FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 25, 1996

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEST 94-369-M
	:	A.C. No. 35-02479-05501
v.	:	Docket No. WEST 94-379-M
	:	A.C. No. 35-02479-05502
	:	Docket No. WEST 94-492-M
TIDE CREEK ROCK, INC., Respondent	:	A.C. No. 35-02479-05503
	:	Docket No. WEST 94-493-M
	:	A.C. No. 35-02479-05504
	:	Docket No. WEST 94-638-M
	:	A.C. No. 35-02479-05505
	:	Docket No. WEST 95-48-M
	:	A.C. No. 35-02479-05506
	:	Docket No. WEST 95-275-M
	:	A.C. No. 35-02479-05507
	:	Tide Creek Rock

DECISION

Appearances: Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington,and Paul A. Belanger, Mine Safety and Health Administration, U.S. Department of Labor, Vacaville, California, for Petitioner; Agnes M. Peterson, Esq., Deer Island, Oregon, 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 Tide Creek Rock, Inc. ("Tide Creek"), 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 21 citations and 2 section 104(b) withdrawal orders, and vacate 12 citations and 1 section 104(b) withdrawal order. I assess penalties in the amount of $640.00.

A hearing was held in these cases in Portland, Oregon. The parties presented testimony and documentary evidence, and filed post-hearing briefs.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Tide Creek Rock Mine, owned and operated by Tide Creek, is a very small crushed stone operation in Columbia County, Oregon. The mine consists of a pit and crusher. The mine recorded about 3,000 annual hours worked and it employs three people. It has a history of no citations between January 1990 and January 1994. On January 20 and 21, 1994, MSHA field office supervisor John Widows inspected the mine following a telephone complaint about the mine received at MSHA's headquarters on January 19. (Ex. R-1).

General Defenses

Tide Creek argues that all or most of the citations should be vacated for five reasons, as discussed herein. First, it maintains that the Secretary failed to show that the citations were issued by a person who is authorized to do so under the Mine Act. Tide Creek contends that Mr. Widows was not "qualified by practical experience in mining or by experience as a practical mining engineer or by education." (T.C. Br. at 3, quoting 30 U.S.C. § 954). Further, Tide Creek argues that Mr. Widows does not have five years of practical mining experience and that in assigning him to inspect the mine, the Secretary failed to give due consideration to his lack of "previous experience in the particular type of mining operation" at the Tide Creek Rock Mine. Id. It contends that these qualification requirements are jurisdictional. (T.C. Answer Br. at 1-2). The Secretary argues that Mr. Widows is an authorized representative of the Secretary and is qualified as a result of his experience, training, and education.

Although Mr. Widows' career history is unusual, I find that he was duly qualified to inspect Tide Creek's mine and to issue citations. He has been employed by MSHA for 17 years, first as a health and safety specialist and then as a field office supervisor. (Tr. 11-12). Although he has never been an MSHA inspector, he is a duly authorized representative of the Secretary, as that term is used in sections 103(a) and 104(a) of the Mine Act. (30 U.S.C. §§ 813(a) and 814(a); Tr. 13, 142). He has a degree in mining engineering from the Colorado School of Mines, but he has never worked at a mine except during the summer while in

college. (Tr. 13). He was also trained at MSHA's Mine Safety and Health Academy. I find that Mr. Widows does not have five years of practical mining experience. Section 505 provides, however, that the Secretary shall appoint, "to the maximum extent feasible," inspectors with five years of practical mining experience. 30 U.S.C. § 954. Thus, that provision is not jurisdictional. For the same reason, the fact that he never worked at a rock or gravel pit does not disqualify him from inspecting Tide Creek's mine. I find that he meets the qualifications of section 505 as a result of his education, training, and experience at MSHA.

Second, Tide Creek argues that any citations that involve the same safety standard and the same equipment or area of the mine should be combined into a single citation. Tide Creek points to MSHA's Program Policy Manual which includes such a directive. (PPM at Vol. I, Sec. 104, p. 15). The citations that Tide Creek believes should be combined include seven guarding citations and four handrail citations. The Secretary maintains that the PPM is not binding on MSHA but merely provides guidance to inspectors. He also contends that the crusher was a large piece of equipment made up of many separate components and that each of the conditions cited presented a separate hazard.

Section 110(a) of the Mine Act provides that "each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense." 30 U.S.C. § 820(a). The Secretary did not abuse his discretion in issuing multiple citations alleging violations of the same or similar safety standards. Each citation addresses a discrete area of the crusher. For example, with respect to the guarding citations, no two citations require a guard at the same location. Each citation required a separate abatement effort by Tide Creek to terminate the citation. See, Port Costa Materials, Inc., 16 FMSHRC 1516, 1519-20 (July 1994) (ALJ).

Although the Secretary's Program Policy manual is evidence of MSHA's policies and practices, it is not binding on the Secretary. Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 536-38 (D.C. Cir 1986); Coal Employment Project v. Dole, 889 F.2d 1127, 1130 n.5 (D.C. Cir 1989). In addition, the Secretary states that the "multiple violations" in these cases should not be treated as one violation because they were not related to the same piece of equipment or the same area of the mine. Thus, the guideline in the Program Policy Manual was not violated.

Third, Tide Creek argues that the Secretary is equitably estopped from enforcing the citations in this proceeding. It states that the Tide Creek Rock Mine has not changed in any significant way since 1979. It argues that the Secretary should

be estopped from enforcing these citations because the cited conditions were observed by MSHA inspectors on previous inspections and no citations were issued. Tide Creek wrote a letter to MSHA after it received two citations in 1979 stating that the inspector was asked to point out any additional "areas of deficiency." (Ex. R-7). The letter went on to state that since he could find no other violations, Tide Creek "has complied with all ... requirements and there is nothing else to be done." Id.

The Commission has long held that equitable estoppel does not apply to the Secretary in Mine Act proceedings. King Knob Coal Co., 3 FMSHRC 1417, 1421-22 (June 1981). The Commission set forth the reasoning behind its conclusion in King Knob, which I will not repeat here. In some cases, courts have estopped the government where it has engaged in "affirmative misconduct." See, e.g., United States v. Ruby, 588 F.2d 697, 702-04 (9th Cir. 1978), *cert. denied*, 422 U.S. 917 (1979). I find that MSHA did not engage in "affirmative misconduct" in this case and I hold that the citations should not be vacated on that basis.

Fourth, Tide Creek maintains that because many of the conditions cited by Mr. Widows have been in existence since 1979, this action is barred by the statute of limitations and by the equitable doctrine of latches. The Mine Act does not include a statute of limitations. As stated by counsel for the Secretary, the only limitation is that citations be issued with "reasonable promptness." 30 U.S.C. § 814(a). If an inspector believes that a safety standard had been violated, he must issue a citation with reasonable promptness. There has been no showing that Mr. Widows unreasonably delayed issuing any citation after he determined that a violation existed. For the same reason, there has been no indication that MSHA knew of violations of safety standards at the mine but slept on its duty to issue citations.

Finally, Tide Creek argues that it was denied due process because the inspection was triggered by a telephone complaint that contained false information. In particular, Tide Creek contends that as "an American citizen entitled to due process in some regard, we firmly believe that to allow the use of a secret `Code-a-phone' system to allow complaints that are false about the department and about an operator without any recourse being allowed amounts to an abuse of process that has been set up to protect miners working in mines." (T.C. Br. 34).

Congress determined that miners should "play an active part in the enforcement of the Act" and that "they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (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 623 (1978). MSHA's system for anonymous telephone complaints furthers that objective. In addition, section 103(a) of the Mine Act expressly grants authorized representatives of the Secretary a right to enter all mines for the purpose of performing inspections under the Act. The Secretary possessed the authority to conduct the inspection at issue even if the inspection ensued from a complaint that contained false information. See, Aloe Coal Co., 15 FMSHRC 4, 8 (January 1993). "An inspector has broad discretion to gain entry and to inspect a mine." Id. Accordingly, Tide Creek did not suffer an abuse of process.

General Background and Discussion

The Tide Creek Rock Mine consists of three work areas: (1) the crusher including auxiliary facilities; (2) the stockpile; and (3) the extraction area in the pit. Usually, only three employees work at the mine, but on occasion there are four employees. John A. Peterson is the only person who operates the crusher and he remains at the crusher's control tower at all times when the crusher is operating. One employee loads rock at the extraction area into a truck, drives the truck to the upper hopper of the crusher, and dumps the rock into the hopper. On occasion another employee also performs this task. The third employee loads crushed rock into a truck at the lower hopper (bunker silo) and dumps the rock at the stockpile. At the time of the inspection, the crusher was not operating.

In its brief, Tide Creek asserts that many of the conditions described in the citations did not create a hazard to Mr. Peterson or to the other employees, for the reasons discussed in more detail below. It argues that the citations should be vacated because the conditions did not create a hazard to miners.

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 assessing civil penalties, I have taken into consideration the fact that Tide Creek is a very small family-run business and that, except as noted below, it promptly abated the 33 citations with its limited resources. Except as noted below, I find that Tide Creek's negligence was low with respect to the citations. The conditions cited by Mr. Widows existed for a considerable length of time without receiving citations by MSHA. Mr. Peterson was attempting to run a safe operation and reasonably believed that he was in compliance with the Secretary's safety standards.

Specific Citations

Tide Creek also argues that the Secretary failed to prove the violation alleged in each citation. In order to discuss the allegations in a systematic way, I have grouped the citations by subject area rather than by docket number.

A. ELECTRICAL CITATIONS

1. Citation No. **4339822** alleges that a danger sign was not posted at the electrical shed to warn persons of electrical hazards. The safety standard, **30 C.F.R. § 56.12021**, provides that "suitable danger signs shall be posted at all major electrical installations." Mr. Widows testified that the cited shed contained the majority of the mine's electrical components and that it did not have a sign warning people that electrical equipment was in the shed. (Tr. 92-95, 181-84). At the time of the inspection the power was off. Id. Mr. Peterson testified that there was no sign, but there was no person to warn of the danger because he is the only person who goes into the shed. (Tr. 335-36).

Tide Creek argues that the citation should be vacated because the citation did not include a reference to the standard allegedly violated. The Secretary admits that the citation did not set forth what safety standard was violated, but contends that Tide Creek was not prejudiced by the omission. It maintains that Tide Creek knew the material facts that led to the issuance of the citation and that its counsel cross-examined Mr. Widows about the violation. It moves to amend the citation to conform to the evidence.

I find that this omission is a technical defect and the citation should not be vacated on this basis. In making this finding I rely on the fact that "Exhibit A" to the Secretary's petition for assessment of civil penalty in WEST 94-369-M, which lists the citations and penalties, alleges a violation of section 56.12021 with respect to Citation No. 4339822. Thus, Tide Creek had notice of the standard allegedly violated long before the hearing in this matter.

Based on the evidence, I find that the Secretary established a violation. There is no dispute that the shed was a "major electrical installation" and it did not have a danger sign. As stated above, the fact that the condition created little or no hazard to miners is not a defense to the violation. I find that the violation was not significant and substantial ("S&S") and that the gravity was low because all miners knew it was an electrical shed and, with the exception of Mr. Peterson, had no reason to enter it. I also find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

2. Citation No. **4339823** alleges that the motor for the El-Jay gyro was not grounded creating a shock hazard in violation of section **56.12025**. The safety standard provides, in part, that all metal encasing electrical circuits shall be grounded or provided with equivalent protection. Mr. Widows testified that all electrical circuits must be grounded back to the source. (Tr. 55-59, 172). He stated that the motor is part of a three-phase 480-volt circuit that required a fourth ground wire. He testified that if one of the wires touched the casing of the motor, the metal could become energized creating an electric shock hazard. Id. Mr. Widows said that frame grounding is not sufficient under the safety standard because "you can never tell how good the frame is" and a buildup of rust or corrosion could interfere with the grounding system. (Tr. 57). Mr. Peterson testified that the cited motor was bolted down to metal and that all metal pieces at the crusher are interconnected with grounding straps including this motor. (Tr. 322-26, 371-73). He stated that the motor was grounded as required by the standard.

The Secretary contends that the standard requires that an operator install a separate ground wire returning to the power source and that frame grounding is unacceptable under the National Electrical Code. He maintains that a fourth grounding wire is required under the standard. Tide Creek argues that the safety standard does not require any particular type of grounding.

I credit the testimony of Mr. Peterson that each piece of metal at the crusher was interconnected with grounding straps, including the cited motor, and that a ground wire was connected

to the frame of the crusher and the mine's grounding rod. (Tr. 322-26, 372-73, 411-13). He welds about twice a month using one electrical lead and the frame of the crusher as the ground. Mr. Widows testified that a continuous fourth grounding wire is required by the standard. (Tr. 402-11). Mr. Widows, however, did not conduct any test to determine if the motor was grounded and did not examine Tide Creek's grounding system. He simply concluded that it violated the standard because there was no fourth grounding wire.

The standard does not set forth any particular means of grounding the metal compartment of a motor. "Electrical grounding" is defined as meaning "to connect with the ground to make the earth part of the circuit." 30 C.F.R. § 56.2 In addition, the standard does not incorporate the National Electrical Code by reference. I find that the Secretary did not establish a violation. The Secretary has the burden of proof and he has not shown that the casing for the motor was not connected to the earth. I do not doubt that a fourth wire grounding system is state of the art at the present time and that it offers certain advantages over Tide Creek's grounding system. The Secretary failed to show, however, that the metal encasing the cited motor was not grounded nor provided with equivalent protection. See, e.g. McCormick Sand Corp., 1 FMSHRC 21, 23-24 (January 1980) (ALJ). Accordingly, this citation is vacated.

3. Citation No. **4339824** alleges that continuity and resistance of the grounding system had not been tested in violation of section **56.12028**. The safety standard provides, in part, that continuity and resistance of the grounding system shall be tested at the time of installation, repair and modification, and annually thereafter. Mr. Widows testified that he asked Mr. Peterson whether he had performed such tests and that he replied "No." (Tr. 59-61, 173). He stated that the purpose of the test is to "make sure that all motors, electrical boxes, energized circuits, ... have a good ground path back to the source...." (Tr. 60). The test would disclose any ungrounded motors. Mr. Peterson did not deny that the grounding system had not been tested and stated that the first time that an electrician tested the ground system was after he added a fourth wire ground to abate Citation No. 4339823. (Tr. 371-73). Tide Creek contends that Mr. Peterson's use of the grounding system to operate his welder is a sufficient test under the standard.

I find that the Secretary established a violation. There is no dispute that the test was not done and Mr. Peterson's use of the grounding system to operate his welder does not comply with the standard. I agree with Mr. Widows that the violation was not S&S and was not serious. I also agree that Tide Creek's negligence was moderate. A penalty of $50.00 is appropriate.

4. Citation No. **4339853** alleges that two cover plates were missing from junction boxes in 110-volt lighting circuits in the shop in violation of section **56.12032**. The boxes were about 8½ feet high and no bare copper wire was observed. The safety standard provides that inspection and cover plates on electrical equipment and junction boxes be kept in place at all times except during testing and repair. Mr. Widows testified that he observed the condition while inspecting the shop. (Tr. 101-07). Tide Creek argues that the citation should be dismissed because there is "no testimony in the record that the pictured items are `electric equipment' or `junction boxes'" (T.C. Br. at 23).

I find that the items cited are "junction boxes," as that term is used in the standard, and that the Secretary established a violation. Mr. Widows did not use the term "junction box" but called them "electrical boxes." (Tr. 101). There is no question, however, that the boxes in which the leads for the lights in the shop were connected to the power source did not have covers. (Ex. P-14). The boxes were junction boxes. I find that the violation was not S&S and not serious. The junction boxes were on the ceiling and the shop was used for storage only. I also find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

5. Citation No. **4340483** alleges that the cover box for the El-Jay gyro motor was missing exposing the insulated connections in violation of section **56.12032**. The citation states that the box was about seven feet high. Mr. Widows testified that the box encloses electrical connections to keep the weather out and that the cover was missing. (Tr. 40-43, 162-62, 193-94; Ex. P-3). He stated that the condition created a hazard because rain could get into the electrical connections, cause a short, and injure someone. Id. Mr. Peterson testified that he took the cover off the box because the motor shakes and jumps causing the wires to rub against the cover. (Tr. 318-321). He was concerned that the wires could short out. Id. He testified that at the time the citation was issued the wires were intact and that the condition did not create a hazard. Id.

Tide Creek contends that removal of the cover plate was a "repair" as that term was used in the safety standard because it was removed to prevent a short circuit caused by vibration of the crusher. It argues that the standard is therefore inapplicable. I disagree and find that the Secretary established a violation. The term "repair" does not include the permanent removal of the box's cover to prevent wires from rubbing against the cover. I construe the exception to refer to repairs to the wires, their connections, and the box itself rather than a permanent solution to a problem. There is no requirement that the cover be metal.

I find that the violation was not S&S or serious. Given the location and condition of the wires in the box the hazard was minimal. I also find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

6. Citation No. **4339854** alleges that there was an improper splice on a 110-volt power circuit in the shop in violation of section **56.12013**. The citation further states that the splice was in the corner of the shop where there was little exposure and no bare copper leads were observed. The safety standard provides, in part, that permanent splices and repairs made in power cables shall be mechanically strong, insulated to a degree equal to that of the original and provided with damage protection as near as possible to that of the original. Mr. Widows testified that the two cables had been spliced using a wire nut without additional insulation or a box. (Tr. 69-71, 176-77, 200-01; Ex. P-8). He stated that using a wire nut did not satisfy the requirements of the standard. Id. Mr. Peterson testified that the splice was temporary and that it was not as strong as the original, but that one could not be injured by it because it was insulated to the same degree as the original. (Tr. 326-28).

Tide Creek contends that the citation should be vacated because the standard applies only to "permanent splices and repairs of power cables." Tide Creek argues that the splice was a temporary solution and that the Secretary failed to prove a necessary condition precedent to a violation. Mr. Peterson testified that the cable went to a new transformer that he had just installed because the old transformer was no longer working. (Tr. 326-27). He said that he attached the wires with a wire nut as a temporary measure and Mr. Widows arrived shortly thereafter. I credit Mr. Peterson's testimony in this regard. I also credit his testimony that it did not present a shock hazard.

The standard clearly states that it applies only to permanent splices and repairs of cables, not to temporary splices. As stated above, the splice was not in an easily accessible area. I find that the splice was temporary and that the cited standard does not apply. Accordingly, the citation is vacated.

7. Citation No. **4340484** alleges that the start and stop switch for the cross belt was not labeled and could not be readily identified by location in violation of section **56.12018**. The safety standard provides that principal power switches shall be labeled to show which units they control unless identification can be made readily by location. Mr. Widows testified that a start/stop switch was not labeled and could not be identified by location. (Tr. 44-46, 163-65, 194-96). He determined that it was for the cross belt by asking Mr. Peterson. Id. At the time

of the hearing, he could not remember if there were any markings on or near the switch but testified that he would not have issued the citation if it was properly labeled. Id. Mr. Peterson testified that dust from the crusher would obliterate any label and that he is the only person who uses the switch in any event. (Tr. 321-22). If anything goes wrong, he shuts down the plant at the two main switches and everything is dead. Id. He stated that the crusher is a one-man operation and he is the only one who would have any need to shut off the power.

Tide Creek argues that because Mr. Widows did not have a clear recollection of the switch or any marking on the switch at the hearing the citation should be vacated. It also argues that the switch is identifiable by location since Peterson knows where it is and what it operates, and he is the only person who works at the crusher. I find that the Secretary established a violation. Mr. Widows testified that the switch was not labeled, although he could not remember if there were any markings in the area. Mr. Peterson's testimony indicates that it was not labeled. Accordingly, I find that the switch was not labeled. I also find, based on Mr. Widow's testimony, that it could not be readily identified by location. As stated above, the Secretary is not required to show that a hazard was created to establish a violation.

I find that the violation was not S&S and that it created little or no hazard. I credit Mr. Peterson's testimony that other miners would not be at the crusher when it was operating and would not be in the position of having to turn off the switch in the event of an emergency. I also find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

B. GUARDING CITATIONS

Tide Creek raises a number of issues that are common to all of the guarding citations. Each citation was issued under 30 C.F.R. § 56.14107, which provides:

> (a) 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.
>
> (b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The citations involve pinch points of belts and pulleys. Tide Creek contends that each citation should be vacated because only Mr. Peterson travels within eight feet of the cited areas and he does so only when the crusher is not running. The evidence discloses that the other employees drive trucks and do not ordinarily walk past the cited areas when the crusher is operating. The record also reveals that Mr. Peterson ordinarily approaches the cited areas only to grease bearings and he does so only when the crusher is not running.

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 am required to 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, as a general matter, the fact that employees do not enter the crusher area when it is running is not a valid defense to the citations. It is not disputed that there is no physical barrier to prevent an employee from walking into the crusher area past the cited pinch points. An employee could stumble and come in contact with a pinch point. The fact that such an event is unlikely relates to the gravity of the violation and not whether a violation occurred. I find that it is highly unlikely that anyone would walk through the crusher while it was running but, given the vagaries of human conduct, I cannot totally rule that possibility out. An employee could decide that he needed to travel through the area; Mr. Peterson could be preoccupied and not see the employee; and the employee could slip, fall and injure himself in a pinch point.

I consider these arguments on a citation-by-citation basis, as discussed below.

1. Citation No. **4339821** alleges that the back side of the V-belt pulleys for the El-Jay gyro were not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulleys were about four feet high and that the exposure was minimal since the front side was guarded. Mr. Widows stated that people walk on the guarded side of the pulley and that if someone slipped and grabbed the guard to brace himself, his fingers could come in

contact with the pinch point. (Tr. 88-92; Ex. P-12). Mr. Peterson testified that there was a chain between two posts to keep people out of the area. (Tr. 336-40, 438-49; Ex. R-21). He also testified that the moving part was not within seven feet of a work area, but that it was within seven feet of a walk area. Id. He stated that he walks by the pulley three or four times a day, but that the crusher is not operating at that time. Finally, he stated that if you grabbed the belt while the pulley was running, it would throw you towards the motor not the pinch point. (Tr. 338).

Tide Creek argues that this citation should be vacated because there was no working or walking surface within seven feet. It also argues that the chain was accepted as a guard by an MSHA inspector during a previous inspection. Finally, it contends that there was no chance of an injury because the pulley runs away from the pinch point towards the electric motor.

Based on the evidence, I find that the Secretary established a violation. Unguarded moving machine parts were present within seven feet of where Mr. Peterson walks every day to run the crusher. The pulley is not operating at that time. As discussed above, other employees would not ordinarily walk through this area while the crusher was operating. Given the vagaries of human conduct, however, an employee could walk by the pulley while it was operating to speak with Mr. Peterson in the control tower. Mr. Peterson could be preoccupied with other matters at the control tower and not see the employee. The employee could slip and his fingers could become entangled in the pinch point. He could grab the lower part of the belt by accident. As stated above, the fact that the condition created little or no hazard to miners is not a defense to the violation.

Perimeter guarding of the area around a machine is not an acceptable alternative to site specific guarding of the moving part. See, e.g. Moline Consumers Co., 15 FMSHRC 1954 (September 1993)(ALJ); Brown Brothers Sand Co., 17 FMSHRC 578 (April 1995)(ALJ); Walker Stone Co., 16 FMSHRC 337, 357 (February 1994)(ALJ). Thus, the chain that was supported by two posts along one side of the pulley is not an acceptable guard. To comply with the standard, the guard must prevent an employee from unintentional contact with the moving part. As discussed above, the Secretary is not estopped from issuing a citation for a violation of a safety standard because an inspector on a previous inspection did not cite the condition. In this instance, an MSHA inspector accepted the chain as a guard during an inspection that occurred sometime between 1979 and 1982. I find that this fact does not warrant a dismissal of the citation, but rather indicates that Tide Creek's negligence was quite low. "Although the record reflects some confusion surrounding MSHA's [interpretation of the safety stand-

ard], as a general rule, `those who deal with the government are expected to know the law and may not rely on the conduct of government agents contrary to law'" Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1416 (10th Cir. 1984)(quoting Heckler v. Community Health Services, 104 S.Ct. 2218, 2226 (1984)).

Based on the above, I find that the violation was not S&S and that the gravity was low because miners did not travel near the cited area while the machine was running. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of $20.00 is appropriate.

2. Citation No. **4339855** alleges that the self-cleaning tail pulley for the bunker conveyor was not provided with a guard to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulley was about three feet high and that persons are not normally in the area when the crusher is running. Mr. Widows testified that an employee could accidentally get his hand caught in the pinch points and sustain a serious injury. (Tr. 107-115, 185; Ex. P-15). Mr. Peterson said that nobody would ever be in the area of the tail pulley while the crusher is operating. (Tr. 341-343, 348).

Tide Creek argues that the moving machine part is more that seven feet from a walking or working surface. It states that the evidence shows that it is at least 15 feet from the control tower and at least 15 feet from the other miners driving trucks. It points to Mr. Widows' testimony that "people could go up there but, more than likely, they would not." (Tr. 112). In sum, Tide Creek contends that no one works or walks near the belt when it is operating.

Tide Creek also argues that this citation should be barred by the doctrine of *res judicata*. In John Peterson, d/b/a Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982), Commission Administrative Law Judge George A. Koutras adjudicated several guarding citations at Tide Creek's facility. Tide Creek argues that two of the areas that Mr. Widows cited were previously cited by another MSHA inspector and that Judge Koutras vacated the citations on the merits. Accordingly, it contends that the issues with regard to these citations have been previously adjudicated and that the Secretary cannot relitigate them now.

Based on the evidence, I find that the Secretary established a violation. People did not routinely work in and around the self-cleaning tail pulley and it was not along a normal walkway. Nevertheless, it was in an open area that was easily accessible

to anyone at the mine. The pinch point presented a hazard to anyone who walked through the area. Given the vagaries of human conduct, an employee could enter the area without being detected, slip on the mud under the tail pulley, and get his hand caught in the pinch point.

I also find that *res judicata* does not apply. Judge Koutras's description of the conditions at the self-cleaning tail pulley is quite similar to the conditions that prevailed at the time the citation was issued in the present case. 4 FMSHRC at 2255. The safety standard at the time of Judge Koutras's decision was different from the present safety standard. The old safety standard, 30 C.F.R. § 56.14-3, provided that guards at tail pulleys "shall extend a distance sufficient to prevent a person from accidentally reaching behind the guard and becoming caught between the belt and the pulley." The present standard does not include such qualifications. All tail pulleys must be guarded if they are less than seven feet away from walking and working surfaces. Thus, the principal legal issue, the interpretation of the safety standard, differs.

Based on the above, I find that the violation was not S&S and that the gravity was low because miners did not travel near the cited area while the machine was running. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of $20.00 is appropriate.

3. Citation No. **4339856** alleges that the head pulley and V-belt drive of the "under El-Jay" conveyor was not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulley was about six feet above the ground and that there was little exposure because miners are not in the area. Mr. Widows testified that someone could become entangled in the pinch points and sustain an injury. (Tr. 110-15, 185; Ex. P-15). Mr. Peterson testified that nobody would ever be in the area of the tail pulley while the crusher is operating. (Tr. 341-343, 348).

The cited area was adjacent to the area cited in the previous citation, No. 4339855. (Ex. P-15). The only significant difference is that the unguarded area was about six feet off the ground in this citation and about three feet off the ground in the previous citation. The parties arguments are the same with respect to both citations.

For the reasons discussed above, I find that the citation should be affirmed. I also find that the violation was not S&S and that the gravity was low because miners did not travel near

the cited area while the machine was running. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of $20.00 is appropriate.

4. Citation No. **4339858** alleges that the V-belt drive for the main screen was not provided with a guard to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the V-belts were about three feet high and that a ladder was present which provided access to the V-belts. It further states that the operator stated that the drive was greased when the crusher was not operating. Mr. Widows testified that it is not likely that the alleged violation would cause an injury because the only access to the area was by the ladder. (Tr. 115-18, 185-86). He testified that "anybody could walk up there, but it was out of the way ... it wasn't a main travelway." (Tr. 116). Mr. Peterson testified that nobody goes up the ladder to the V-belt drive when the crusher is running. (Tr. 295-96, 366).

Tide Creek argues that the alleged pinch point is more than seven feet from a walking or working surface and that a person would have to climb a 12-foot ladder to get to the pinch point. The Secretary contends that because the ladder was "up" at the time of the inspection, it was a working surface and the pinch point was required to be guarded. (Ex. P-18).

I find that the Secretary did not establish a violation because the moving machine part was more than seven feet from a walking or working surface. I credit Mr. Peterson's testimony that he greases the drive when the crusher is not operating. There is no other reason for anyone to climb the 12-foot ladder. Even considering the vagaries of human conduct, I find that a miner would not walk or work within seven feet of the pinch point. Under the circumstances of this case, the ladder was not a walking or working surface. Accordingly, the citation is vacated.

5. Citation No. **4339851** alleges that the air compressor behind the shop had unguarded V-belts in violation of section **56.14107(a)**. The citation states that the compressor is infrequently used and that minimal exposure is present. It further states that the V-belt pulley was on the back side of the compressor and about three feet high. Mr. Widows testified that an accident was unlikely because the belts were back against the wall in an out-of-the-way area. (Tr. 67-69, 175; Ex. P-7). He also stated that there was an electrical box nearby and that if someone were to throw the switch on the box, he would be close to the compressor. Id. Mr. Peterson testified that the compressor

is automatically activated, there is no switch to turn it off or on. (Tr. 267-70, 356-57; Ex. R-4). He also stated that the compressor is about 15 feet from the road and is not within seven feet of a walking or working surface. Id. He testified that no employee goes near the compressor at any time. Id. Finally, he testified that the switch on the electrical box controls a pump in the creek that is seldom used. Id.

Tide Creek argues that the compressor is more than seven feet from any walking or working surface, particularly given its remote location against the back wall of the shop. The Secretary contends that the area around the compressor is a working surface because someone occasionally turns on the electrical switch near the compressor to activate a pump.

Based on the evidence, I find that the Secretary established a violation. The area around the compressor is a working surface on an occasional basis when the water pump is turned on. A person could trip and accidentally get his fingers caught in the pulley for the V-belts, if the compressor was operating. The risk of an injury is low, however, because of the location of the pulleys against the back wall of the shop.

Based on the above, I find that the violation was not S&S and that the gravity was low because a miner would enter the area only occasionally and the pinch points are partially guarded by location. I also find that Tide Creek's negligence was low. Taking into consideration all of the factors discussed above, a penalty of $20.00 is appropriate.

6. Citation No. **4339859** alleges that the tail, head, and V-belt pulleys for the cross belt were not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulleys were about four to five feet high and that persons pass by the tail pulley on their way to the control tower for the crusher. Mr. Widows testified that one had to pass within two feet of the cited area to get to the control tower. (Tr. 120-24, 134, 136-38; Exs. P-1, P-16). He also testified that a miner would have to climb over the cited area to get to a work platform. Id. He determined that the alleged violation was S&S because anyone walking in the area would be exposed. Id. Mr. Peterson testified that the cited area is more than seven feet from a walking or working surface. (Tr. 299-301; Exs. R-2, R-18). He stated that no miner walks across the cited area except him to grease fittings and that he greases the fittings before he starts the crusher. Id. He stated that it is not the route he or anyone else uses to go to the control tower.

On February 7, 1994, Mr. Widows issued Order No. 4340486 under section 104(b) of the Mine Act because he determined that Tide Creek had not abated the conditions described in the citation. The order states that the operator built a handrail rather than a guard to abate the citation despite the fact that Tide Creek was advised that a handrail would not be acceptable.

Tide Creek contends that the citation should be vacated because the cited area is more than seven feet from a walking or working surface. In addition, it argues that the alleged violation is not S&S because it was highly unlikely that anyone would be injured. It argues that the section 104(b) order should not have been issued because it installed the handrails in a good-faith attempt to abate the citation. Finally, Tide Creek contends that the record makes clear that more time for abatement was required and Mr. Widows' refusal to provide more time was an abuse of his discretion.

Based on the evidence, I find that the Secretary established a violation. I credit the testimony of Mr. Peterson that the cited area was not along the route that he or other miners take to reach the control tower. Nevertheless, Mr. Peterson testified that he walks along the area to reach fittings. Even though he greases the fittings before the crusher is started, the cited area is within seven feet of a walking surface. As stated above, the Secretary is not required to show that a hazard was created to establish a violation.

I find, however, that the violation was not S&S and that the gravity was low. It is highly unlikely that a miner would walk along the route suggested by Mr. Widows while the crusher was operating, even taking into consideration the vagaries of human conduct. The employees of Tide Creek work in discrete areas and it is highly unlikely that anyone would climb upon the superstructure of the crusher and thereby come in contact with the cited pinch points. The Secretary failed to establish "a reasonable likelihood that the hazard contributed to will result in an injury." Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984). Accordingly, the violation is not S&S.

An MSHA inspector is authorized to issue an order under section 104(b) of the Mine Act if he determines on a subsequent inspection that: (1) the violation described in the citation has not been totally abated within the period of time originally fixed in the citation; and (2) the period of time for abatement should not be further extended. It is clear that the violation was not totally abated within the time set in the citation. Whether the time should be extended is subject to the inspector's reasonable exercise of discretion. Tide Creek contends that it was trying to abate about 33 citations in a short period of time

with only three miners. Mr. Peterson stated that it took about three weeks to get everything done. (Tr. 364). I find that Mr. Widows did not abuse his discretion in issuing the order. By that time, Mr. Peterson knew or should have known that a handrail would not guard the moving machine parts. Mr. Widows advised him of that fact on January 28. (Tr. 137-38). I appreciate that Tide Creek faced a difficult task, but its actions in this instance did not excuse its failure start working on guards.

I find that the negligence of Tide Creek was low. The violation was not timely abated. Taking into consideration the factors discussed above, including the fact that the violation was not S&S and that the gravity was low, a penalty of $50.00 is appropriate.

7. Citation No. **4339860** alleges that the tail pulley of the three-inch conveyor was not guarded to prevent persons from contacting the pinch points in violation of section **56.14107(a)**. The citation states that the pulley was about three feet high, but there was little exposure in the area. Mr. Widows testified that the pinch point of this conveyor was close to the area cited in the previous citation, No. 4339860. (Tr. 124-27, 138-40; Ex. P-1). He determined that the exposure was not great because the area is infrequently traveled. Mr. Peterson testified that the cited area is more than seven feet from a walking or working surface. (Tr. 299-301; Exs. R-2, R-18). He stated that no miner walks across the cited area except him to grease fittings and that he greases the fittings before he starts the crusher. Id. He stated that it is not the route he or anyone else uses to go to the control tower.

On February 7, 1994, Mr. Widows issued Order No. 4339827 under section 104(b) of the Mine Act because he determined that Tide Creek had not abated the condition described in the citation. The order states that the operator built a handrail rather than a guard to abate the citation despite the fact that Tide Creek was advised that a handrail would not be acceptable.

The cited area was adjacent to the area cited in the previous citation, No. 4339859. (Ex. P-15). The facts are essentially the same. The parties' arguments are the same with respect to both citations and the section 104(b) orders.

For the reasons discussed above, I find that the citation should be affirmed. The area was within seven feet of a walking surface and a guard was not present. I also find that the violation was not S&S and that the gravity was low because it was highly unlikely that miners would travel near the cited area while the machine was running.

I also find that the section 104(b) order should be affirmed, for the reasons discussed above. Finally, I find that Tide Creek's negligence was low. Taking into consideration the factors discussed above, including the fact that the violation was not S&S and that the gravity was low, a penalty of $50.00 is appropriate.

C. OTHER EQUIPMENT CITATIONS

1. Citation No. **4126437** alleges that the Cat 966 loader did not have a back-up alarm in violation of section **56.14132(b)(1)**. The citation states that the operator of the vehicle had an obstructed rear view and that no one was present to signal when it was safe to back up. The safety standard requires an automatic reverse-activated signal alarm on self-propelled mobile equipment if the operator has an obstructed view to the rear. Mr. Widows testified that he observed the loader backing up without a reverse alarm system or a spotter. (Tr. 75-80; Exs. P-10, P-11). He stated that the operator would not be able to see anyone close behind the loader if he were to back up, because of the obstructed view. Mr. Peterson testified that nobody is ever walking around in the vicinity of the loader. (Tr. 331-37).

Tide Creek argues that the evidence does not establish that the operator had an obstructed view. In addition, it argues that the evidence establishes that only one employee is in the stockpile area and he is the operator of the loader. Finally, it contends that the safety standards are designed to protect miners and not others who may be in the area. (At the time the citation was issued, a customer was in the stockpile area).

I find that the Secretary established a violation. The evidence makes clear that the loader operator had an obstructed view. (Tr. 76; Exs. P-10, P-11). There is no dispute that a backup alarm was not present. While it is true that only one employee ordinarily works in the stockpile area, other employees could be in the area without the knowledge of the loader operator. Indeed, the fact that others are not usually there could give the loader operator a false sense of security.

I also find that the violation was S&S because the Secretary established the elements of the S&S test set forth in Mathies. First, as discussed above, there was a violation of the safety standard. Second, the violation contributed to a measure of danger to safety. Third, there was a reasonable likelihood that the hazard contributed to will result in an injury. Given the noise of the loader and the fact that the operator's vision to the rear is restricted, it is reasonably likely that someone would be injured as a result of the violation. Mr. Peterson walks around

the property and it is unlikely that the loader operator would be able to see Mr. Peterson if he were backing up. Finally, an injury would be of a reasonably serious nature. I find that Tide Creek's negligence was moderate. Based on the above, a penalty of $100.00 is appropriate.

2. Citation No. **4126439** alleges that Tide Creek was not conducting inspections of mobile equipment used during the shift in violation of section **56.14100(a)**. The safety standard provides that self-propelled equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation. Mr. Widows testified that he knew that safety inspections were not being made because the loader did not have a back-up alarm. (Tr. 81-84). He could not recall if he asked the loader operator if a safety inspection was made or whether he requested any documentation to support a safety inspection. Id. He said that such a document request was standard MSHA procedure. Mr. Peterson testified that the equipment operators tell him if there is any problem with their equipment. (Tr. 334-35).

Tide Creek argues that the Secretary failed to prove that an inspection was not made. I agree. The fact that the back-up alarm was not functioning does not establish that a safety inspection was not made. Mr. Widows could not remember whether he requested to see a safety checklist. The fact that such a request is standard MSHA procedure is not enough to establish a violation. Accordingly, the citation is vacated.

3. Citation No. **4340481** alleges that the red Mack haul truck was not provided with seat belts in violation of section **56.14131**. The citation states that the truck was used on level ground around loaders and on short hauls. The safety standard provides that seat belts shall be provided and worn in haulage trucks. Mr. Widows testified that he looked into the vehicle and could not find any seat belts. (Tr. 127-29). He stated that he did not consider the violation to be S&S because of the manner in which the truck is used. Id. He further stated that Mr. Peterson told him that he thought that older vehicles did not need to be equipped with seat belts. Mr. Peterson testified that the cited haul truck was manufactured in the early 1960s. (Tr. 344-47; Ex. R-23). He said that it is only used to make 400-foot trips over flat ground and that the top speed is 15 miles per hour. He said that the lack of seat belts did not create a hazard because the truck would not tip over on flat ground and it is only used on straight, flat trips.

Tide Creek argues that the Secretary did not establish that the cited vehicle is a haulage truck. I disagree. The vehicle is a dump truck. (Ex. R-23). Although the term "haulage truck"

is not defined by the Secretary, I conclude that an ordinary dump truck is a "haulage truck" as that term is used in the safety standard.

I agree with Mr. Widows that the violation was not S&S and was not serious. I find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

D. TRAVELWAY CITATIONS

1. Citation No. **4339847** alleges that there was no handrail in front of the conveyor at the operator's control tower to prevent persons from falling onto the conveyor in violation of section **56.11002**. The safety standard provides, in part, that crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Mr. Widows testified that there is a conveyor that runs along the side of the control tower for the crusher. (Tr. 97-101; Ex. P-13). He stated that one of the duties of the crusher operator is to pick pieces of wood off the conveyor. Id. He testified that the lack of a handrail created a risk of falling onto the belt, which was about 18 inches high. Id. Mr. Peterson testified that he stands all day in the control tower when the crusher is operating. (Tr. 293).

Tide Creek argues that the control tower is not a crossover, elevated walkway, elevated ramp, or a stairway. It contends that the control tower is a platform and that the safety standard does not apply. Tide Creek states that Mr. Peterson is the only person who works at the control tower and that he operates the controls for the crusher from there. (R-17). The Secretary did not address this issue.

The safety standard applies to "crossovers, elevated walkways, elevated ramps, and stairways." Although a work platform could be construed as a walkway under many circumstances, I find that the platform cited here is not a walkway. The term "walkway" is not defined by the Secretary, but "travelway," a similar term, is defined as "a passage, walk or way regularly used ... for persons to go from one place to another." 30 C.F.R. § 56.2. The control tower was not a route miners would take to go from one place to another. It was not a route that maintenance personnel would use to gain access to equipment. Rather, it was a work station for Mr. Peterson. I find that the Secretary failed to prove that the control tower was covered by the subject safety standard. Compare, Moltan Co., 11 FMSHRC 351, 355-36 (March 1989)(ALJ). Accordingly, this citation is vacated. It is important for Tide Creek to understand, however, that another safety

standard, 30 C.F.R. § 56.11027, requires handrails on work platforms.

2. Citation No. **4339849** alleges that the work platform along the second screen was not provided with handrails to prevent a person from falling in violation of section **56.11002**. The citation states that the platform was about six feet high and that it is used to change the shacker screens. Mr. Widows testified that Mr. Peterson told him that he needed to get on the platform to perform periodic maintenance. (Tr. 26-31, 148-51, 153-55, 191-93; Ex. P-1). Mr. Widows said that Mr. Peterson could fall six feet into a puddle of water without the handrails. Mr. Peterson testified that the cited platform is not a walkway, crossover, ramp, or stairway, and that it is not used to get from one place to another at the crusher. (Tr. 317-18).

Tide Creek argues that the cited area was not subject to the cited standard. For the reasons set forth above, I agree. Indeed, Mr. Widows referred to the area as a "work platform." Although a work platform may also be an elevated walkway in many instances, in this case the Secretary failed to establish that it was. Apparently, Mr. Peterson, on an infrequent basis, stands on the platform to change a shaker screen. There is little evidence as to the use of this platform. Accordingly, the citation is vacated.

3. Citation No. **4339846** alleges that the elevated walkway along the bunker silo was not provided with handrails to prevent persons from falling, in violation of section **56.11002**. The citation states that the walkway was about ten feet high on one side and that persons are required to be on the walkway to load trucks. Mr. Widows testified that the walkway was where someone would stand when trucks are loaded. (Tr. 61-66, 173-75, 198-99; Ex. P-6). He said that the walkway is along the bunker silo and, after a truck backs in under the silo, an employee stands on the walkway and pulls down a lever to release rock into the truck. Id. He said that there is a danger that an employee could fall while pulling on the lever. He also said that the walkway is a wooden plank about ten feet long. Mr. Peterson testified that the cited area was not a crossover, walkway, ramp, or stairway. (Tr. 301-07, 364).

Tide Creek argues that the cited area was not covered by the safety standard. It contends that the standard was designed to protect individuals from falling from elevated areas that are used as walkways and that the board by the bunker silo was not used in such a fashion. The Secretary did not address this issue.

The cited area is only used when a truck is under the silo and is ready to be loaded. A worker steps up on the board and pulls down on the handle to release material into the truck. It is not a means of walking to any other location at the mine and no person would be in the area unless a truck was ready to be loaded. The Secretary failed to establish that the board was a walkway, crossover, ramp, or stairway. A platform may be covered by this safety standard in many situations, but the Secretary failed to establish that this platform was a walkway. In addition, it appears that the cited area would be covered by section 56.11027, which requires handrails on scaffolds and work platforms. Accordingly, this citation is vacated.

E. OTHER CITATIONS

1. Citation No. **4126433** alleges that the mine operator failed to notify MSHA of the opening of the mine in violation of section **56.1000**. The safety standard provides, in part, that the operator of any metal or nonmetal mine shall notify the nearest MSHA office before starting operations. The standard also requires such operators to notify MSHA if it intends to close the mine on a temporary or permanent basis. The citation states that Mr. Widows told Mr. Peterson three years ago to notify MSHA when he starts operating. Mr. Widows testified that MSHA never received any notice from Tide Creek that the mine was operating. (Tr. 23-26). He further testified that he told Mr. Peterson that if he wanted to get started in the mining business, he had to notify MSHA in advance.

Mr. Peterson testified that the mine has been in operation since at least 1979 and has had an MSHA identification number since that time. (Tr. 307-12, 368-69). He stated that the mine was previously inspected by MSHA. He stated that at the time of Mr. Widows' previous visit to the mine, the crusher was not running. Apparently, Widows told Peterson on that date that whenever he comes by he cannot find anybody at the mine. He also told Peterson that if "you're not running, I'm going to take your name out of my book." (Tr. 309). Mr. Peterson testified that the mine was operating on that date, but the crusher was not operating. He further testified that MSHA inspectors came by on subsequent dates, but they did not inspect the mine because the crusher was not running. Mr. Voris Probst, who was familiar with the mine, testified that the mine has not been closed for the past 20 years. (Tr. 393-94, 399-400). He further testified that the crusher operates about half of the time.

The Secretary failed to establish a violation of the standard. I credit the testimony of Peterson and Probst with regard to this citation. It is clear from the record that Tide Creek is

a small family-run business. Mr. Peterson operates the crusher and oversees other operations at the minesite. Agnes M. Peterson is the president, keeps the books, takes care of the paperwork, and acts as Tide Creek's counsel. Mr. Peterson also is engaged in logging and farming and Ms. Peterson practices law in St. Helens, the county seat. If Mr. Peterson is not at the mine, the crusher does not operate because he is the only person who operates the crusher. The safety standard does not require Mr. Peterson to notify MSHA every time he decides to operate the crusher. Apparently, there are significant periods when the crusher is not operating, but the mine is still open. The fact that Mr. Widows decided to take the mine out of his "book" does not establish a violation. Tide Creek must have notified MSHA that it was operating at some point in the late 1970s because it had an MSHA identification number at the time of the inspection. There is no evidence that it ever notified MSHA that it was closed. Accordingly, this citation is vacated.

2. Citation No. **4339852** alleges that several compressed gas cylinders were not secured in a safe manner in violation of section **56.16005**. The safety standard provides that compressed and liquid gas cylinders shall be secured in a safe manner. The citation states that no mobile equipment traveled in the area. Mr. Widows testified that two of the cylinders were in the shop and one was outside the shop. (Tr. 85-88, 181). He stated that they were lying on the ground and the floor, and that Mr. Peterson told him that they were empty. Mr. Peterson testified that he keeps cylinders that are full tied up or secured in a cart. (Tr. 270-77, 357-58; Exs. R-8, R-9). He further stated that the cited cylinders were empty.

Tide Creek argues that the cylinders should not have been cited because they were empty. It contends that Mr. Peterson secures empty bottles by opening the valve and laying them on the ground. Tide Creek maintains that this is a safe procedure because it relieves all pressure from inside the cylinder.

Based on the evidence, I find that the Secretary established a violation. The language of the standard makes clear that cylinders must be physically secured whether they are empty or full. Although opening the valve of empty cylinders greatly reduces the safety hazard, such a method does not comply with the safety standard. I agree with Mr. Widows that the violation was not S&S. I find Tide Creek's negligence to be low. A penalty of $20.00 is appropriate.

3. Citation No. **4340482** alleges that an oxygen gas cylinder was found in the shop in violation of **56.16005**. The citation was issued on February 7, 1994. Mr. Widows testified that the cylin-

der was lying on the floor and it was not secured. (Tr. 31-37, 151-52, 181, 193). As with the previous citation, No. 4339852, the danger is that something heavy may break the valve and cause the gas in the cylinder to be suddenly released. (Tr. 34). Mr. Peterson's testimony was the same for both cylinder citations. The parties' arguments were also the same.

For the reasons discussed above, I find that the Secretary established a violation. Mr. Widows determined that the violation was not S&S because the cylinder was not located in an area where it was likely that the valve would be broken. At the hearing, counsel for the Secretary sought to amend the citation to allege an S&S violation based on the evidence. I find that the violation was not S&S. The likelihood of an injury contributed to by this violation was not very great. I also find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

4. Citation No. **4339826** alleges that a competent person was not examining the working place at least once each shift and recording these examinations in violation of section **56.18002**. The safety standard provides, in part, that a competent person shall examine each working place at least once each shift for safety hazards and that a record of such examinations shall be kept. Mr. Widows testified that he asked Mr. Peterson about such examinations and that he replied that they had not been done. (Tr. 95-97).

Tide Creek contends that the Secretary is seeking to prove the violation on the basis that if the examinations had been performed all of the other citations would not have been issued. It contends that this citation constitutes "improper doubling-up" and should be vacated.

Based on the evidence, I find that the Secretary established a violation. The Secretary is not seeking to establish a violation based on the number of citations issued during the inspection. Rather, the Secretary established that the examinations were not being performed and records of them were not being kept. I agree with Mr. Widows' determination that the violation was not S&S or serious. I find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

5. Citation No. **4339845** alleges that fire extinguishers were not being visually inspected at least once a month in violation of section **56.4201(a)(1)**. The safety standard provides, in part, that all fire extinguishers shall be inspected visually at least once a month to determine that they are fully charged and operable. Subsection (b) provides that a record of the

inspections must be kept. Mr. Widows testified that the fire extinguishers did not indicate whether monthly examinations were being made. (Tr. 119-20, 133, 135-36, 187-88). He stated that, typically, markings are made at the extinguisher to note the inspections. He further testified that when he asked Mr. Peterson if examinations had been made, he replied that he did not know that extinguishers had to be checked. Finally, Mr. Widows stated that the fire extinguishers were in operating condition.

On February 7, 1994, MSHA Inspector Mike J. Williams issued Order No. 4340180 under section 104(b) of the Mine Act because he determined that Tide Creek had not abated the citation. The order states that no apparent effort was made to visually inspect fire extinguishers every 30 days. Inspector Williams testified that when he talked to Mr. Peterson about the citation, he was told that he did not have time to get to it because he was working on abating the more serious citations. (Tr. 207-09). Mr. Williams stated that if Mr. Peterson had asked for more time to abate the citation, he would have given it to him. Id.

Tide Creek contends that the citation should be vacated because it was issued for not having the proper documentation to show that the fire extinguishers were inspected. I disagree. Mr. Widows testified that Mr. Peterson told him that they had not been examined. Accordingly, I find that the Secretary established a violation.

The citation was not abated within the time originally set in the citation and Inspector Williams did not extend the abatement time. He believed that Tide Creek had been given sufficient time to inspect the fire extinguishers. I find, however, that the inspector abused his discretion in not extending the abatement time. There is no dispute that the fire extinguishers were operational. It is also clear that Tide Creek was engaged in trying to abate over 30 other citations. Given that the extinguishers were in operating condition, it was reasonable for the operator to give it a lower priority. Inspector Williams testified that he would have given Tide Creek an extension if it had asked.

At the hearing, Mr. Peterson impressed me as being a rather stoic individual. He did not appear to be the type of person who would ask for an extension or offer an excuse for not abating a citation. He simply advised Mr. Williams that he had been so busy with the other citations that he had not been able to get to it. As a general matter, it is the responsibility of a mine operator to ask for an extension. Given the circumstances of this case, however, I find that Mr. Peterson's failure to request an extension should be excused. It only took about 15 minutes to

abate the citation. Based on the above, the order of withdrawal is vacated.

I agree with Mr. Widows that the violation was not S&S and was not serious. I find that Tide Creek's negligence was low. A penalty of $5.00 is appropriate.

6. Citation No. **4339844** alleges that there was an accumulation of combustible waste in the oil storage building that could create a fire hazard in violation of section **56.4104(a)**. The safety standard provides that waste materials, including liquids, shall not accumulate in quantities that could create a fire hazard. The citation states that a 30-inch diameter spillage container contained two to three inches of spilled oil and that persons are required to enter the building to get supplies. Mr. Widows testified that he observed the container with an inch or two of spilled oil in it. (Tr. 37-40, 155-59; Ex. P-2). He further said that the oil could be ignited by someone smoking or by an open flame. He believed that the wooden floor was also saturated with oil. He did not believe that there was any electricity in the building. He testified that Mr. Peterson told him that employees are not allowed to smoke at the mine.

Mr. Paterson testified that the oil that Mr. Widows saw was in a container that was placed under an oil drum to catch any drips or spills. (Tr. 278-81, 359-61; Ex. R-10). The container was directly under the spout of the oil drum. He determined that oil was an inch and a quarter deep. He testified that the oil was motor oil used in his mobile equipment and that it does not ignite easily. He said that the oil in the container under the drum was not waste because he uses it to lubricate chains and other items at the mine. He did not believe that it created a fire hazard and that he offered to get a torch to show that it would not ignite. Mr. Voris Probst, a former plant manager for Boise Cascade, testified that the flash point of the motor oil at the mine was so high that it did not pose a fire hazard. (Tr. 385-86).

The Secretary argues that the citation should be affirmed because "combustible" is defined as "capable of being ignited and consumed by fire." He argues that the fact that the oil is not easily ignited is not relevant. I disagree and find that the Secretary failed to establish that the oil in the drip pans created a fire hazard. I credit Tide Creek's evidence that the oil was not easy to ignite. I also find that there were no ignition sources in the area. Accordingly, the citation is vacated.

7. Citation No. **4126440** alleges that there was no sign prohibiting smoking and open flame at the oil storage building in violation of section **56.4101**. The safety standard provides that readily visible signs prohibiting smoking and open flames should be posted where a fire or explosion hazard exists. Mr. Widows testified that anytime there is a sufficient amount of materials to create a fire or explosion hazard, a no smoking or open flame sign is required. (Tr. 55, 171-72). He stated that no sign was present. He also stated that he did not observe any smoking or open flames. Mr. Peterson testified that he does not believe that there is a fire or explosion hazard in the shed because it is a long way from any ignition source. (Tr. 281-82).

Tide Creek contends that no fire or explosion hazard existed in the shed. I disagree. As Exhibit P-2 shows, the shed was filled with oil drums, paper, and miscellaneous items that could catch fire. The fact that there were no ignition sources in the shed is not relevant. The standard is designed to warn people not to bring potential ignition sources into the area. A cigarette could ignite paper and rags in the shed, which could propagate a fire. I agree with Mr. Widows that the violation is not S&S or serious. I find that Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

8. Citation No. **4339857** alleges that the shop was not maintained in a orderly fashion in violation of section **56.20003(a)**. The safety standard provides that workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly. The citation states that numerous items were a l over the floor creating a tripping hazard. It alleges that persons are required to be in the shop to turn on the lights and answer the phone. Mr. Widows testified that there was junk, material, and equipment all over the floor presenting a tripping hazard. (Tr. 72-73; Ex. P-9). Mr. Peterson testified that he goes in and out of the shop on a daily basis, often in the dark, and has never tripped or stumbled. (Tr. 329-31). He stated that he follows the trail shown on Exhibit P-9. He also stated that the shop is for storage of tools only and that there is a phone outside that most people use.

Based on the evidence, I find that the Secretary established a violation. The cited area was not clean and orderly, and a tripping hazard was created. I find that the violation was not S&S or serious. Tide Creek's negligence was low. A penalty of $5.00 is appropriate.

9. Citation No. **4126436** alleges that berms along the roadway up to the pit were not maintained in violation of section **56.9300**. The safety standard provides, in part, that berms shall

be provided and maintained on the banks of roadways where a drop-off of sufficient grade or depth exists that could cause a vehicle to overturn or endanger persons in equipment. The citation states that there was a 20-foot drop-off where a vehicle could overturn and roll down. It also stated that pick-ups and front-end loaders use the road. Mr. Widows testified that the cited roadway was 20 to 30 feet wide and did not have any berms. (Tr. 50-54, 168-71; Ex. P-5). He stated that he could see fresh rubber tire tracks on the roadway. Mr. Peterson testified that the road that was cited went from one level of the quarry to another. (Tr. 283-91, 361-63; Ex. R-11). He stated that this roadway is changed all the time because he uses the Cat to push overburden over the hill and dig a new road around to get the Cat back up. Id. He stated that on the day of the inspection he had just created that road and someone drove a loader down the road. There was no berm because he had been working on it with the Cat. He stated that he would not have put a berm on the roadway because the road was there only temporarily. He also testified that it was not reasonably likely that anyone would drive off the road. Id. He admitted, however, that if someone drove off, he could be injured.

Based on the evidence, I find that the Secretary established a violation. The cited area was a roadway with a drop-off of sufficient grade or depth to cause a vehicle to overturn. The roadway did not have a berm. Although a bench that is not a roadway would not need to be equipped with a berm, I find that the cited area was a roadway because it was used by a front-end loader on at least one occasion. If only the Cat had been on the bench as part of the mining process, it would not appear that a berm would be required.

The Secretary contends that the violation was S&S. In this case, however, the roadway was infrequently used. The evidence shows that it was only used once by the front-end loader and that the operator did not plan on keeping the road for any period of time. Accordingly, I find that the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury. See, e.g. Skelton Inc., 13 FMSHRC 294, 302-04 (February 1991)(ALJ); Lakeview Rock Products, Inc., 17 FMSHRC 83, 90 (January 1995)(ALJ). I find that the violation was not S&S. Tide Creek's negligence was low. A penalty of $20.00 is appropriate.

10. Citation No. **4126434** alleges that several large trees were observed along the perimeter of the pit in violation of section **56.3131**. The safety standard provides, in part, that loose or unconsolidated material shall be sloped back for at least ten feet from the top of a quarry wall in places where people work or travel. It also states that other conditions at

or near the perimeter of a quarry wall which create a fall-of-material hazard shall be corrected. The citation states that the trees were 20 to 40 feet high and the quarry perimeter was not stripped back at least ten feet. In addition, the citation states that the trees created a falling hazard for persons working in the quarry. Mr. Widows testified that a couple of trees were leaning over near the edge of the quarry and the roots were exposed. (Tr. 46-50, 165-66, 186, 196-97; Ex. P-4). He believed that the trees could fall into the quarry and injure someone. He stated that the area had been recently worked and that the wet conditions could cause the trees to fall. He did not know how long the trees had been there or what kind they were.

Mr. Peterson testified that the cited trees were maple trees that were six to eight feet back from the edge of the bank. (Tr. 314-16, 369-70). He stated that the trees were not leaning towards a work area. He also stated that maple trees are tough to push down because of their extensive root system. He stated that there was no danger of the cited trees falling over into the quarry. Mr. Peterson is an experienced logger. (Tr. 231). Mr. Voris Probst, a former plant manager for Boise Cascade and experienced logger, testified that maple trees do not come down easily. (Tr. 393).

I find that the Secretary did not establish that the trees created a fall-of-material hazard to employees working in the quarry. I credit the testimony of Peterson and Probst in this regard. Exhibit P-4, upon which the Secretary puts significant weight, is not persuasive. There was simply no proof that there was a risk that the cited trees would fall into the quarry. Accordingly, this citation is vacated.

11. Citation No. **4126431** alleges a violation of **30 C.F.R. § 41.20**, dealing with legal identity reports. At the hearing, the Secretary agreed to vacate this citation. (Tr. 75).

12. Citation No. **4126432** alleges a violation of **30 C.F.R. § 50.30**, dealing with quarterly employment reports. At the hearing, Tide Creek agreed to pay the penalty proposed by MSHA for this citation. (Tr. 6).

13. Citation No. **4340642** alleges a violation of section 103(a) of the Mine Act. At the hearing, the Secretary agreed to vacate this citation. (Tr. 6).

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 94-369-M		
4126431	41.20	vacated
4126437	56.14132(b)(1)	$100.00
4126439	56.14100(a)	vacated
4339852	56.16005	20.00
4339821	56.14107(a)	20.00
4339822	56.12021	20.00
4339826	56.18002(b)	20.00
4339847	56.11002	vacated
4339853	56.12032	20.00
4339855	56.14107(a)	20.00
4339856	56.14107(a)	20.00
4339858	56.14107(a)	vacated
WEST 94-379-M		
4126433	56.1000	vacated
4339849	56.11002	vacated
4340482	56.16005	20.00
WEST 94-492-M		
4339844	56.4104(a)	vacated
4340483	56.12032	20.00
4340484	56.12018	20.00
WEST 94-493-M		
4126434	56.3131	vacated
4126436	56.9300(a)	20.00
4126440	56.4101	20.00
4339823	56.12025	vacated
4339824	56.12028	50.00
4339846	56.11002	vacated
4339851	56.14107(a)	20.00
4339854	56.12013	vacated
4339857	56.20003(a)	5.00
WEST 94-638-M		
4339845	56.4201(a)(1)	$ 5.00

4339859	56.14107(a)	50.00
4339860	56.14107(a)	50.00
4340481	56.14131(a)	20.00
WEST 95-48-M		
4126432	50.30	100.00
WEST 95-275-M		
4340642	§103(a)	vacated
	Total Penalty	$640.00

III. ORDER

Accordingly, the citations listed above are **VACATED** or **AFFIRMED** as indicated, and Tide Creek Rock, Inc. is **ORDERED TO PAY** the Secretary of Labor the sum of $640.00 within 30 days of the date of this decision. Any amount previously paid for the settled citation should be credited against this amount.

Richard W. Manning
Administrative Law Judge

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RWM