FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

July 27, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-237-M
Petitioner	:	A.C. No. 45-03338-05504
	:	
v.	:	Morgan Kame Terrace
	:	
PALMER COKING COAL COMPANY,	:	
Respondent	:	

DECISION

Appearances: Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
William Kombol, Manager, Palmer Coking Coal Co., Black Diamond, Washington, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Palmer Coking Coal Company ("Palmer"), 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"). A hearing was held in Seattle, Washington. The parties presented testimony and documentary evidence and made closing arguments.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Morgan Kame Terrace is a sand and gravel mine operated by Palmer in King County, Washington. It has been in operation for about five years and has been inspected by MSHA about twice a year since then. (Tr. 68). Although Palmer retained the words "Coking Coal" in its name, it is no longer in the coal mining business. Palmer employs about 18 people, including managers and partners. Rock is extracted at the mine and there is a crushing plant. About 13 employees are involved in the day-to-day operation of the mine. (Tr. 95). On January 19, 2000, MSHA Supervisory Inspector Dominic Vilona conducted an inspection of the mine along with Russell Argall, an inspector in training. At the time of the inspection, Mr. Argall was not an authorized representative of the Secretary. Mr. Argall accompanied Inspector Vilona as part of his training. During the course of the inspection, Palmer was issued seven citations under section 104(a) of the Mine Act.

The citations were signed by MSHA Inspector Terry Miller, who was not at the mine when the conditions were observed by Inspector Vilona and Mr. Argall. Inspector Miller issued the citations because Mr. Argall was not, at the time of the inspection, an authorized representative of the Secretary. Inspector Vilona testified that "when we returned to the office, I went ahead and took myself off the inspection." (Tr. 38). He apparently did that because he was the supervisor, but he determined that the alleged violations existed at the time of his inspection. He also reviewed the wording of each citation and agrees with the allegations described in each citation. The wording of each citation was based, in large part, on the notes taken by Inspector Vilona. Thus, Inspector Miller simply functioned as a scribe in the writing of the citations. Although this sequence of events is rather unusual, I find that this procedure did not violate the provisions of the Mine Act.

After the Secretary presented her case, Palmer moved to dismiss the case for lack of jurisdiction on the basis that the Secretary failed to prove that Morgan Kame Terrace is a mine subject to the Mine Act or that its products enter into or affect commerce. I denied Palmer's motion at the hearing. (Tr. 65-66). The Secretary established that the mine produces aggregate products that it sells in the open market and that some of the equipment used to mine and crush this product is manufactured outside the State of Washington. In *Wickard v. Filburn*, 317 U.S. 111 (1942), the U. S. Supreme Court held that growing wheat solely for consumption on the farm that grew it had an impact on interstate commerce. "Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States...." *Fry v. United States*, 421 U.S. 542, 547 (1975). The Commission and the courts have consistently held that Congress intended to exercise its authority to the maximum extent feasible when it enacted the Mine Act. *See, e.g., Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683, 686 (April 1994); *United States v. Lake*, 985 F.2d 265, 267-69 (6th Cir. 1993). I affirm my denial of Palmer's motion to dismiss.

One fundamental tenet must be kept in mind when analyzing the issues raised by Palmer. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *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. If conditions existed which violated the regulations, citations [are] proper.

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

A. Citation No. 7974794

Citation No. 7974794 alleges a violation of 30 C.F.R. § 56.9300(b). The condition or practice section of the citation provides:

> The berms on the ramp to access the feed hopper were not maintained to mid-axle height of the vehicles using the ramp. The berms were 18" high and should have been approximately 36" high. The ramp is used daily to feed the plant. The elevated ramp had a drop-off of three feet on both sides.... Should the loader accidentally run off the ramp and overturn, a worker could be injured resulting in lost work days or restricted duty.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not of a significant and substantial nature ("S&S"); and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides, in part, that berms shall be "provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn" and that such berms "shall be at least mid-axle height of the largest ... equipment which usually travels the roadway."

The cited ramp is used by the loader operator to feed the hopper for the crushing plant. Inspector Vilona testified that he and Mr. Argall measured the height of the berm and the height of the axles of the loader that uses the ramp. Palmer does not dispute these measurements. Vilona testified that the violation was not serious because the ramp was about 20 feet wide, making it unlikely that the loader operator would drive off the edge, especially since the loader is operated at low speeds on the ramp. He also testified that, because equipment operators wear seatbelts at the mine, it was unlikely that any injuries would be serious.

Mr. Kombol testified that the cited berms were of sufficient height to protect against overtravel and that 36" berms could create an even greater hazard because they would make the drop off greater. He testified that the earthen ramp was about three feet high and, when three-foot berms were added to abate the citation, the drop-off became six feet. He worried that a loader would be more likely to tip over if it went over the berm.

The cited safety standard makes it quite clear that berms must be at least mid-axle height. There is no dispute that the berms did not meet the requirements of the standard. I find that the Secretary established a violation of the safety standard. The photographs introduced by Palmer show the size of the berms after the citation was abated. (Ex. R-1). If Palmer is concerned about the height of the drop off, it can reduce the gradient along the outside edges by adding more material.

I agree with MSHA that the violation did not present a serious safety hazard. Palmer argues that the cited condition existed for five years and, since the mine has been inspected by

MSHA twice a year during this period, Palmer did not have reason to know that the berms were inadequate. Palmer does not understand why these berms, which are readily observable, had been in the same condition for five years, and had been inspected many times by MSHA, were suddenly out of compliance in January 2000, requiring the company to pay a civil penalty. Palmer suggests that, with respect to all of the citations, the MSHA inspection team was "nitpicking" the mine to impress the inspector in training. (Tr. 70).

I cannot vacate the citation based on these arguments. In essence, Palmer is arguing that, although the cited safety standard clearly requires that berms be mid-axle height, it is not at fault because MSHA failed to cite the condition in the past. While that argument has some surface appeal, it fails because of the strict liability nature of the Mine Act. In addition, Palmer is in no worse position than if MSHA had cited the condition five years ago. It simply would have had to correct the condition and paid the civil penalty at that time.

I reduce Palmer's negligence slightly based on these arguments. The negligence should not be reduced to "low," however, because the condition was obvious and the regulation was clear. A penalty of $50 is appropriate.

B. Citation No. 7974795

Citation No. 7974795 alleges a violation of 30 C.F.R. § 56.14100(b). The condition or practice section of the citation provides, in part:

> The brake lights on the 980 Cat loader were not maintained in a functional condition. Also the rear wiper was missing.... The front-end loader works only around the highwall; no other mobile equipment or foot traffic is in the area. The lights should be maintained so that other equipment and workers are aware that this loader is coming to a halt. The wipers could be necessary for safe operation in inclement weather. Either of these conditions could contribute to an accident involving the loader and a worker could be injured resulting in lost work days or restricted duty.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides, in part, that "[d]efects on any equipment ... that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to miners."

There is no dispute that the brake lights were burned out and that the wiper blade was missing. Palmer argues that MSHA's interpretation of its safety standards is illogical. The Secretary's safety standard concerning brakes, section 56.14101, does not require brake lights. In addition, this section does not require that if brake lights are installed, they must be in working order. MSHA admitted at the hearing that if the manufacturer had not installed brake lights on

the loader, it would not have issued a citation. Thus, Palmer argues that the Secretary cannot seriously argue that the burned out lights affected safety. Palmer makes the same arguments with respect to the missing wiper blade.

It is well established that an agency's interpretation of its own regulations should be given "deference ... unless it is plainly wrong" and so long as it is "logically consistent with the language of the regulation and ... serves a permissible regulatory function." *General Electric Co. V EPA*, 53 F.3d 1324, 1327 (D.C. Cir 1995)(citations omitted); *Buffalo Crushed Stone, Inc.*, 19 FMSHRC 231, 234 (February 1997). In addition, the legislative history of the Mine Act states that "the Secretary's interpretations of the law and regulations shall be given weight by both the Commission and the courts." S. Rep. No. 181, 95th Cong., 1st Sess. 49 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 637 (1978).

Although there is some tension in MSHA's position, it is not unreasonable. If someone in another vehicle is following a loader with brake lights, he will likely rely on the lights to warn him to stop. If the vehicle he is following is not equipped with brake lights, he will know that he cannot rely on such lights. The driver of a vehicle following a loader with inoperable brake lights may become complacent and not notice that the loader is stopping because the brake lights did not come on. Thus, inoperable brake lights are a defect that affects safety. Other Commission administrative law judges have reached the same conclusion. *See, e.g., Barrett Paving Materials, Inc.*, 15 FMSHRC 1999, 2007-08 (September 1993). I also find that the defect was not corrected "in a timely manner." Neither Inspector Vilona nor Mr. Kombol knew how long the brake lights had been out-of-order. Because Palmer had not been checking the brake lights during pre-shift examinations, it can be safely inferred that the condition had existed for more than one shift.

I reach the same conclusions with respect to the missing wiper blade. The operator of the loader backs up the vehicle on a regular basis. In inclement weather, he may not be able to see clearly out the back, which has the potential of putting himself and others in danger. I find that the Secretary's interpretation of the standard is reasonable and that the missing wiper blade was a defect affecting safety that should have been discovered during preshift examinations. Other Commission administrative law judges have reached the same conclusion. *See, e.g., Mechanicsville Concrete*, 16 FMSHRC 1444, 1451 (July 1994).

Palmer contends that it did not have any notice of the Secretary's interpretation of the safety standard. Actual notice of a standard's requirements is not required. The language of section 56.14100(b) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement*

Co., 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

I find that adequate notice was provided to mine operators as to the requirements of the standard. Mine operators are required to perform preshift inspections of self-propelled mobile equipment before being put into service under section 56.14100(a). Mine operators throughout the country check brake lights and window wipers during pre-operational examinations. It is well known that these items must be checked during these examinations. Equipment operators have been disciplined by mine operators for failing to check brake lights during their preshift examination. *Morales v. Asarco, Inc.*, 22 FMSHRC 659, 662 (May 2000). MSHA has consistently interpreted this safety standard to require that brake lights and wiper blades be checked and, as stated above, Commission judges have held that inoperative brake lights and window wipers are a defect affecting safety.

I find that the Secretary established a violation and that the violation was not serious for the reasons set forth in the citation. I also find that Palmer's negligence was moderate. The safety defects should have been corrected during pre-shift examinations. A penalty of $55 is appropriate.

C. Citation No. 7974796

Citation No. 7974796 alleges a violation of 30 C.F.R. § 56.14107(a). The condition or practice section of the citation provides:

> The tail pulley on the oversize screen belt was not adequately guarded to prevent a worker from being injured. The bottom of the tail pulley was 3½ feet off ground level. The top and sides were guarded but the bottom had an exposed pinch point. A worker could come in contact with the pinch point and possibly receive permanently disabling injuries. The area is not usually accessed

> during production and the foreman stated that machinery is locked out for maintenance.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting ... drive, head, tail, and takeup pulleys, ... and similar moving parts that can cause injury."

There is no dispute that there was no guard under the tail pulley. The evidence shows that this unguarded area was about 3½ feet above the ground and that contact with the pinch point was unlikely. (Tr. 25; Ex. R-1). Palmer argues that this area had been inspected by MSHA on numerous occasions and no citations were issued for lack of a guard at this location during these inspections. Palmer also maintains that it would be very difficult for anyone to become entangled in the pinch point from underneath the tail pulley and that all maintenance is performed while the plant is shut down and locked out. Consequently, it contends that it did not know that the area under the tail pulley was required to be guarded.

In *Thompson Brothers Coal Co., Inc.*, 6 FMSHRC 2094, 2097 (September 1984), 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." The Commission stressed that the construction of safety standards involving employees' behavior "cannot ignore the vagaries of human conduct." *Id.* (citations omitted). As the Commission stated in interpreting another safety standard, "[e]ven a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions...." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983). Thus, although an injury may have been unlikely in this instance, an injury was possible and the standard is designed to eliminate such injuries.

As stated above, that fact that MSHA did not previously cite the bottom of the tail pulley is not a defense in this strict liability statute. For the reasons discussed above, I find that mine operators were provided with reasonable notice of the requirements of the guarding standard. MSHA's interpretation of this safety standard has been consistent. MSHA has frequently issued citations in similar circumstances and such citations have been affirmed by Commission judges. *See, e.g. Tide Creek Rock, Inc.* 18 FMSHRC 390, 405 (March 1996).

I find that the Secretary established a violation and that the violation was not serious for the reasons set forth above. I find that Palmer's negligence was low, however, because the top and sides of the tail pulley were guarded. The violation was not obvious and Palmer reasonably believed that it was complying with the safety standard. A penalty of $45 is appropriate.

D. Citation No. 7974797

Citation No. 7974797 alleges a violation of 30 C.F.R. § 56.11001. The condition or practice section of the citation provides:

> Safe access was not provided to the storage trailer. Workers access the trailer daily in the performance of their job. The ramp was constructed of smooth plywood and went from ground level to the floor of the trailer which was three feet above the ground level. The ramp was on a steep 45 degree angle. Workers track sand and mud onto the ramp creating a slip hazard. A slip on the smooth surface could injure a worker resulting in lost work days or restricted duty.

MSHA determined that it was reasonably likely that someone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation. The safety standard provides that "[s]afe means of access shall be provided and maintained to all working places."

The parties dispute the basic facts that gave rise to this citation. The Secretary contends that the floor of the trailer was 36 inches above the ground and that the plywood ramp was at a 45 degree angle. (Tr. 27, 55, 59). Mr. Kombol testified that the floor of the trailer was about 15-16 inches above the ground and that the ramp was at a 28-30 degree slope. (Tr. 88). Palmer placed some gravel in the area soon after the citation was issued and then subsequently added a metal step. (Ex. R-1). I find that the ramp presented a slip and fall hazard, even if I accept Mr. Kombol's measurements. The plywood had a smooth surface so that mud from the boots of Palmer's employees could make the surface slick. Someone could fall and sustain a minor injury, especially if he were carrying supplies.

I find that the Secretary established a violation and that the violation was not serious. I reduce Palmer's negligence slightly because Palmer believed that the ramp provided safe access to the trailer. A penalty of $50 is appropriate.

E. Citation No. 7974798

Citation No. 7974798 alleges a violation of 30 C.F.R. § 56.14100(b). The condition or practice section of the citation provides:

> The brake lights on the 980 Cat front-end loader were not maintained in a functional condition. The front-end loader is used in all areas of the mine. At the time of the inspection, the loader was being used to load over the road trucks that entered the mine. Without the brake lights operating, other mobile equipment operators would not know when the loader would stop. This

> hazard could possibly cause a collision involving mobile equipment. A collision between mobile equipment could possibly cause a worker to sustain injuries that would cause lost work days or restricted duty.

MSHA determined that it was reasonably likely that someone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation.

This citation was issued for the mine's other loader. There is no dispute that the brake lights were not working because the bulbs were burned out. Palmer's arguments with respect to this citation are the same as for Citation No. 7974795 above.

For the reasons set forth for that citation, I find that the Secretary established a violation and that the violation was not serious for the reasons set forth above. I also find that Palmer's negligence was moderate. The safety defects should have been corrected during pre-shift examinations. A penalty of $55 is appropriate.

F. Citation No. 7974799

Citation No. 7974799 alleges a violation of 30 C.F.R. § 56.11001. The condition or practice section of the citation provides:

> Safe access was not provided to a floating deck with a pump mounted on it that supplied water for the wash plant. A 15-foot walkway from the ground out to the deck had handrails of only 18" on both sides of the walkway. The walkway is 2 feet wide. There were several obstacles in the path of the walkway that a worker would have to step over to access the floating deck. This area is accessed daily during cold weather. If a worker should fall or slip from this walkway and enter the deep water, it could be fatal.

MSHA determined that it was reasonably likely that someone would be injured by the violation; that the violation was S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $150 for this violation.

The facts are not in dispute. There is a pump in the pond that is used to provide water for the wash plant. Employees get to this pump via a floating walkway that is about 15 feet long and 2 feet wide. The only time employees have to get to the pump on a regular basis is during freezing weather. The handrails were only 18 inches high. Mr. Kombol testified that, although Palmer's employees considered all of the other citations to be "ridiculous," they "felt that this one was justified" because the higher handrails that were installed to abate the citation were "better." (Tr. 90-91). Mr. Kombol questioned MSHA's moderate negligence determination because Palmer reasonably believed that employees would rarely have to go out to the pump.

I find that the Secretary established a violation. I also find that the Secretary established that the violation was serious and S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a ... mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988).

The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

There was a violation of the standard and a measure of danger to safety contributed to by the violation. Without adequate handrails, an employee might fall into the water if he slipped on the surface of the walkway. Tripping hazards were present. The key issue is whether there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. I find that the Secretary established that an injury was reasonably likely in this instance and that such an injury would be of a reasonably serious nature, assuming continued normal mining operations. Employees had to travel along the walkway on a regular, but not frequent, basis in freezing weather. If an employee were to slip and fall into the cold water, he could suffer from hypothermia and a fatal accident could result.

Finally, I find that Palmer's negligence was moderate. Given that employees were required to use the walkway from time-to-time, adequate handrails should have been installed. A penalty of $150 is appropriate.

G. Citation No. 7974800

Citation No. 7974800 alleges a violation of 30 C.F.R. § 56.14107(a). The condition or practice section of the citation provides:

> The gearbox on the drive pulley of the scalping screen feeder conveyor was not adequately guarded. An accessory coupling on the side of the gear box had exposed moving parts. On the opposite side of the conveyor, the smooth 2½ inch diameter shaft for the pulley extended out of the bearing for about 4 inches. Both

> of these hazards were located 5 feet above the deck. Should a worker contact either of these hazards, permanently disabling injuries could occur. The foreman stated that this area is accessed only when the plant is shut down.

MSHA determined that it was unlikely that anyone would be injured by the violation; that the violation was not S&S; and that Palmer's negligence was moderate. The Secretary proposes a penalty of $55 for this violation.

The facts are not in dispute. The cited areas were in rather remote locations and it was unlikely that anyone would come in contact with the moving machine parts. Nevertheless, these parts were exposed and contact was possible. The areas had not been previously cited by MSHA and Palmer relied on that fact in its defense. Mr. Kombol testified that it would take a deliberate act to put oneself in danger at the cited locations and that Palmer does not employ "imbeciles to work around sand and gravel plants." (Tr. 94).

The Secretary recognized that it was unlikely that anyone would be injured when she made her gravity and S&S determinations. Exposed moving machine parts were present, however, and given the vagaries of human conduct, an injury was possible.

For the reasons set forth with respect to Citation No. 7974796, I find that the Secretary established a violation and that the violation was not serious. I find that Palmer's negligence was low, however, because the unguarded areas were quite small and rather remote. The violation was not obvious and Palmer reasonably believed that it was complying with the safety standard based, in part, on prior MSHA inspections. A penalty of $45 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that Palmer was issued six citations during the two years prior to this inspection. Palmer was a small operator. The violations were abated in good faith within a reasonable period of time. The penalties assessed in this decision will not have an adverse effect on Palmer's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
7974794	56.9300(b)	$50.00
7974795	56.14100(b)	55.00
7974796	56.14107(a)	45.00
7974797	56.11001	50.00
7974798	56.14100(b)	55.00
7974799	56.11001	150.00
7974800	56.14107(a)	45.00

Accordingly, the citations contested in this proceeding are **AFFIRMED** as set forth above, and Palmer Coking Coal Company is **ORDERED TO PAY** the Secretary of Labor the sum of $450.00 within 40 days of the date of this decision. Upon payment of the penalty, this proceeding is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Matthew L. Vadnal, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

William Kombol, Manager, Palmer Coking Coal Co., P.O. Box 10, Black Diamond, WA 98010 (Certified Mail)

RWM