

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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March 20, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 94-74-M  
Petitioner : A.C. No. 04-04420-05504  
:  
v. : Docket No. WEST 94-75-M  
:  
JOHN CULLEN ROCK CRUSHING : A.C. No. 04-04420-05505  
AND GRAVEL, :  
Respondent : Grant Pit  
:

**DECISION**

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,  
U.S. Department of Labor, Denver, Colorado,  
for Petitioner;  
John Cullen, owner, John Cullen Rock Crushing &  
Gravel, Pueblo, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against John Cullen Rock Crushing and Gravel ("Cullen"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. " 815 and 820. The petitions allege 27 violations of the Secretary's safety standards. For the reasons set forth below, I vacate three citations, modify other citations, and assess penalties in the amount of \$912.00.

A hearing was held in these cases on January 19 and 20, 1995, in Pueblo, Colorado. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

**I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

At all pertinent times the Grant Pit, owned and operated by Cullen, was a small sand and gravel pit located in Pueblo County, Colorado. It employed about three to five miners. On July 21, 1992, MSHA Inspector Lyle Marti<sup>1</sup> inspected the mine and found a

<sup>1</sup> Inspector Marti's name is incorrectly spelled in the

number of violations of the Secretary's safety standards. When Inspector Marti returned to the mine the following day to continue the inspection, Mr. John Cullen confronted him in a manner that he considered to be threatening and he discontinued the inspection. Three other MSHA inspectors continued the inspection on July 28, 1992.

Cullen maintains that the mine was not operating on the dates of the inspection. I find that the evidence establishes that the mine was in operation in July 1992 for purposes of the Mine Act. While it appears that Cullen was having difficulty keeping its cone crusher running, Cullen was operating the mining equipment and processing material on July 21, 1992. I base this finding on the testimony of Inspector Marti and photographs that show the pit in operation. (Ex. G-13). Cullen may not have been operating at full production in July but, at a minimum, it was running the equipment and processing material to troubleshoot the problems it was having with the crusher. In addition, it is undisputed that miners were working at the mine on July 28 in an attempt to repair the cone crusher. Although the portable generator providing power to the pit had not been started on that date, miners were present doing repair work on the mining equipment.

Cullen also maintains that MSHA did not have jurisdiction over that part of its operation which the parties referred to as the experimental silica-free plant ("silica plant"). Within the area of the Grant Pit, Cullen had set up a plant to reclaim mill scale to make sandblasting grit. (Tr. 10, 76, 201). Cullen brought in slag material, screened and processed it, and bagged the material at the silica plant. Id. The silica plant was located in the pit adjacent to the crushing and screening plant for the sand and gravel mine. The equipment used at the silica plant was similar to that used at the sand and gravel plant. The same employees operated both plants.

I find that MSHA had jurisdiction over the silica plant because it was located at the mine and was operated by the same

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transcript.

A citation issued by Inspector Marti alleging a violation of section 103(a) of the Mine Act, 30 U.S.C. ' 813(a), for Cullen's refusal to allow the inspection to continue was affirmed by Administrative Law Judge August Cetti. John Cullen Rock Crushing and Gravel, 16 FMSHRC 909 (April 1994).

In relevant part, section 3(h)(1) of the Mine Act defines a mine to include "an area of land from which minerals are extracted ..., and ... lands, ... structures, facilities, equip-

employees using the same kind of equipment. As Mr. Cullen put it, "We are a one-horse operation." (Tr. 126). Mining equipment, such as conveyors, screening devices, and electric motors, were used at both facilities. The testimony indicated that parts and supplies used at one facility could and would have been used at the other facility. The miners that operated the crushing and screening plant also operated the silica plant and were exposed to the hazards presented by that plant. Given the integrated nature of the operation, I find that the MSHA had jurisdiction over all of the facilities at the Grant Pit. See, W.J. Bokus Industries, Inc., 16 FMSHRC 704 (April 1994).

Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), sets out six criteria to be considered in determining the appropriate civil penalty. I find that Cullen was issued eight citations in the 24 months preceding the inspection in this case. (Ex. G-1).

I also find that Cullen was a very small operator, it employed between three and five miners. Cullen no longer operates the Grant Pit and Cullen has sold most of the mining and crushing equipment. Cullen contends that MSHA is, in large measure, responsible for running it out of the sand and gravel business. Nevertheless, I find that the civil penalties assessed in this decision would not have affected its ability to continue in business. The conditions cited in the citations were not corrected by Cullen. Instead, the citations were terminated by MSHA because the Grant Pit is no longer operating and the mining equipment has been removed from the site. The Secretary has not alleged that Cullen failed to timely abate the citations.

#### A. Electrical Citations

1. Citation No. 3470641 alleges that the continuity of the equipment grounding conductors and resistance of the grounding rod had not been tested at the silica plant and the results recorded, in violation of 30 C.F.R. ' 56.12028. Power at the mine is supplied by a generator mounted on a trailer. The safety standard provides, in part, that continuity and resistance of grounding systems shall be tested at the time of installation

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ment. machines, tools, or other property . . . , used in, or to be used in, the work of milling of such minerals, or the work of preparing . . . minerals . . . ." 30 U.S.C. ' 802(h)(1). The legislative history of the Mine Act indicates that this definition is to be interpreted expansively. S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

and annually thereafter. Inspector Jake DeHerrera testified that this test had never been performed or recorded. (Tr. 205-06). Mr. Cullen testified that the silica plant had only been there a month and that an independent electrician had come to the plant and checked the grounding system. (Tr. 293). The inspector indicated that the electrician, Mike Simpson, was not sure how to test the continuity and resistance of grounding systems. (Tr. 281). (Mr. Simpson was at the mine on the day of Inspector DeHerrera's inspection.) Mr. Cullen stated that he is not an electrician and that Cullen should not be held responsible for electrical problems because it relied on an independent electrician and MSHA inspectors to set up the electrical system.

Based on the evidence, I find that the Secretary has established a violation. The Mine Act is a strict liability statute, and the mine operator is legally responsible for violations that occur at its mine. I agree with the inspector that the violation was not significant and substantial ("S&S"). I also find that Cullen's negligence was low, given that the silica plant had just been installed. A penalty of \$20.00 is appropriate.

2. Citation No. 3470642 alleges that three electrical conductors between the cone crusher's starter box and another electrical box were not protected from mechanical damage, in violation of section 56.12004. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." Inspector DeHerrera testified that the conductors were not protected by an outer jacket and were subject to damage by vibration or contact with other metal objects. (Tr. 206-11; Ex. G-14). He stated that the primary hazard created is an electric shock if the insulation was damaged and the metal conductors contacted and energized the electrical boxes or other metal surfaces. Id. He also stated that if a miner came into contact with energized metal surfaces he could be fatally injured. Id. Mr. Cullen testified that the cited electrical conductors were used for running pumps and that there was no electricity entering the electrical boxes at the time of the inspection. (Tr. 294-96). He stated that the electrical boxes were not being used and that Cullen was not planning on using them. (Tr. 296).

Based on this evidence, I find that the Secretary has established a violation. The fact that the electrical boxes were not being used at the time is not a defense. Assuming continuing mining operations, the conductors could have been used in the future and created a hazard. The inspector determined that the violation was S&S. I find that the evidence does not establish "a reasonable likelihood that the hazard contributed to will result in an injury." Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Given the location and length of the conductors, I find

that it was unlikely that the insulation would be damaged or that metal surfaces would become energized as a result. I further find that the violation was the result of Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

3. Citation No. 3470643 alleges that the 200 amp fuses protecting the cable supplying power to the cone crusher were inadequate to protect the circuit, in violation of section 56.12001. The safety standard provides that "[c]ircuits shall be protected against excessive overload by fuses or circuit breakers of the correct type or capacity." Inspector DeHerrera testified that the cable should have been protected by a 70 amp fuse. (Tr. 211-16). The inspector testified that the cable may remain energized and start a fire or energize electrical equipment in the event of a short circuit. Id. He further stated that such an event is reasonably likely and that it is reasonably likely that an injury would be fatal. (Tr. 214). Mr. Cullen testified that the magnetic starters in the circuit contained three "heaters" (overcurrent devices) that adequately protected against a short circuit or a problem with a motor. (Tr. 296). The inspector agreed that the overcurrent devices were present, but stated that they are designed to protect equipment and are time delayed. (Tr. 270). He said the overcurrent devices would "take quite a bit longer" to break the circuit than an "instantaneous fuse." Id. Cullen also defends its electrical system on the basis that former MSHA Inspector Barr had inspected the installation years earlier and found it to be in compliance with MSHA safety standards. With respect to all of the electrical citations, Mr. Cullen stated that "if someone had told me ... that [the fuses] needed to be changed, believe me, I'd change it, because electricity is one damn dangerous thing." (Tr. 289).

Based on this evidence, I find that the Secretary has established a violation. Although the circuit was protected with overcurrent devices to prevent motors from burning out, the fuses were inadequate to instantaneously open the circuit in the event of a short. That is, the fuses were not of the correct capacity. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 214). Given that the circuit was protected by overcurrent devices, which provides some level of protection, I might not ordinarily find this violation to be S&S. As the inspector noted, however, the electrical system at the Grant Pit had a significant other grounding and fusing problems. (Tr. 215). Taken together these created a very hazardous situation. Accordingly, I credit Inspector DeHerrera's testimony and find the violation to be S&S. Mr. Cullen's testimony that he relied on former Inspector Barr's determination that the circuit complied with MSHA standards is not very persuasive. By Mr. Cul-

len's own account, Mr. Barr has not inspected the mine for ten years and it was unreasonable for Cullen to rely on those previous inspections. I appreciate that it is difficult for a mine operator to comply with a safety standard that is subject to different interpretations by different inspectors. In this instance, however, that is not the case. Accordingly, I find that the violation was caused by Cullen's moderate negligence. A penalty of \$80.00 is appropriate.

4. Citation No. 3470644 alleges that the fuses protecting the cable supplying power to the south belt motor were inadequate to protect the circuit, in violation of section 56.12001. Inspector DeHerrera testified that the circuit should have been protected with 20 amp fuses rather than the two 30 amp and one 45-amp fuses that was present. (Tr. 216-18). He testified that a fire and shock hazard was present. Id. As with the previous citation, Cullen maintains that the circuit was adequately protected by overcurrent devices (heaters). (Tr. 296-98). The inspector did not deny that heaters were present. (Tr. 271-72).

Based on this evidence, I find that the Secretary has established a violation, for the reasons set forth with respect to Citation No. 3470644. The Secretary has not alleged that the violation was S&S. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

5. Citation No. 3470645 alleges that fuses protecting the circuits for the feeder motor, under cone motor, under screen motor, under jaw motor, crossover motor and screen motor were inadequate, in violation of section 56.12001. Each of these circuits were protected by 200 amp fuses through starter boxes. Inspector DeHerrera testified that these circuits should have been protected by 20 and 30 amp fuses. (Tr. 218-22). He stated that the conditions created a fire and shock hazard. Id. As before, Cullen maintains that the circuit was adequately protected by heaters. (Tr. 298-99).

Based on this evidence, I find that the Secretary has established a violation, for the reasons set forth with respect to Citation No. 3470644. The Secretary has not alleged that the violation was S&S. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

6. Citation No. 3470646 alleges that grounding was inadequate at the crushing and screening plant because the majority of the circuits were fused at 200 amps and the grounding conductors were attached to starter boxes, in violation of section 56.12025. The safety standard provides, in part, that metal parts enclosing electrical circuits shall be grounded or provided with equivalent protection. Inspector DeHerrera testified that the

standard was violated because the grounding conductor was not capable of carrying fault current back to the source, the generator. (Tr. 223-29) As a consequence, he stated that in the event of a fault, metal surfaces of "a lot" of equipment could become energized. (Tr. 223). He further stated that Cullen's outside electrician, who was present during the inspection, generally agreed with the electrical problems cited by the inspector. (Tr. 255). The inspector determined that this violation was S&S because of the seriousness of the violation and because it could lead to a fatality. (Tr. 226). Mr Cullen testified that he thought the grounding system was adequate based on what his outside electrician and former Inspector Barr had told him. (Tr. 299-300).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that crushing and screen plant was not adequately grounded. I also find that the Secretary has established that the violation was S&S and that Cullen's negligence was moderate. A penalty of \$80.00 is appropriate.

7. Citation No. 3470647 alleges that the conductors supplying power to the crushing and screening plant were laying on the ground and were not protected against mechanical damage, in violation of section 56.12004. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." Inspector DeHerrera testified that power conductors were on the ground in a roadway and were not protected from mechanical damage from vehicles. (Tr. 229-32; Ex. G-15). Vehicles were in the area and the inspector observed that the conductors were damaged. Id. Mr. Cullen testified that these conductors are usually protected by railroad ties, but that these ties were being used for another purpose at the time. (Tr. 300-01).

Based on this evidence, I find that the Secretary has established a violation. The Secretary did not allege that the violation was S&S. I find that the violation was obvious and that Cullen's negligence was greater than moderate. A penalty of \$50.00 is appropriate.

8. Citation No. 3470648 alleges that a hand-held disk grinder was not equipped with ground protection because the grounding prong on the plug was missing, in violation of section 56.12025. The safety standard provides that metal enclosures shall be grounded or provided with equivalent protection. Inspector DeHerrera testified that the round grounding prong on the plug was missing and that this condition created shock hazard. (Tr. 233-36; Ex. G-16). He stated that miners have been killed in situations where a short circuit in a small hand tool

energized the metal surfaces. Id. Mr. Cullen testified that the disk grinder was plugged into a portable generator and that a ground fault interrupter ("GFI") was attached to the generator. (Tr. 301-02; 311-313). The inspector indicated that a GFI would be equivalent protection. (Tr. 282). A GFI is a device that breaks a circuit in the event of a fault; plugs in newer home bathrooms are equipped with such devices. (Tr. 301).

Based on this evidence, I find that the Secretary has established a violation. Although the GFI provided protection at that location, miners could have used the disk grinder at other locations at the mine where a GFI was not present. (Tr. 313). At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 236-37). Because the grinder was used in a location that was protected by a GFI, I find that the evidence does not establish "a reasonable likelihood that the hazard contributed to will result in an injury." A penalty of \$30.00 is appropriate.

9. Citation No. 3470649 alleges that the power cable entering the motor housing of the stacker conveyor at the silica plant was not bushed, in violation of section 56.12008. The safety standard provides, in part, that "[c]ables shall enter frames of motors, splice boxes, and electrical compartments only through proper fittings." Inspector DeHerrera testified that the cable had been "pulled away from the splice box and the protection was not there for the [inner] conductors." (Tr. 238). As a consequence, the insulation on the conductors could be damaged by the rough edges of the opening or fitting of the splice box and a fault could result, creating a shock hazard. (Tr. 237-39). Mr. Cullen testified that he bought many of the motors used and that they did not always have a proper fitting on them. (Tr. 302-03). He stated that he tried to tighten the cables down as best as he could. Id. He also stated that the silica plant was a temporary, experimental operation and that MSHA should not have inspected it because it had nothing to do with the mine. Id.

Based on this evidence, I find that the Secretary has established a violation. As set forth above, I find that MSHA did have authority to inspect the silica plant. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence. A penalty of \$20.00 is appropriate.

10. Citation No. 3470650 alleges that the power cable entering the motor housing of a water pump at the pond near the silica plant was not bushed, in violation of section 56.12008. Inspector DeHerrera testified that the hazards associated with



this alleged violation is the same as the previous violation. (Tr. 239-41; Exs. G-3, G-19). Mr. Cullen testified that he did not think that the pump was "hooked up" and that the inspector should not have been at the silica plant. (Tr. 303-05).

Based on this evidence, I find that the Secretary has established a violation. As set forth above, I find that MSHA did have authority to inspect the silica plant. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence. A penalty of \$20.00 is appropriate.

11. Citation No. 3470654 alleges that the cover plate for the secondary screen motor junction box at the silica plant was not in place, exposing wires and connections, in violation of section 56.12032. The safety standard provides that inspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repair. Inspector DeHerrera testified that because the cover was missing, moisture could enter the junction box and possibly cause a short circuit, creating a shock hazard. (Tr. 250-53; G-18). Mr. Cullen testified that he buys used motors and that often the covers are missing and he has to fabricate one. (Tr. 308-09). He stated that he does not think that the motor was ever used in that condition. Id.

Based on this evidence, I find that the Secretary has established a violation. As set forth above, I find that MSHA did have authority to inspect the silica plant. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence and was not serious. A penalty of \$10.00 is appropriate.

12. Citation No. 4119016 alleges that the cover plate on the junction box at the drive motor for a specified conveyor at the crusher was missing, exposing wires to moisture, in violation of section 56.12032. Inspector Gary Grimes testified that the exposed wires created possible shock and fire hazards. (Tr. 34-37; Ex. G-6). Mr. Cullen testified that power to the drive motor had been disconnected at the junction box. (Tr. 101-04). That is, power had been disconnected by removing the cover plate and removing the wires supplying power to the junction box. Id. The power was disconnected because the miners were moving the equipment to repair the cone crusher. Id. I credit the testimony of Mr. Cullen in this regard, which is supported by Exhibit G-6. It appears that the wires supplying power to the motor had been removed. Accordingly, it is appropriate that this citation be vacated.

13. Citation No. 4121086 alleges that the metal enclosure for the generator supplying power to the mine was not grounded, in violation of section 56.12025. The safety standard provides that all metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. Inspector Marti testified that metal parts of the generator were not grounded to the earth, presenting an electric shock hazard. (Tr. 141-44, 162-63; Ex. G-11). Mr. Cullen testified that the generator was properly grounded with a grounding rod, but that Inspector Marti just did not see it because it was underneath the generator trailer. (Tr. 183-85). He also testified that Inspector DeHerrera told him on July 28, 1992, that the generator was grounded, but the grounding rod was not long enough. Id. Inspector De Herrera testified that he did not see a grounding rod and told Mr. Cullen what kind of rod would be required. (Tr. 204).

Based on this evidence, I find that the Secretary has established a violation. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's moderate negligence and was serious. A penalty of \$50.00 is appropriate.

#### B. Guarding Citations

1. Citation No. 3470652 alleges that the drive belts and pulleys on the boom truck air compressor were not guarded, in violation of section 56.14107(a). The safety standard provides, in part, that moving machine parts shall be guarded to protect persons from contacting pulleys, flywheels and similar moving parts that can cause injury. Inspector DeHerrera testified that the pinch point of pulley and belt was about four feet above the ground and was at the back of the truck where miners could come in contact with it. (Tr. 243-47, 283-84, 286; Ex. G-17). He stated that someone could get their hand caught in the rotating parts or the pinch points. Id. Mr. Cullen testified that the compressor is in the same condition as when he bought it and that the moving parts are protected by location between the compressor motor and the air tank. (Tr. 306-07). He also stated that no miner has been injured since he as purchased it about six years before the citation was issued. Id.

Based on this evidence, I find that the Secretary has established a violation. I do not agree that the location of the pulley provided any significant degree of protection. At the time of the inspection, the inspector determined that the violation

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Ms. Barbara Renowden, an MSHA Conference & Litigation Representative, examined Inspector Marti for the Secretary and cross-examined Mr. Cullen with respect to all of the citations issued by Inspector Marti.

was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 247). I agree and find that this violation was significant and substantial. Specifically, I find that the Secretary established a reasonable likelihood that the hazard contributed to will result in a serious injury. The evidence establishes that miners worked around the truck, taking and returning supplies kept there, and were exposed to the hazards of the moving parts. I find that the violation was caused by Cullen's moderate negligence and was serious. A penalty of \$80.00 is appropriate.

2. Citation No 3470653 alleges that a hand-held disk grinder was not equipped with a disk guard, in violation of section 56.14107(a). Section 56.14107(a) states:

Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Inspector DeHerrera testified that the disk grinder did not have a guard and that a miner could become injured if the disk wheel disintegrates or comes in contact with the rotating disk. (Tr. 247-50; Ex. G-16). He stated that Cullen violated that part of the regulation that covers "similar moving parts." (Tr. 249). Mr. Cullen testified that there was usually a shield for the grinder but the miners must have taken it off to use the grinder on the cone crusher. (Tr. 307-08).

I find that the Secretary has not established a violation of the safety standard because the rotating disk on the small hand-grinder is not similar to gears, sprockets, chains, pulleys or the other parts listed in the standard. The rotating disk on the electric hand tool is used to grind and smooth metal surfaces and does not have characteristics in common with pulleys, gears, sprockets, flywheels, fan blades or the other moving parts. Mathies Coal Co., 5 FMSHRC 300, 302 (March 1983); Rochester & Pittsburgh Coal Co., 10 FMSHRC 1576, 1580 (November 1988)(ALJ). Although the disk moves in a circular manner, it does not share other characteristics with the moving parts specified in the standard. While safety standards must often be broadly written to cover a wide range of circumstances, they cannot be applied in a manner that fails to inform a reasonably prudent person that the condition at issue was in violation of the standard. Ideal Cement Co., 12 FMSHRC 2409, 2416 (November 1990). I find that a

reasonably prudent person would not realize that the cited standard applied to the disk grinder. Accordingly, it is appropriate that this citation be vacated.

3. Citation No. 4119014 alleges that the guard for the drive belts and pulley for the jaw crusher had been partially cut away exposing miners to moving machine parts, in violation of section 56.14112(a)(2). The safety standard provides that guards shall be constructed and maintained to "not create a hazard by their use." Inspector Grimes testified that the guard that was present had been partially cut exposing the flywheel, pulley drive, and belts. (Tr. 25-27; Ex. G-4). He stated that a person slipping or falling could get caught in the pulley drive and lose an arm or a hand. (Tr. 26). Mr Cullen stated that the holes in the guard have been there since he purchased the crusher and that the holes are so high off the ground that it would be very difficult to get your hand in it. (Tr. 94-96). He stated that he owned the crusher for about nine years. (Tr. 118-120).

Based on this evidence, I find that the Secretary has established a violation. I find that the holes cut into the guard created a hazard. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 28). I agree with the inspector's original determination and find that this violation was not S&S. Although a discrete safety hazard was created by the violation, the Secretary did not establish that there was a reasonable likelihood that the hazard contributed to will result in an injury. Specifically, I find that the holes were small and difficult to reach, even if someone were to slip and fall. That is, I find that the chance of someone getting his hands or fingers in the unguarded area to be remote, at best. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

4. Citation No. 4119015 alleges that the guard on the tail pulley for the No. 2 conveyor was not securely in place, in violation of section 56.14112(b). The safety standard provides, in part, that guards shall be securely in place while machinery is being operated. Inspector Grimes testified that the guard was inadequate because it did not cover all the moving machine parts and was not firmly attached to the structure. (Tr. 28-34; Ex. G-5). He stated that someone could come into contact with the moving tail pulley while cleaning up spilled material around the belt. Id. Mr. Cullen testified that the only moving part was the tail pulley and the only way to contact it would be to do so on purpose. (Tr. 98-101, 120-22). He testified that miners shovel away spilled material from the bottom and that they would not be exposed to the moving pulley. Id. He stated that other

MSHA inspectors have observed the guard and have not found it to be in violation of the safety standard. (Tr. 100).

Based on this evidence, I find that the Secretary has established a violation. I find that the guard did not adequately protect the tail pulley from contact by miners. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 32). Whether this violation is S&S is a close call. I find that the Secretary established by a preponderance of the evidence that there was a reasonable likelihood that the hazard contributed to would result in an injury and that such injury could be of a reasonably serious nature. The evidence establishes that miners worked around the area, occasionally cleaned out loose material while the belt was operating, and greased a fitting. I find that the violation was caused by Cullen's moderate negligence and was serious. A penalty of \$50.00 is appropriate.

5. Citation No. 4119017 alleges that the back of the self cleaning tail pulley beneath the Telesmith crusher was not guarded, in violation of section 56.14107(a). Inspector Grimes testified that the tail pulley was about two feet above the ground and that it was possible for a miner to come in contact with it if he slipped and fell while cleaning up loose material under the belt. (Tr. 37-40; Ex. G-7). He stated that there was at least one guard on the side. (Tr. 39). Mr Cullen testified that the guard had been taken off to clean material from the area. (Tr. 104-05).

Based on this evidence, I find that the Secretary has established a violation. I find that tail pulley was not adequately guarded. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 40). I agree with the inspector's original determination and find that this violation was not S&S. Although a discrete safety hazard was created by the violation, the Secretary did not establish that there was a reasonable likelihood that the hazard contributed to will result in an injury. I find that it was unlikely that a miner would come in contact with the tail pulley, even if he were to slip and fall, given its location and the fact that there was at least one guard on the side. I find that the violation was caused by Cullen's moderate negligence. A penalty of \$30.00 is appropriate.

6. Citation No. 4119018 alleges that the bottom drive pulley and belts on the Telesmith crusher were not properly guarded, in violation of section 56.14107(a). Inspector Grimes testified

that the existing guard did not extend far enough down to prevent miners from coming in contact with the pulley. (Tr. 40-44; Ex. G-8). He stated that a miner could slip on loose material and touch the pulley or accidentally put his hand on the pulley while performing maintenance. Id. The pulley was about four feet above the ground. (Tr. 42). Mr. Cullen testified that the guard had been removed a few days before to work on the crusher. (Tr. 105-08). He stated that the cone (Telesmith) crusher had become jammed with material and the guard was taken off so that miners could manually shake the pulley back and forth to get the material loose. Id.

Based on this evidence, I find that the Secretary has established a violation. I find that pulley was not adequately guarded. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, counsel for the Secretary moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 44). I agree with the inspector's original determination and find that this violation was not S&S. Although a discrete safety hazard was created by the violation, the Secretary did not establish that there was a reasonable likelihood that the hazard contributed to will result in an injury. I find that it was unlikely that a miner would come in contact with the pulley, even if he were to slip and fall. I have taken into consideration the fact that the cone crusher was under repair and I credit Mr. Cullen's testimony that part of the guard had been removed in an attempt to dislodge the material that was jammed in the crusher. Thus, the hazard had not existed for a long time. The crusher was never used again because it had to be rebuilt. (Tr. 108). I find that the violation was caused by Cullen's low negligence. A penalty of \$20.00 is appropriate.

7. Citation No. 4119019 alleges that the tail pulley beneath the pioneer shaker screen was not properly guarded, in violation of section 56.14107(a). Inspector Grimes testified that the cited tail pulley was not guarded and that miners could come in contact with it while cleaning loose material from the area. (Tr. 44-49; Ex. G-9). He stated that if someone contacted the moving tail pulley, he could lose a limb or be killed. (Tr. 48). Mr. Cullen testified that a guard was present, but that when Cullen moved the cone crusher for repair, the guard was removed as well because it was built into the conveyor system. (Tr. 108-10, 116-18). He stated that once the cone crusher had been repaired, the guard would have been replaced when the equipment was put back into place. (Tr. 118-18). Inspector Marti, who had been at the mine on July 21, 1992, testified that the tail pulley was operating on that date and that a guard was not in place. (Tr. 133).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that tail pulley was not guarded and that the pulley had been operating while the guard was not in place. I also find that the Secretary has established that the violation was S&S and that Cullen's negligence was moderate. A penalty of \$50.00 is appropriate.

8. Citation No. 4119020 alleges that the head pulley guard on the conveyor belt underneath the pioneer screen was not securely in place, in violation of section 56.14112(b). Inspector Grimes testified that the head pulley was not guarded to prevent employees from contacting the moving part or being caught in the pinch point. (Tr. 49-52; Ex. G-10). He stated that a guard was there but that it had come loose. Id. He testified that a miner could trip and fall and accidentally come in contact with the pinch point. He also stated that miners would be in the area because a grease fitting was next to the pulley. Mr. Cullen testified that a person would have to stand on top of another conveyor to reach the moving parts cited by the inspector. (Tr. 110-11). He also stated that miners do not grease the pulley when it is in operation because it must be shut down to get on top of the conveyor to reach the grease fitting. Id.

Based on this evidence, I find that the Secretary has established a violation. The Secretary did not allege that the violation was S&S. I find that the violation was caused by Cullen's low negligence and was not serious. A penalty of \$20.00 is appropriate.

#### C. Other Citations

1. Citation No. 3470651 alleges that three employees were installing a new mantle on the Telesmith cone crusher and were not wearing safety shoes, in violation of section 56.15003. The safety standard provides that suitable protective footwear should be worn in and around an area of a mine or plant where a hazard exists that could cause an injury to the feet. Inspector DeHerrera testified that the workers were wearing athletic shoes and that they were working with heavy tools and other equipment. (Tr. 241-43; Ex. G-16). He stated that if one of the men dropped a tool or the heavy mantle on their foot they could receive a permanently disabling injury. Id. Mr. Cullen testified that he tells his employees that they must wear hard-toed work boots, but they sometimes do not wear them. (Tr. 305-06).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that three miners were not wearing protective footwear in an area where their feet could be seriously injured. I also find that the Secretary has established that the violation was S&S and that Cullen's negligence was moderate. A penalty of \$50.00 is

appropriate.

2. Citation No. 4119013 alleges that the ladder to the crusher deck did not extend to the ground, that a wooden block was under the ladder as the first step, and that an employee could fall. The citation alleges a violation of section 56.11001, which provides that a safe means of access shall be provided to all working places. Inspector Grimes testified that a 12-inch by 12-inch block of wood was used as a "stepping stone" to reach the bottom of the ladder that is used to get onto the crusher deck. (Tr. 22-24). He stated that the wooden block was "unsecured on unstable ground." (Tr. 23). The ladder was not supported by the wooden block. Id. He stated that someone stepping on the block could twist it, fall and hit their head on the frame of the crusher deck. (Tr. 24). Mr Cullen testified that the ladder was attached to the deck, was equipped with a handrail and the bottom step was usually was closer to the ground. (Tr. 96-98). He further stated that at this location the block was put there as a bottom step.

Based on this evidence, I find that the Secretary did not establish that there was not a safe means of access to the crusher deck. A mine is not an office building with smooth, flat surfaces. I credit Mr. Cullen's testimony that the ladder was equipped with a handrail and I find that one could safely get up to the deck by stepping onto the block and then the ladder. There was no showing that the block was likely to flip over or that it created hidden hazard that could injure a miner. Accordingly, it is appropriate that this citation be vacated.

3. Citation No. 4121087 alleges that a handrail was not provided on the stair steps to the trailer for the generator or on the outer edges of the trailer, in violation of section 56.11002. The safety standard provides, in part, that elevated walkways, elevated ramps and stairways shall be provided with handrails. Inspector Marti testified that miners have to go onto the generator trailer to start, stop, and service the generator. (Tr. 144-48; Ex. G-12). He stated that cables coming out of the generator obstruct part of the walkway around the generator creating a tripping hazard. He testified that the bed of the trailer was about 42 inches above the ground and that a person could be seriously injured if he fell off. Id. Mr. Cullen testified that this trailer never had handrails, has never been cited for lack of handrails, and nobody has ever fallen off the trailer. (Tr. 186).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that handrails were not provided on the elevated walkway and the stairs. A falling hazard was presented. Although the hazard was not particularly



great, I find that the Secretary has established that the violation was S&S. I find that Cullen's negligence was low. A penalty of \$40.00 is appropriate.

4. Citation No. 4121088 alleges that an access road at the mine was not bermed, blocked or posted against entry, in violation of section 56.9300(d). The citation states that a drop-off of about four to five feet existed on one side of the roadway for about 250 feet creating a rollover hazard. The safety standard provides, in part, that certain infrequently traveled roads need not be provided with berms or guardrails if the roadway is protected by locked gates, warning signs are posted and delineators are installed. Inspector Marti testified that the cited roadway was not a regularly traveled road, but that it was open to travel and presented a rollover hazard. (Tr. 148-53; Ex. G-13). He also stated that it was reasonably likely that a rollover would occur because the drop-off was close to the roadway. (Tr. 150-51). He testified that a very serious injury could occur in the event of a rollover. Id. He also stated that there were no warning signs or delineators and that the hazard would be greater if there was snow on the ground. (Tr. 152-53). Mr Cullen testified that nobody has any reason to go down the cited roadway because it is a dead end road that is never used and it does not provide access to any part of the mine. (Tr. 186-89).

Based on this evidence, I find that the Secretary has established a violation. The evidence establishes that there was a drop-off close to this roadway that presented a hazard if traveled in bad weather. While the road was not often used, it was open and could have been used. Although the hazard was not particularly great, I find that the Secretary has established that the violation was S&S. I find that Cullen's negligence was low. A penalty of \$40.00 is appropriate.

5. Citation No. 4121091 alleges that toilet facilities were not provided at the mine, in violation of section 56.20008. The standard requires toilet facilities that are compatible with the mining operation and are readily accessible. Inspector Marti testified that there were four persons employed at the mine and that mines of this size usually provide portable toilets. (Tr. 153-55). Mr. Cullen testified that their mining permit authorizes the employees to use the bathroom at a private residence that is nearby and that the employees go to a local convenience store several times a shift to buy sodas and use the facilities there. (Tr. 189-90).

Based on this evidence, I find that the Secretary has established a violation. The safety standard does not have an exemption for small mines and the facilities located off-property do not meet the requirements of the standard. I also find, however,

that it was reasonable for the miners to use the facilities at the local convenience store. I find that the violation was not serious and was the result of Cullen's low negligence. A penalty of \$2.00 is appropriate.

6. Citation No. 4121092 alleges that the mine did not have any fire extinguishers or other acceptable means to fight fires in their early stages that could endanger a person, in violation of section 56.4200. The safety standard provides, at subsection (a)(1), that mines shall have onsite equipment for fighting fires in their early stages and describes, at subsection (b), the specific equipment requirements. Inspector Marti testified that fire extinguishers should be available to fight fires when they first start and he did not find any on the property. (Tr. 155-59). He stated that the lack of fire extinguishers created a hazard because it is a natural reaction of people to try to put out a small fire and, without the proper equipment, someone could become injured. Id. A person fighting a fire without the proper equipment could become overcome by smoke, or could catch their clothing on fire and be seriously injured. Id. Mr. Cullen testified that he has repeatedly told his employees to get away if a fire starts because none of Cullen's equipment is "worth risking your life over." (Tr. 190-93). He also stated that fire extinguishers were in the storage shed, in the fuel truck, and in the tool truck. Id. He stated that the storage shed was not locked and was about 500 yards from the plant. (Tr. 193-94). Inspector DeHerrera testified that he also looked for fire extinguishers, including in the fuel truck, and did not find any. (Tr. 203-04). He also stated that Mr. Cullen told him that there was nothing but junk in the storage shed and that it was locked. Id.

Based on this evidence, I find that the Secretary has established a violation. I credit the testimony of the inspectors and find that there were no fire extinguishers on the property. Although the employees might not have attempted to put out a small fire, situations might arise in which a miner would endanger his safety by trying to extinguish a fire with unsuitable equipment. At the time of the inspection, the inspector determined that the violation was not S&S. At the hearing, Ms. Renowden moved to have the citation changed to S&S based on the inspector's testimony. (Tr. 158). I agree that the violation should be designated S&S because there was a reasonable likelihood that the hazard contributed to would result in an injury and the injury was reasonably likely to be serious. I find that the violation was serious and was the result of Cullen's moderate negligence. A penalty of \$50.00 is appropriate.

## II. CIVIL PENALTY ASSESSMENTS

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), I assess the following civil penalties as discussed above:

<u>Citation Nos.</u>	<u>30 C.F.R. '</u>	<u>Assessed Penalty</u>
<u>WEST 94-74-M</u>		
4121086	56.12025	\$50.00
4121087	56.11002	40.00
4121088	56.9300(d)	40.00
4121091	56.20008	2.00
4121092	56.4200	50.00
3470641	56.12028	20.00
3470642	56.12004	30.00
3470643	56.12001	80.00
3470644	56.12001	30.00
3470645	56.12001	30.00
3470646	56.12025	80.00
3470647	56.12004	50.00
3470648	56.12025	30.00
3470649	56.12008	20.00
3470650	56.12008	20.00
3470651	56.15003	50.00
3470652	56.14107	80.00
3470653	56.14107	vacated
3470654	56.12032	10.00
4119013	56.11001	vacated

WEST 94-75-M

4119014	56.14112(a)(2)	\$30.00
4119015	56.14112(b)	50.00
4119016	56.12032	vacated
4119017	56.14107(a)	30.00
4119018	56.14107(a)	20.00
4119019	56.14107(a)	50.00
4119020	56.14112(b)	20.00

Total Penalty                   \$912.00

III. ORDER

Accordingly, Citation Nos. 3470653, 4119013 and 4119016 are **VACATED**, all of the other above-listed citations are **AFFIRMED** as modified, and Cullen Rock Crushing and Gravel is **ORDERED TO PAY** the Secretary of Labor the sum of \$912.00 within 40 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

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