FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

November 22, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 95-186-M A.C. No. 24-01986-05505
v.	:	Docket No. WEST 95-433-M A.C. No. 24-01986-05507
	:	Docket No. WEST 95-448-M A.C. No. 24-01986-05506
HOLLOW CONTRACTING, INC., Respondent	:	Docket No. WEST 95-549-M A.C. No. 24-01986-05508
	:	Portable Crusher

DECISION

Appearances: Barbara J. Renowden and Gary L. Grimes, Conference and Litigation Representatives, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
William J. Hollow, President, Hollow Contracting, Inc., Butte, Montana, 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 Hollow Contracting, Inc. ("Hollow Contracting"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The petitions allege 33 violations of the Secretary's safety standards. For the reasons set forth below, I affirm 30 citations, vacate 3 citations, and assess penalties in the amount of $2,065.

A hearing was held in these cases in Butte, Montana. The parties presented testimony and documentary evidence, but waived post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Portable Crusher involved in these cases was a very small facility that produced fines and crushed rock. (Tr. 284). At the time the citations were issued, the crusher was about ten miles south of the town of Big Timber in Sweet Grass County, Montana. The operation consisted of a crusher and related equipment. Hollow Contracting recorded about 2,375 hours of production in 1994 and it employed about 16 people. (Ex. S-1; Tr. 284). About five people were employed at the Big Timber crusher at the time the citations were issued. (Tr. 283). Hollow Contracting has a history of 25 citations between September 1992 and September 1994. (Ex. S-2). On September 15, 1994, MSHA Inspector Seibert Smith inspected the crusher and issued most of the citations at issue in these proceedings. Two citations were issued by MSHA Inspector Ronald Goldade at a different time.

General Background

Hollow Contracting first became involved in the crushing business when it operated a crusher that was owned by another company near Libby, Montana. (Tr. 280). After that job was completed, Hollow Contracting bought equipment, leased other equipment, and operated a crusher near Roundup, Montana. (Tr. 281). At about the same time, Hollow Contracting started the Big Timber operation. *Id.* It started setting up the Big Timber crusher about a week before MSHA's inspection. (Tr. 282). It ran the plant for one day to get product samples to be analyzed in Billings. *Id.* At the time of the inspection, the plant was not operating because the crusher was broken. Mr. Hollow went to Billings to get a part. (Tr. 286). The crusher started production the next day after it was fixed. *Id.* Hollow Contracting was not paid for much of its work and the company sold its crushing equipment to Montana Materials, L.L.C., sometime after the subject citations were issued. (Tr. 317-18). Hollow Contracting is still in business but does not own the crushing equipment. *Id.* Mr. Hollow is the sole owner of Hollow Contracting and Hollow Contracting is a part owner of Montana Materials. *Id.* Based on the evidence of record, I find that Hollow Contracting remains liable for any penalties assessed for the citations at issue in these proceedings.

Hollow Contracting contends that it attempted on several occasions to get a copy of MSHA's safety regulations from MSHA inspectors. Hollow Contracting states that it did not know what the safety standards required because it did not have a copy of the standards. The Secretary's safety standards are publicly available in the Code of Federal Regulations. While I appreciate that the standards may be difficult for a small mine operator to obtain, they are available to the public. The fact that Mr. Hollow had not yet received a copy cannot be a defense to the citations or a mitigating factor in assessing civil penalties. *See Materials Delivery,* 15 FMSHRC 2467, 2471 (December 1993) (ALJ).

Hollow Contracting also maintains that many of the conditions described in the citations did not create a hazard to its employees. The Commission and the courts have uniformly held that the Mine Act is a strict liability statute. See, e.g. Asarco v. FMSHRC, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." Id. at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

> The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. 30 U.S.C. § 814(a). If conditions existed which violated the regulations, citations [are] proper.

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The degree of the hazard is taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i).

In addition, Hollow Contracting contends that its crusher was not operating at the time of the inspection. There is no dispute that the crusher was out of service for repairs at the time the citations were issued. Nevertheless, Mr. Hollow testified that once the repairs were completed, the plant was scheduled to start commercial production within one day. (Tr. 286). Thus, the conditions observed by MSHA would have continued to exist when the plant was started. Except where noted below, Hollow Contracting did not argue that it would have repaired the cited conditions prior to starting production. In addition, there is no dispute that the crusher was operating the day before the inspection when product samples were obtained.

Finally, Hollow Contracting contends that its crushing equipment was inspected by MSHA in the past and that MSHA's inspectors saw the same conditions that were cited at Big Timber. It argues that it is unreasonable for MSHA to issue citations and assess penalties for conditions that were not cited in these past inspections. The Commission has held that the Secretary is not prevented from issuing a citation for a condition that violates a safety standard simply because the same condition existed during a previous MSHA inspection and was not cited. The fact that a condition was observed by an MSHA inspector and not cited may reduce the level of negligence attributed to the mine operator and result in a reduced penalty.

In assessing civil penalties, I have taken into consideration the fact that Hollow Contracting is a very small business and that it promptly abated the citations. I reduced the penalties from that proposed by the Secretary, in part, because the Secretary did not give sufficient consideration to Hollow Contracting's small size. Except as noted below, I find that Hollow Contracting's negligence was low with respect to the citations. Mr. Hollow was attempting to run a safe operation and reasonably believed that he was in compliance with the Secretary's safety standards.

Specific Citations

In order to discuss the allegations in a systematic way, I have grouped the citations by subject area rather than by docket number.

A. NOTIFICATION AND REPORTING CITATIONS

1. Citation No. **4409918** alleges that Hollow Contracting failed to notify MSHA in writing that it was starting operations at the Big Timber site. The regulation, **30 C.F.R. § 56.1000**, provides, in part, that the operator of any metal or nonmetal mine shall notify the nearest MSHA office before starting operations. Inspector Smith testified that the crusher was not on MSHA's list for the Big Timber location. (Tr. 219-20). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $136.

Mr. Hollow testified that his office notified the local MSHA office of the Big Timber operation by telephone. (Tr. 316). Apparently, Hollow Contracting had notified MSHA of its other

crushing operations. (Tr. 224). I find that the Secretary established a violation. The regulation does not specifically require that the notification be in writing, but when the regulation is read in conjunction with 30 C.F.R. § 41.11(a) and section 109(d) of the Mine Act it is clear that a telephone call may not be sufficient. In any event, I credit the testimony of Inspector Smith that the local MSHA office did not have any record of the call.

I find that Hollow Contracting's negligence was very low because it believed that it notified MSHA and the crusher facility had only been at Big Timber for about a week. Based on the penalty criteria, I assess a civil penalty of $5 for this violation.

2. Citation No. **4363435** alleges that Hollow Contracting failed to notify the local MSHA office when it closed its operations at Big Timber. The regulation, **30 C.F.R. § 56.1000**, provides, in part, that the operator of any metal or nonmetal mine shall notify the nearest MSHA office when a mine is temporarily or permanently closed. Inspector Goldade testified that when he traveled to the site on March 23, 1995, the crusher was no longer there. (Tr. 258). He stated that the violation was not serious but that Hollow Contracting's negligence was high because Hollow Contracting had been cited for violations of this safety standard on two previous occasions. The Secretary proposed a penalty of $189.

Mr. Hollow testified that Hollow Contracting had not completed its work at the Big Timber site at the time of Inspector Goldade's inspection so the mine was not temporarily or permanently closed. (Tr. 312-15). Apparently, Hollow Contracting was crushing material at the site that was used in an asphalt paving project. The citation was issued in March and Mr. Hollow stated that Hollow Contracting was required to return to the cite in the spring and "clean up the chips." (Tr. 315). Chips are "three-eighths rock with no fines in it." (Tr. 314). The cleaned chips would then be put on top of the asphalt. The asphalt was not chipped in the fall because of cold weather.

I find that the Secretary did not establish a violation. I credit Mr. Hollow's testimony that he had to return to the site to finish work on the project. Hollow Contracting had to bring in some screening equipment to clean the chips. (Tr. 259, 313-14). The screen removed any debris and fines. This activity is considered to be "sizing," which is subject to Mine Act jurisdiction. The Secretary did not produce evidence to establish the length of time between the date the crushing operation was com-

pleted and the date that the chips were to be screened. The inspector issued the citation because the crushing equipment was not at the Big Timber site on March 23. Although the regulation requires mine operators to notify the nearest MSHA office when a mine is temporarily closed, a rule of reason is required. A short period of inactivity may not amount to a temporary closure. Hollow Contracting removed the crushing equipment because they were no longer needed at Big Timber, not because the mine was closed. Accordingly, this citation is vacated.

3. Citation No. **4410149** alleges that Hollow Contracting failed to provide Inspector Smith with a copy of the quarterly employment report for the second quarter of 1994. The regulation, **30 C.F.R. § 50.40**, provides, in part, that mine operators shall keep a copy of each quarterly employment report submitted to MSHA at the mine office for a period of five years. Inspector Smith testified that he was told that the report was not available at the mine. (Tr. 171). He stated that the violation was not serious but that Hollow Contracting's negligence was high because no employment reports were available at the mine. The Secretary proposed a penalty of $136.

Mr. Hollow testified that the plant was not in operation and he did not know that these reports were required to be filed when Hollow Contracting was not in production. (Tr. 315). He stated that at that time he kept his records on top of his refrigerator. I find that the Secretary established a violation, but I do not agree that the operator's negligence was high. The fact that several reports were not available does not establish high negligence. Based on the penalty criteria, I assess a civil penalty of $5 for this violation.

B. MACHINERY AND EQUIPMENT CITATIONS

1. Citation No. **4410144** alleges that records were not provided at the mine site of the defects in the equipment that "were cited on this inspection" for review by the inspector. The regulation, **30 C.F.R. § 56.14100(d)**, provides, in part, that defects on self-propelled mobile equipment affecting safety, which are not immediately corrected, shall be recorded. Inspector Smith testified that there were no records kept of safety defects at the mine. (Tr. 209-10). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $157.

Mr. Hollow testified that there was a calendar in the generator van where workers would mark down what needed to be

fixed that day. (Tr. 210, 310-11). It appears, however, that this record concerned routine matters, such as oil changes. The calendar did not contain a list of the safety defects found by employees. Accordingly, I find that the Secretary established a violation. I find that the violation was not serious. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

2. Citation No. **4409970** alleges that the backup alarm on a John Deere loader was not maintained in a functioning condition. The safety standard, **30 C.F.R. § 56.14132(b)(2)**, provides, in part, that backup alarms shall be audible above the surrounding noise level. Inspector Goldade testified that he observed an employee backing up the loader and that a backup alarm could not be heard. (Tr. 250). He stated that the violation was significant and substantial ("S&S"), and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that the backup alarm was working, but that Inspector Goldade did not think it was loud enough. (Tr. 305, 312). He stated that Inspector Smith was in the area on the previous day and did not issue a citation.

I find that the Secretary established a violation. I also find that the violation was S&S. The four elements of the *Mathies* test were met. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element, whether there was a reasonable likelihood that the hazard contributed to will result in an injury, presents the closest question. Inspector Goldade testified that if an employee were to walk in the area of the loader while it was backing up, he may not be aware that he was in danger because he could not hear the backup alarm. (Tr. 252). He testified that the operator of the loader might not see him because of a blind spot on the loader. (Tr. 253). He further testified that there was a reasonable likelihood that the hazard contributed to would result in a serious accident or a fatality. (Tr. 254). He noted that fatal accidents in such situations are not uncommon. (Tr. 252).

I credit the inspector's testimony and find that the violation was very serious. I also find that Hollow Contracting's negligence was moderate. Based on the penalty criteria, I assess a civil penalty of $300 for this violation.

3. Citation No. **4409920** alleges that the guard installed on the tail end of the pan discharge feeder was not secured on the right side. The safety standard, **30 C.F.R. § 56.14112(b)**, pro-

vides, in part, that guards shall be securely in place while machinery is being operated. Inspector Smith testified that a guard was present but that it was not secured on one side. (Tr. 39-44; Ex. G-448-2). He determined that the violation was not serious and was the result of Hollow Contracting's low negligence. The Secretary proposed a penalty of $189.

Mr. Hollow testified that the guard had been bolted on, but that the guard must have been snagged by a loader. (Tr. 287). He stated that it was highly unlikely that the condition would cause anyone to be injured. I find that the Secretary established a violation. I agree that the violation was not serious and that it was highly unlikely that it would have caused an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

4. Citation No. **4409922** alleges that a guard was not installed on the overhead v-belt drive unit for the main white screen plant to prevent a whipping action of the belt if it were to break. The safety standard, **30 C.F.R. § 56.14108**, provides that overhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons. Inspector Smith testified that he observed that the v-belt drive was not provided with a guard. (Tr. 54-58; Ex. G-448-4). He stated that if the belt were to break, a whipping action could cause the belt to strike an employee. Inspector Smith stated that he saw an employee in the area on the previous day. (Tr. 60-61). He determined that the violation was not serious and was the result of Hollow Contracting's low negligence. The Secretary proposed a penalty of $147.

Mr. Hollow testified that because of the direction of the rotation of the belt and the location of the motor, he did not believe that a broken belt would hit anyone. (Tr. 59, 289). I find that the Secretary established a violation. I agree that the violation was not serious and that it was highly unlikely that it would have caused an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

5. Citation No. **4409921** alleges that a guard was not installed on the sides of the fin-type tail pulley for the orange stacker discharge conveyor. The safety standard, **30 C.F.R. § 56.14107(a)**, provides, in part, that moving machine parts shall be guarded to protect persons from contacting drive, head, tail, and takeup pulleys and similar moving parts that can cause injury. Inspector Smith testified that he observed that the cited tail pulley was not provided with guards and that several employees were required to work or walk by the area. (Tr. 44-46;

Ex. G-448-3). He stated that neither side of the tail pulley was guarded and that employees cleaning up in the area could be injured as a result. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that it would be very difficult for a person to fall and trip into the pinch point of the tail pulley. (Tr. 288). He stated that the only time that anyone was in the area was at the end of the work day after the operation was shut down. *Id.* On the other hand, he testified that employees sometimes clean up while the conveyors are running. (Tr. 289).

The Commission held that the most logical construction of a guarding standard "imports 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. (citations omitted). Thus, I must consider all relevant exposure and injury variables including "accessibility of the machine parts, work areas, ingress and egress, work duties, and ... the vagaries of human conduct" on a case-by-case basis. Id.

Taking these factors into consideration, I find that the Secretary established a violation. The more difficult question is whether the Secretary established that the violation was S&S. It is clear that a discrete safety hazard was created by the violation. The issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in a serious injury if not corrected. Inspector Smith testified that an employee working in the area or walking through the area could slip and fall and come in contact with the moving parts of the tail pulley. (Tr. 48). He determined that such an event was reasonably likely. (Tr. 47-48). The tail pulley was about one foot above the ground.[1] I find that the Secretary established

[1] For reasons that are not entirely clear, Inspector Smith was instructed by MSHA headquarters to take all of his measurements in centimeters. The safety standard at subsection (b) uses feet as the standard measurement. It is pointless to require measurements in the metric system when the safety standards use feet and inches. This requirement confused Mr. Hollow and I can understand his confusion. I encourage the Secretary to drop his requirement that MSHA inspectors take measurements in centimeters. In this decision, I converted Inspector Smith's measure-

that the violation was S&S. The ground was uneven in the area. A significant tripping hazard was presented by the terrain. (Ex. G-448-3). I find that it was reasonably likely that someone would be seriously injured as a result of the cited condition. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

6. Citation No. **4409923** alleges that a guard was not installed on the tail pulley for the discharge conveyor under the white shaker screen, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 62-72; Ex. G-448-5). He stated that employees were required to clean up in the area and that an employee could slip, come in contact with the moving parts, and sustain serious injuries. The pulley was about one and a half feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that it would be difficult for someone to come in contact with the tail pulley because of its location. (Tr. 290). He stated that the tail pulley is behind iron supports for the white shaker screen. (Tr. 290-92; Ex. G-488-4). He stated that an employee could not get any closer than about three to four feet from the pulley. He testified that it was unlikely that someone would trip and come in contact with the tail pulley. Finally, Mr. Hollow stated that the fines are cleaned off the belt at a different location. *Id.*

I find that the Secretary established a violation but did not establish that the violation was S&S. There was no showing that it was reasonably likely than anyone would be injured by the violation because the pulley was not in an easily accessible area and regular cleanup was not required. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

7. Citation No. **4409924** alleges that a guard was not installed on the head pulley and v-belt drive system for the main discharge conveyor for the shaker screen, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited head pulley and v-belt drive were not provided with guards. (Tr. 73-85; Ex. G-448-6). He stated that employees were required to be in the area where they could make contact with the moving parts. He stated that he observed footprints in the area. At its lowest point, the pulley unit was about three feet above the

---

ments to feet and inches.

ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that the area had been guarded, but that the guard had been removed. (Tr. 293-95). I find that the Secretary established a violation. The moving parts were within seven feet of a walking or working surface. (Tr. 83-84). Whether the violation was S&S is a close question. Inspector Smith stated that employees "could make contact with the moving parts." (Tr. 76). Spilled material was in the area and footprints were observed on the spilled material. He stated that anyone cleaning up the spilled material or walking in the area could slip and make contact. (Tr. 78-79). Inspector Smith did not observe anyone working close to the head pulley or v-belt drive. (Tr. 81). Given the nature of the hazard, the location of the unguarded moving parts, the terrain around the area, and the necessity to clean up the accumulated material from time-to-time, I find that it was reasonably likely that someone would be seriously injured as a result of the cited condition, assuming continued normal mining operations. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

8. Citation No. **4409925** alleges that a guard was not installed on the v-belt drive unit for the pan feeder for the orange crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited v-belt drive was not provided with a guard. (Tr. 85-94; Ex. G-448-7). He stated that employees were required to be in the area where they could make contact with the moving parts. He stated that the v-belt drive was readily accessible to employees walking in the area. The lower pulley was about two feet from the ground and the upper pulley was about eight feet off the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that the area may have been guarded in the past and that it is a slow-moving v-belt drive. (Tr. 295). I find that the Secretary established a violation but did not establish that the violation was S&S. Although the v-belt drive was not near an established walkway, it was in an area that was easily accessible to miners. They could walk within seven feet of the pulleys in their daily routine. It was not shown, however, that it was reasonably likely that anyone would be injured as a result of this condition, assuming continued normal mining operations. Inspector Smith stated that employees would not be in the area very often. (Tr. 89). Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

9. Citation No. **4409926** alleges that a guard was not installed on the side of the fin-type tail pulley for the stacker conveyor at the El-Jay crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 97-103; Ex. G-448-8). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about 15 inches above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that the pulley was in an area where employees were not normally required to be. (Tr. 295-96). He stated that there was a cluster of belts in the area and it was a difficult area to enter. I find that the Secretary established a violation but did not establish that the violation was S&S. Although the tail pulley was not near an established walkway, it was in an area that was accessible and employees might be required to cleanup accumulations in the area. It was not shown, however, that it was reasonably likely that anyone would be injured as a result of this condition, assuming continued normal mining operations. I credit Mr. Hollow's testimony and find that employees would generally not be in the area while the belts were operating. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

10. Citation No. **4409927** alleges that a guard was not installed on the tail pulley for the light yellow stacker conveyor, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 103-08; Ex. G-448-9). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about 15 inches above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that a guard was supposed to be on the tail pulley. (Tr. 296). I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. In addition, the exhibit shows a shovel within a few feet of the conveyor. It would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

11. Citation No. **4409928** alleges that a guard was not installed on the head pulley and the v-belt drive for the main discharge conveyor for the El-Jay crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited head pulley and v-belt drive assembly were not provided with a guard. (Tr. 109-17; Ex. G-448-10). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about five feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that he did not own the cited equipment, but rented it. (Tr. 297). He said that the crusher did not have guards when it was delivered. I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. The fact that Hollow Contracting did not own the equipment is not controlling. In addition, the evidence shows that it would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

12. Citation No. **4409929** alleges that a guard was not installed on the fin-type tail pulley for the sand stacker conveyor, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 117-22; Ex. G-448-11). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was between one and two feet above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that he had recently purchased the cited equipment and that it did not come equipped with guards. (Tr. 297). I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. The fact that guards were not installed on the equipment when Hollow Contracting purchased it is not controlling. In addition, the evidence shows that it would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Accumulations were visible and the inspector observed footprints in the accumulations. Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

13. Citation No. **4409930** alleges that a guard was not installed on back end of the tail pulley for the conveyor under the Telsmith crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited tail pulley was not provided with a guard. (Tr. 123-27; Ex. G-448-12). He stated that employees were required to be in the area where they could make contact with the moving parts. The pulley was about one foot above the ground. He determined that the violation was S&S and was the result of Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $362.

Mr. Hollow testified that he had recently acquired the equipment and it did not come with guards. (Tr. 298). I find that the Secretary established a violation and that the violation was S&S. The tail pulley was in an open area and accumulations from the conveyor would require cleaning. The fact that guards were not installed on the equipment when Hollow Contracting purchased it is not controlling. In addition, the evidence shows that it would be reasonably likely that an employee would be seriously injured while cleaning around the pulley. Accumulations were visible around the pulley and there were indications that the an employee had cleaned around the area. (Tr. 124). Based on the penalty criteria, I assess a civil penalty of $100 for this violation.

14. Citation No. **4409932** alleges that a guard was not installed on the bottom half of the main v-belt drive unit for the Telsmith crusher, in violation of section **56.14107(a)**. Inspector Smith testified that he observed that the cited v-belt drive unit was not provided with a guard. (Tr. 131-40; Ex. G-448-14). He stated that he believed that a guard had been provided at one time. He also said that he observed footprints under the Telsmith crusher. The v-belt drive was about five feet above the ground and a little over two feet from the frame of the crusher. He determined that the violation was S&S and was the result of Hollow Contracting's low negligence. The Secretary proposed a penalty of $235.

Mr. Hollow testified that it would be impossible for anyone to come in contact with the v-belt drive assembly unless one climbed up onto the crusher and reached into the area or crawled under the crusher. (Tr. 298-300). He stated that the sides of the v-belt drive were guarded. I find that the Secretary did not establish a violation. There was no showing that the cited drive was within seven feet of walking or working surfaces. 30 C.F.R. § 14107(b). The v-belt drive was protected by its location and an employee could come in contact with the moving parts only if he stooped over and walked under the crusher or climbed onto the

crusher. (Tr. 135-36). Although Inspector Smith observed footprints under the crusher, it is not clear how they got there. The crusher had been recently set up and the prints could predate the operation of the crusher. Accordingly, this citation is vacated.

C. FIRE CONTROL AND MEDICAL ASSISTANCE CITATIONS

1. Citation No. **4409940** alleges that a small quantity of gasoline was stored in a five-gallon plastic container. The safety standard, **30 C.F.R. § 56.4402**, provides that small quantities of flammable liquids shall be kept in safety cans labeled to indicate the contents. Inspector Smith testified that he was concerned that pressure could build in the container if it got hot and cause an explosion. (Tr. 185-93; Ex. G-443-2). He could not recall if the can was labeled. He stated that a safety can is "a metal can that has a spring loaded lid on top that ... will pop and relieve the pressure." (Tr. 189). He stated that the violation was not serious and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $147.

Mr. Hollow testified that the can was OSHA-approved and it probably contained diesel fuel. (Tr. 306-07). I find that the Secretary established a violation. Safety can is defined as "an approved container ... having a spring-closing lid and spout cover." 30 C.F.R. § 56.2. There is no question that the can used by Hollow Contracting was not a safety can. I find that the violation was not serious in that it did not pose a hazard to employees, and that Hollow Contracting's negligence was low. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

2. Citation No. **4410141** alleges that a set of oxygen and acetylene cylinders were observed being stored in the back of a pickup truck. A small container of gasoline was stored in the same area. The safety standard, **30 C.F.R. § 56.4601**, provides that oxygen cylinders shall not be stored in areas used for storage of flammable liquids. Inspector Smith testified that he observed grease, an acetylene cylinder, and gasoline stored in the same area as the oxygen cylinder. (Tr. 193-98; Ex. G-443-3). He was concerned about an explosion hazard. He stated that the violation was S&S and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $238.

Mr. Hollow testified that he was not present at the time the citation was issued and the can may have contained antifreeze. (Tr. 307). I find that the Secretary established a violation and that the violation was S&S. Two employees were cutting metal

with the torch at the end of the truck. (Tr. 196). This created a significant risk of a fire or explosion. It was reasonably likely that an employee would be seriously injured by this practice. This violation posed a serious safety hazard to employees. I credit Inspector Smith's testimony that he considered the negligence to be low because Mr. Hollow was not at the mine at the time of the violation. Based on the penalty criteria, I assess a civil penalty of $175 for this violation.

3. Citation No. **4410142** alleges that an employee was observed using oxygen and acetylene cylinders with a cutting torch at the end of a pickup truck and that a fire extinguisher was not available. The safety standard, **30 C.F.R. § 56.4600 (a)(2)**, provides, in part, that a fire extinguisher shall be at a worksite where cutting is being performed with an open flame. Inspector Smith testified that he observed employees cutting with an open flame on the tailgate of the pickup truck in the vicinity of flammable material and that a fire extinguisher was not readily available. (Tr. 198-206; Ex. G-443-3). The conditions that prompted Inspector Smith to issue this citation are the same as described in Citation No. 4410141, above. He stated that the violation was S&S and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that fire extinguishers were available at the mine. (Tr. 308-10, 200-06). He stated that if a fire were to start, employees would want to get away from the fire and get an extinguisher. Mr. Hollow contends that under MSHA's interpretation of the standard, the extinguisher would have to be within a few feet of the cutting activity, which would be too close to be of use during a fire. He testified that a fire extinguisher was available in a truck that was parked within ten feet of the cutting activity. (Tr. 310).

Inspector Smith testified that he issued the citation because he could not find a fire extinguisher in the "immediate area." The regulation does not contain such a requirement. It states that an extinguisher must be "at the worksite." This term is not defined in the regulations. Mr. Hollow testified that an extinguisher was available within about ten feet of the cutting activity. No evidence contradicts this testimony and I credit the testimony. I also agree that there is no advantage in having an extinguisher so close that an employee would hesitate to get it for fear of getting burned. Accordingly, this citation is vacated.

4. Citation No. **4410147** alleges that Hollow Contracting had not established emergency fire fighting, evacuation, and rescue procedures for the mine. The safety standard, **30 C.F.R. § 56.4330(a)**, provides that such procedures be established and coordinated with available fire-fighting organizations. Inspector Smith testified that Mr. Hollow had not contacted any fire-fighting organization or established any procedures. (Tr. 216-18). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $168.

Mr. Hollow testified that he had not established any procedures but that everybody knew that the crusher was there, including the police department. (Tr. 311). I find that the Secretary established a violation. The violation was not serious and was highly unlikely to result in an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

5. Citation No. **4410146** alleges that Hollow Contracting had not made arrangements for obtaining emergency medical assistance and transportation of injured persons. The safety standard, **30 C.F.R. § 56.18014**, provides that such arrangements be established in advance. Inspector Smith testified that Mr. Hollow had not made arrangements for emergency medical assistance and for the transportation of injured persons in the event of an accident at the mine. (Tr. 213-16). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $168.

Mr. Hollow testified that he had not made any arrangements but that everybody knew that the crusher was there, including the police department. (Tr. 311). He stated that he did not believe that rescue services were available in the area. I find that the Secretary established a violation. The violation was not serious and was highly unlikely to result in an injury. Based on the penalty criteria, I assess a civil penalty of $20 for this violation.

6. Citation Nos. **4409933** and **4409934** allege that a record of the inspection of the fire extinguishers at the fuel truck and generator trailer was not provided at the mine for review by the MSHA inspector. The safety standard, **30 C.F.R. § 56.4201(b)**, provides that a certification shall be made that fire extinguishers have been tested in the manner set forth in subsection (a),

and requires that this certification be kept at the mine. Inspector Smith testified that he searched for the required records but that none were available. (Tr. 140-42). He stated that other extinguishers at the site were provided with such certifications. He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed penalties of $147 and $136, respectively.

Mr. Hollow said that the employees regularly check the extinguishers, but he did not know why these did not have a record of the inspections. (Tr. 300-01). I find that the Secretary established the violations. The violations were not serious because there was no showing that the extinguishers were not functioning properly. Based on the penalty criteria, I assess a civil penalty of $10 for each violation.

D. ELECTRICAL CITATIONS

1. Citation No. **4410143** alleges that Hollow Contracting did not perform a continuity and resistance test of the grounding system at the mine. The safety standard, **30 C.F.R. § 56.12028**, provides, in part, that continuity and resistance of grounding systems shall be tested immediately after installation and annually thereafter. Inspector Smith testified that there was no indication that such a test had been preformed. (Tr. 206-08). He stated that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $168.

I find that the Secretary established a violation. If such tests are not conducted, the operator cannot be sure that its grounding system is working. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

2. Citation No. **4409931** alleges that a cover plate was not provided on the motor make-up box for the drive unit for the feed return conveyor on the Telsmith crusher. The citation states that the cover plate fell off and was on the ground. The safety standard, **30 C.F.R. § 56.12032**, provides, in part, that cover plates on junction boxes shall be kept in place at all times except during testing or repair. Inspector Smith testified that he observed the condition during his inspection. (Tr. 127-31; Ex. G-488-13). He stated that the crusher was not energized at the time of his inspection. He further stated that the violation was not serious because it was not in an accessible area and that

Hollow Contracting's negligence was low. The Secretary proposed a penalty of $235.

I conclude that the Secretary established a violation. I agree with the inspector that the violation was not serious because the junction box was in an inaccessible area and it was unlikely that anyone would come in contact with it. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

3. Citation No. **4409935** alleges that the door on the 480-volt electrical panel in the generator trailer was left open. The citation states that the circuits were energized and could be accidentally contacted by employees. The safety standard, **30 C.F.R. § 56.12030**, provides that when a potentially dangerous condition is found, it shall be corrected before the circuit is energized. Inspector Smith testified that he observed an employee in the generator trailer and that the door on the electrical panel had been left open. (Tr. 143-57; Ex. G-488-17). He stated that he believed that the circuit was energized at the time of his inspection. He further stated that the violation was S&S because it would be easy for an employee in the trailer to accidentally contact the energized connections. He stated that he observed tools and other things stored in the trailer. He determined that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that the generator was shut down shortly after the inspector arrived because the crusher was not operating. He also testified that the main circuit breaker, which was at a different location, was off so the electrical contacts at the electrical panel were not energized. (Tr. 301-02). He stated that employees are not in the generator trailer and that he believed that the employee spotted by the inspector had been in the trailer to test the circuit to make sure it was not energized so that employees could start their repairs on the crusher. He stated that this panel is not used to de-energize the circuit.

I find that the Secretary established a violation. The panel could be closed but it could not be latched. Normally I would find that such a violation was S&S. In this case, however, I credit the testimony of Mr. Hollow that the circuit had been de-energized at the main breaker and that employees do not generally go into the trailer when the power is on. Because of Hollow Contracting's operating procedures, it was not reasonably likely that anyone would be in a position to contact the electrical connections when the circuit was energized. Based on the

penalty criteria, I assess a civil penalty of $50 for this violation.

4. Citation No. **4409936** alleges that no ground was provided for the extension cord that provided power to the overhead lights at the crusher motor. The citation states that the grounding prong on the plug was missing. The safety standard, **30 C.F.R. § 56.12025**, provides that all metal parts enclosing or encasing electrical circuits shall be grounded. Inspector Smith testified that he observed that the grounding prong was missing from the electrical cord. (Tr. 157-63; Ex. G-488-18). He testified that the cord was plugged in but was not energized at the time of his inspection. He further stated that the violation was S&S and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $298.

Mr. Hollow testified that he believes that the cited plug is on a 110-volt cord and not on the 220 volt cord that supplied power to the lights. (Tr. 302-03). I find that the Secretary established a violation. The circuit connected to the cited extension cord was not protected by the grounding circuit. I find that the Secretary did not establish that the violation was S&S. When the inspector was asked why he determined that an injury was reasonably likely he stated that "the operator was aware that all circuits shall have a ground." (Tr. 159-60). When the inspector was asked why he determined that the violation was S&S, he replied that he observed an employee "in the area" the day before when it was raining. (Tr. 161). This testimony does not establish that it was reasonably likely that an employee will be seriously injured as a result of the cited condition, assuming continued normal operations. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

5. Citation No. **4409937** alleges that the inner wires on the power cord for the overhead lights at the crusher operator's station were exposed where they pass into the fixture. The citation states that if a person contacted the metal parts of the light fixture, he could receive a serious injury. The safety standard, **30 C.F.R. § 56.12008**, provides, in part, that power wires shall be insulated adequately where they pass into electrical compartments and substantially bushed with insulated bushings. Inspector Smith testified that the power cord was torn so that the inner wires were exposed to the metal frame of the lighting fixture. (Tr. 163-70; Ex. G-488-19). He was concerned that an employee working around the operator's station could be killed or seriously injured if he made contact with the metal parts of the fixture. The inspector stated that the

violation was S&S and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $595.

Mr. Hollow testified that he believes that the cord had not been torn for a long time because the cord was pulled tight. I find that the Secretary established an S&S violation. It is not disputed that the inner wires of the cord were exposed. Although there is no evidence that the insulation on the individual wires had been cut, this insulation is designed to provide electrical protection, not mechanical protection. The insulation could easily be damaged and the metal components could become energized as a result. The photograph, Ex. G-448-19, shows the hazard involved. The wires were pulled tight against the frame and it was only a matter of time before bare wire would be exposed. People were required to work in the area and the lighting fixture was in an easily accessible area. Accordingly, I find that it was reasonably likely that someone would be seriously injured as a result of the condition. I also find that Hollow Contracting's negligence was moderate. Based on the penalty criteria, I assess a civil penalty of $300 for this violation.

E. OTHER CITATIONS

1. Citation Nos. **4409938** and **4409939** allege that a toeboard and handrails were not provided on the elevated work deck on the main orange crusher below the operator's station. The safety standard, **30 C.F.R. § 56.11002**, provides, in part, that elevated walkways, ramps, and stairways shall be provided with handrails and, where necessary, with toeboards. Inspector Smith testified that the work deck was about nine feet above the ground. (Tr. 175-84; Ex. G-433-1). Toeboards were not provided. He stated that he was concerned that an employee on the deck could accidentally kick rocks or other objects off the deck onto employees working below. Inspector Smith testified that handrails were present but were not complete. He stated that a midrail should have been installed in one area and a top rail in another area. He was concerned that an employee could slip and fall from the deck. Finally, he testified that the violations were not serious and that Hollow Contracting's negligence was low. The Secretary proposed a penalty of $147 for each citation.

Mr. Hollow testified that these conditions existed on the crushing equipment for quite some time at other sites and were never cited by MSHA. (Tr. 304-06). I find that the Secretary established a violation. The cited work deck is a walkway and I believe that a toeboard was required in that location. I find

that a reasonably prudent person would have known that a toeboard was necessary. I also agree with the inspector that complete handrails were not provided at some locations on the deck. The violations did not present a serious safety hazard. Based on the penalty criteria, I assess a civil penalty of $20 for each violation.

2. Citation No. **4409919** alleges that a berm was not provided on the outer edge of the elevated roadway at the main hopper for the crusher. The safety standard, **30 C.F.R. § 56.9300**, provides that berms or guardrails shall be provided on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. Inspector Smith testified that the area cited is where employees drive the front-end loader to dump rock into the hopper of the crusher. (Tr. 26-31; Ex. G-488-1). He stated that the drop-off was about ten feet and that it was possible for a loader to fall off. (Tr. 38-39). Because the mine was shut down at the time the citation was issued, there was no activity in the area, but the inspector observed the front-end loader operating in the area on the previous day. He further stated that the violation was S&S and was caused by Hollow Contracting's moderate negligence. The Secretary proposed a penalty of $595.

Mr. Hollow testified that there was about a three-to-one slope off the outer edge. (Tr. 285-86). He did not believe that this slope created a serious hazard of a rollover. In any event, Mr. Hollow stated that once operations commenced, the loader operator would have put a berm in that area. I find that the Secretary established a violation. A drop-off existed along the bank of the elevated dumping area of a sufficient depth and grade to create a risk that a loader would overturn or the loader operator would be injured if he accidentally went over the edge. I cannot assume that the loader operator would have created a berm when the mine began full production.

I also find that the violation was S&S based on the testimony of Inspector Smith. He stated that he observed a loader operating in the area the previous day and that he saw tire tracks in the area. He also relied on the fact that fatal and serious accidents have been reported to MSHA involving overtravel on elevated roadways. Accordingly, I find that it was reasonably likely that someone would be seriously injured as a result of the condition, assuming normal operations. Based on the penalty criteria, I assess a civil penalty of $100 for the violation.

3. Citation No. **4410145** alleges that a record of the examination of working places was not provided for review by the MSHA inspector. The safety standard, **30 C.F.R. § 56.18002(b)**, provides that a record certifying that an examination was made once each shift of each working place shall be kept at the mine and shall be made available for review by MSHA inspectors. Inspector Smith testified that he asked to review the records of the examinations of working places and the operator could not provide such records. (Tr. 211-13). He testified that the violation was not serious and that Hollow Contracting's negligence was moderate. The Secretary proposed a penalty of $136.

Mr. Hollow testified that records of equipment inspections are usually kept at the generator van. (Tr. 310). I find that the Secretary established a violation. Equipment operators are required to check equipment before they start using them. In addition, the cited safety standard requires that a competent person examine all working places for adverse conditions. This requirement is in addition to the equipment checks. A record of these examinations must be kept at the mine. The violation was not serious and Hollow Contracting's negligence was moderate. Based on the penalty criteria, I assess a civil penalty of $50 for this violation.

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:

Citation Nos.	30 C.F.R. §	Assessed Penalty
WEST 95-186-M		
4409918	56.1000	$ 5.00

Citation Nos.	30 C.F.R. §	Assessed Penalty
WEST 95-433-M		

4409938	56.11002	$ 20.00
4409939	56.11002	20.00
4409940	56.4402	20.00
4410141	56.4601	175.00
4410142	56.4600(a)(2)	vacated
4410143	56.12028	50.00
4410144	56.14100(d)	20.00
4410145	56.18002(b)	50.00
4410146	56.18014	20.00
4410147	56.4330(a)	20.00
4409970	56.14132(b)(2)	300.00
4363435	56.1000	vacated

WEST 95-448-M

4409919	56.9300	100.00
4409920	56.14112(b)	20.00
4409921	56.14107(a)	100.00
4409922	56.14108	20.00
4409923	56.14107(a)	50.00
4409924	56.14107(a)	100.00
4409925	56.14107(a)	50.00
4409926	56.14107(a)	50.00
4409927	56.14107(a)	100.00
4409928	56.14107(a)	100.00
4409929	56.14107(a)	100.00
4409930	56.14107(a)	100.00
4409931	56.12032	50.00
4409932	56.14107(a)	vacated
4409933	56.4201(b)	10.00
4409934	56.4201(b)	10.00
4409935	56.12030	50.00
4409936	56.12025	50.00
4409937	56.12008	300.00

WEST 95-549-M

4410149	50.40	5.00
	Total Penalty	$2,065.00

III. ORDER

Accordingly, the citations listed above are **VACATED** or **AFFIRMED** as indicated, and Hollow Contracting, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $2,065.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Barbara J. Renowden and Gary L. Grimes, Conference and Litigation Representatives, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (Certified Mail)

Mr. William J. Hollow, President, HOLLOW CONTRACTING, INC., 601 Garden Avenue, Butte, MT 59701 (Certified Mail)

RWM