further testified that loader rolled for "probably eight seconds or something" and was traveling "I don't know, three, four miles an hour. Four, five miles an hour" before he told the operator to pull the parking brake. (Tr. 94-95.)

The Respondent argues that this was not the appropriate way to test whether the parking brakes would hold. I agree. Section 56.14101(b), 30 C.F.R. § 56.14101(b), sets out the procedure for testing a vehicle's service brakes, but there is no similar provision for testing the parking brakes. However, it is apparent that section 56.14101(a)(2) requires that the vehicle's parking brakes hold on a hill, not stop it on a hill. That there is a difference between the two is evident from section 56.14101(a)(1), 30 C.F.R. § 56.14101(a)(1), which requires that the service brake system be "capable of stopping and holding" the vehicle. Thus, it would seem that the appropriate test would be to stop the loader on the incline, set the parking brake and then see if it holds the loader, that is, that the loader does not move.

Based on the testimony at the hearing, particularly that of Joe Spitzer, that sometimes the brake would work and sometimes it would not and that later it was determined that the brake plate was warped, it may well be that the parking brake would not have held if it had been tested properly. However, there is no evidence before me from which I can conclude that the brake would not hold.[6] Therefore, I find that the Secretary has not proved this violation and will vacate the order.

Order No. 7713980

This order alleges a violation of section 56.14100(b)[7] because:

> Defects affecting safety on the Dresser 555b company number L-41 front end loader were not corrected in a timely manner to prevent the creation of a hazard to the operator of the

[6] When taken out of context, the inspector's testimony, "I said let's do it one more time. So he backed back up the hill. And I said apply your parking brake. When he backed back up the hill and applied his parking brake, it started to coast back down the hill again," (Tr. 93-94), could be interpreted as indicating that the parking brake was tested after the loader had made a complete stop. However, based on all his testimony, I am satisfied that Inspector Goodale did not conduct two separate tests, but had the parking brake applied after the loader had begun coasting in both instances.

[7] The requirements of section 56.14100(b) are set out at page 7, *supra*.

> loader. The defects were reported to the foreman and signed off by the foreman. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 10.)

Inspector Goodale testified, with regard to this order, that: "The defect was the parking brake on this front-end loader." (Tr. 102.) The company argues that this order is duplicative of the previous order and, therefore, that it should be vacated. While I agree that the order must be vacated, it is not necessary to determine that this violation is duplicative to reach that conclusion.

The Secretary's case that the parking brake was defective rests on the theory that it would not hold on a hill. However, as discussed above, the Secretary has failed to prove that the brake would not hold on a hill. Consequently, there is no evidence that the brake was defective.[8] Accordingly, I conclude that the Secretary has failed to prove this violation and will vacate the order.

Order No. 7713982

This order charges a violation of section 56.18002(a), 30 C.F.R. § 56.18002(a), in that:

> The contractor failed to conduct an adequate examination of work places for the primary and secondary plant areas. Several violations were cited relating to the plant areas. The records were signed by the foreman. The foreman engaged in aggravated conduct constituing [*sic*] more than ordinary negligence. This is an unwarrantable failure to comply with a mandatory standard.

(Govt. Ex. 11.) Section 56.18002(a) provides that: "A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions."

Inspector Goodale testified, with regard to this violation, as follows:

> The violation . . . is that the foreman failed to do an adequate examination of workplaces. If he would have done an adequate

[8] The fact that the company's witnesses testified that the parking brake had to be adjusted, does not without more, indicate that it was defective. Brakes commonly have to be adjusted. That does not necessarily mean that they are defective.

> examination of workplaces, I would not have found all these violations. And where it says several violations cited relating to plant area, it starts with the bushing, and it also starts with several of the other ones that aren't even in here such as a fire extinguisher, the electrical extension cord, three unsafe access standards, and I think that's it. And also under .18002(a) the operator must initiate prompt action to correct these conditions, and he didn't.
>
> Q. In issuing this violation, are you contending that the workplaces were not examined at all?
>
> A. No. I'm just saying they were examined, but he didn't do an adequate examination.
>
> Q. And why was it inadequate?
>
> A. Because all the violations I found.
>
> Q. If the exam had been adequate, what would be required to make it adequate?
>
> A. Well, one thing is you need to have a record that you examined these work areas. And I looked at these records examinations where the foreman signed off on. But there was not --- on these records, there was nothing indicating that the bushing was pulled out of the motor, the fire extinguisher was discharged, an electrical cord was missing a brown lug, the three belts were not accessed safely. They did not have any handrails or whatever to prevent that condition. There was nothing on this report indicating this.

(Tr. 106-08.)

In connection with section 57.18002, 30 C.F.R. § 57.18002, which is identical to the regulation in this case, the Commission has held that there are three requirements to the regulation: "(1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp.*, 11 FMSHRC 1622, 1628 (September 1989). Significantly, there is no mention of the word "adequate" either in the regulation or the Commission's setting out of the regulation's elements.

Nor is it mentioned in the Secretary's Program Policy Manual discussion of the regulation. *Program Policy Manual* Volume IV, Subpart Q, (last updated July 25,

2000)<http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL4E.HTM#77. With regard to alleging a violation of the standard, it states:

> Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken will result in a citation for violation of §§ 56/57.18002(a) or (c). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found. Although the presence of hazards covered by other standards may indicate a failure to comply with this standard, MSHA does not intend to cite §§ 56/57.18002 automatically when the Agency finds an imminent danger or violation of another standard.

Id. While this does not preclude the Secretary from alleging that an examination was inadequate, the language clearly tracks the elements of the offense set out in *FMC Wyoming* in indicating that the standard is violated if the examination is *not conducted* or *corrective action not taken*. More importantly, it indicates that a violation should not be charged every time there is an imminent danger, which was obviously not present here, or violation of another standard.

Judge Richard W. Manning vacated a nearly identical citation which relied on the issuance of other citations as proof that the examination was inadequate, finding that: "Moreover, it is not uncommon for an MSHA inspector to issue multiple citations at a mine that cite conditions which should have been detected by the operator's examiner. Citations under section 56.18002 are generally not issued under such circumstances." *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1136 (October 1999). In this case, it is undisputed that examinations were being conducted and that the operator was keeping a record of them. Nor is there any evidence that the examinations were not being conducted by a competent person.

While there may be cases where the violations are so obvious and so egregious that a finding that section 56.18002(a) was violated is appropriate, such is not the case here. I agree with Judge Manning's reasoning and will vacate the order.

Civil Penalty Assessment

The Secretary has proposed penalties of $33,500.00 for the citation and four orders found to constitute violations. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the parties have stipulated, and I so find, that the proposed penalties will not adversely affect the ability of Lopke to remain in business. (Jt. Ex. 1, Stip. 5.) I also find that Lopke's operation at the Low Moor site was a small one and that Lopke

Quarries, Inc., is a small to medium size company. I further find that the operator's history of violations is relatively good and that it demonstrated good faith in rapidly abating the violations.

Turning to the specific violations, the Secretary has proposed a penalty of $5,000.00 because of the company's "high" negligence for Citation No. 7713969. This is based on the belief that Spitzer knew about the problem with the wires not being bushed for about two months and made little effort to correct it. I find, however, that the violation was the result of "low" negligence on the part of the company. The wires were located in a junction box on a feeder. The evidence indicates that the feeder vibrates and that it is not unusual for the bushing and wires to vibrate out of the box. It is a continuing problem. Further, Spitzer testified that he fixed the problem at least twice and had a new part on order at the time of the inspection. The inspector testified that he found that an injury was unlikely to result from this violation. I concur and find that the gravity of the violation was not serious. This was not a high priority problem nor was it a problem that was being ignored. Accordingly, I will modify the citation by reducing the level of negligence from "high" to "low' and assess a penalty of $500.00.

On the other hand, Citation No. 7713973 and Order Nos. 7713974 and 7713975 clearly involved "high" negligence on the part of the operator. Walking up the conveyor belts without handrails or safety belts was highly risky. The gravity of these violations was serious. The Secretary has proposed a penalty of $7,000.00 for each of these violations and I agree with that assessment.

Finally, the Secretary proposed a penalty of $7,500.00 for Order No. 7713977. However, I have found that the violation was not "significant and substantial" and did not result from the operator's "unwarrantable failure" to comply with the regulation. Consistent with those findings, I find that the gravity of the violation was not serious and that the operator was "moderately" rather than "highly" negligent in committing it. Consequently, I assess a penalty of $1,000.00 for the violation.

Order

Order Nos. 7713976, 7713979, 7713980 and 7713982 are **VACATED**. Citation No. 7713969 is **MODIFIED** by reducing the level of negligence from "high" to "low" and is **AFFIRMED** as modified. Order No. 7713977 is **MODIFIED** to a 104(a) citation, 30 U.S.C. § 814(a), by deleting the "unwarrantable failure" designation, is further modified by deleting the "significant and substantial" designation and by reducing the level of negligence from "high" to "moderate, and is **AFFIRMED** as modified. Citation No. 7713973 and Order Nos. 7713974 and 7713975 are **AFFIRMED**.

Lopke Quarries, Inc., is **ORDERED TO PAY** a civil penalty of **$22,500.00** within 30 days of the date of this decision.

T. Todd Hodgdon
Administrative Law Judge

Distribution: (Certified Mail)

Daniel Barish, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Suite 516, Arlington, VA 22203

R Henry Moore, Esq., Buchanan Ingersoll, One Oxford Centre, 301 Grant Street, 20th Floor, Pittsburgh, PA 15219-1410

/nt