FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., Room 6003
WASHINGTON, D. C. 20006-3867
Telephone No.: 202-653-5454
Telecopier No.: 202-653-5030

February 21, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-368-M
Petitioner	:	A. C. No. 35-02479-05509
	:	
	:	Docket No. WEST 2000-437-M
	:	A. C. No. 35-02479-05510
	:	
	:	Docket No. WEST 2000-446-M
	:	A.C. No. 35-02479-05511
	:	
v.	:	Docket No. WEST 2000-519-M
	:	A. C. No. 35-02479-05512
	:	
	:	Docket No. WEST 2000-561-M
	:	A.C. No. 35-02479-05513
	:	
	:	Docket No. WEST 2001-76-M
	:	A.C. No. 35-02479-05514
TIDE CREEK ROCK INCORPORATED,	:	
Respondent	:	Mine: Tide Creek Rock Incorporated

DECISION

Appearances: Deia W. Peters, Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for the Secretary;
Agnes Petersen, Esquire, Tide Creek Rock, Incorporated, Deer Island, Oregon, for the Respondent.

Before: Judge Barbour

These cases are before me on petitions for the assessment of civil penalties filed by the Secretary of Labor on behalf of her Mine Safety and Health Administration (MSHA) against Tide Creek Rock, Inc. (Tide Creek), pursuant to sections 105, 110 and 113 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §§§ 815, 820 and 823 (the Act or the Mine Act)). The petitions allege 24 violations of the Secretary's mandatory safety and health standards for surface metal and nonmetal mines and they seek the assessment of civil penalties that total $2,492. In

addition, six of the citations contain findings that the alleged violations were significant and significant contributions to mine safety hazards (S&S violations).

Tide Creek challenges the Secretary's jurisdiction and alternatively argues that in many instances the allegations of violation and the S&S findings are invalid. Further, Tide Creek asserts that several of the inspectors' findings regarding the gravity of the alleged violations and the company's negligence are inaccurate. Finally, it contends the amount of any penalties assessed will affect adversely its ability to continue in business.

The cases were consolidated, and a hearing was held in Portland, Oregon. The parties presented testimony and documentary evidence. They also filed post-hearing briefs. The issues are whether the Secretary has jurisdiction; whether the violations occurred as alleged; whether the inspectors' S&S and other findings are valid; and the amount of any civil penalties that must be assessed for the violations in light of the statutory civil penalty criteria (30 U.S.C. § 820(i)).

THE TIDE CREEK MINE AND THE MINE'S INSPECTION HISTORY

The Tide Creek Mine is a small, crushed stone operation located in Columbia County, Oregon. The mine is operated by Tide Creek Rock, Inc., a company owned and run by the Petersen family. Presently, three persons work intermittently at the mine, including John Petersen and his nephew, Robert Petersen. John Petersen directs the day-to-day functioning of the facility.

The mine includes a pit, a haul road, a crusher, a caterpillar tractor and three caterpillar loaders. At the mine stone is excavated, crushed to size, and stockpiled. The crushed stone is trucked from the mine. Among other things, the stone is used in road construction.

JURISDICTION

The facility has been inspected by MSHA for several years, and it has been the site of previous violations whose validity has been litigated before the Commission (*See Tide Creek Rock, Inc.*, 18 FMSHRC 390 (March 25, 1994) (ALJ Manning); *John Petersen, d/b/a/ Tide Creek Rock Products*, 12 FMSHRC 2241 (December 1982) (ALJ Koutras); *John Petersen d/b/a/ Tide Creek Rock Products*, 11 FMSHRC 3404 (November 1980) (ALJ Vail)). Despite the fact that in each instance, jurisdiction has been found to exist, the company continues to contend it is not subject to the Act.

The Mine Act provides that "each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such a mine, and every miner in such a mine shall be subject to the provisions of [the Act]" (30 U.S.C.§803). Although Tide Creek asserts that the Secretary failed to elicit testimony on the

company's affect on interstate commerce (Resp. Br. 5), the record fully supports finding that Tide Creek's products enter commerce and that its operations affect commerce.

At trial, John Petersen stated that rock extracted at the mine sometimes is used as a base in the construction of public roads (Tr. 256). An operator whose product is used in the construction of public roads plays an inevitable part in interstate transportation and thus in interstate commerce (*See Soothsay Construction Co.*, 6 FMSHRC 174, 176 (January 1984) (ALJ Carlson)). John Petersen also stated that the front-end loaders used at the mine were manufactured in Illinois. It has been held that the use of equipment manufactured in another state is an indicia of interstate commerce (*U.S. v. Dye Construction Co.*, 510 F.2d 17, 83 (10th Cir. 1975); *Mechanicsville Concrete*, 16 FMSHRC 1444, 1446047 (July 1994) (ALJ Amchan)). It is true that Tide Creek is small and most of its product is sold locally. However, even under these circumstances, it has been found that interstate commerce is affected because of the cumulative effect small scale operations can have in interstate pricing and demand (*See U.S. v. Lake*, 985 F. 2d 265 (6th Cir. 1993)). Therefore, the mine and its operator come within the jurisdiction of the Act.[1]

ALLEGED VIOLATIONS WITH S&S ALLEGATIONS

The Commission has stated that if, based upon the particular facts surrounding a violation, there exists a reasonable likelihood that a hazard contributed to will result in an injury or illness of a reasonably serious nature, the violation is S&S (*Cement Div. Nat. Gypsum Co.,* 3 FMSHRC 822,825 (April 1981)); *(see also, Buck Creek Coal Co., Inc.,* 17 FMSHRC 8, 13 (January 1995)). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission outlined the elements of proof for an S&S determination when it stated:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary . . . must prove: (1) the underlying violation of a mandatory safety

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[1] Tide Creek contends if its facility comes within the Act, res judicata bars consideration of the allegations in Citation No. 7978130 (Docket No. West 2000-159). Tide Creek's argument appears to be that Citation No. 7978130 is "basically the same" as another citation that has become "final"; in other words, that Citation No. 7978130 duplicates a previous citation (Resp. Br. 9). Tide Creek's argument fails. While I would vacate any citation at issue that was shown to duplicate a previously assessed and paid citation, I cannot do so on the basis of a mere assertion. Tide Creek did not introduce into evidence the citation it claims was duplicated. Accordingly, there is nothing in the record which I can compare to Citation No. 7978130. Further, to the extent that Tide Creek is arguing that the same allegations have been alleged previously—this argument also fails. The Secretary, may and frequently does, cite repeated violations of repeated violative conditions.

> standard; (2) a discrete safety hazard — that is, 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 determination of whether a violation is S&S is made in the context of continuing mining operations.

DOCKET NO. 2000-561-M

Citation No.	Date	30 C.F.R.§
7978438	3/29/2000	56.9301

The citation alleges that the lower dump area of the mine was not provided with a device to stop mobile equipment from traveling over the edge and overturning. The dump area was composed of loose rock material. Section 56.9301 states: "berms . . . or other impeding devices shall be provided at dumpling locations where there is a hazard of over-travel or overturning."

I conclude the violation existed as charged. The inspector testified that the lower dump area contained an embankment that was approximately 60-feet long and 20- to 25-feet high. Haulage trucks operated on the embankment and there was nothing along the edge of the embankment to hinder a haulage truck from going over the edge (Tr. 422). Tide Creek argues that restraints in the form of rock berms were in place around the area when dumping occurred but that they were removed and the rock was crushed when dumping was finished (Resp. Br. 43). While that may have been the case, the inspector's undisputed testimony established that no berms where in place when he observed the embankment. Further, the inspector testified, without dispute, that he saw tire tracks leading to the very edge of the embankment (Tr. 427). With no berms to warn a driver that his or her truck was at the edge of the embankment, the truck was in danger of dropping 20 to 25 feet and overturning.

The violation was S&S and serious. Berms partially restrain a vehicle. They also alert a driver how close the vehicle is to the edge of the dumping area. With no restraints or warnings at the edge of the 20- to 25-foot drop, it was reasonably likely that a driver would move too close and travel over the edge of the embankment. This was especially so because the dumping area was composed of loose material which was more likely to give way. The inspector testified that the haulage truck weighed between 30 and 40 tons (Tr. 428). He also testified that miners were working in the area below the embankment. If the haulage truck fell off the embankment, not only was the driver of the truck reasonably likely to suffer a serious injury, but any miner working below who was hit by the falling truck or its load was likely to be killed.

In addition, the lack of berms in the dumping area and the fact that the truck was operating on the embankment were visually obvious. If Tide Creek management officials had exercised the care required of them, then the berms or restraints would have been present; or if they had been removed, then the embankment would have been made "off-limits" until the berms were replaced. Tide Creek's lack of care resulted in the violation and establishes the company's negligence.

Citation No.	Date	30 C.F.R.§
7978439	3/29/2000	56.9300(b)

The citation alleges that the berms along the mine's main haulage road were not of the mid-axle height of the largest vehicle using the road. Section 56.9300(b) requires "[b]erms or guardrails . . . [to] be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway." The citation further alleges that the haulage road, which had a three percent grade, ran from the plant toward the pit area and that for about 30 feet—the berms ranged in height from zero to 12 inches. There were drop-offs of up to 10 feet along the road. The mid-axle height of the largest haulage truck traveling the road was 18 inches. When materials were transported from the pit, the road was used several times a day.

I conclude, the violation existed as charged. Tide Creek did not dispute the height of the berms ranged from zero to 12 inches and that this was less than the mid-axle height of the largest vehicle that traveled the road. In fact, Robert Petersen who regularly traveled the road, conceded the berms were inadequate along the cited portion (Tr. 496).

Rather than challenge the violative conditions, Tide Creek argued that the berms along the road were inadequate to help ensure proper drainage. Tide Creek asserted that the Secretary bore the burden of proving that the cited area was not needed for drainage and that she failed to do so (Resp. Br. 34).

It may be true that the berms were inadequate in order to provide proper drainage. Indeed, the inspector testified it was likely (Tr. 451). However, the standard makes no exception for drainage. If Tide Creek believed it was safer to eliminate or to lower the berms in order to facilitate drainage, its recourse was not to violate the standard but rather to seek its modification pursuant to section 101(c) of the Act (30 U.S.C. §811(c)). It did not do so.

The violation was S&S and serious. The road had a three-percent grade. The road was regularly traveled. During rains (which happen frequently in Oregon) the grade and the road's slippery condition could cause a vehicle to slip through the inadequate berms and off the road (Tr. 438-439). In the context of continuing mining I find that such an accident was reasonably likely and that a drop of up to 10 feet could be expected to cause a serious or critical injury to the driver

of the affected vehicle.

Finally, Tide Creek failed to meet the standard of care required. It chose not to comply and in so doing it caused the violation.

DOCKET NO. WEST 2000-159-M

Citation No.	Date	30 C.F.R.§
7978123	9/27/1999	56.14107(a)

The citation alleges that the counterbalance on the right side of a shaker screen was not guarded to prevent employee contact. The standard requires "[m]oving machine parts . . . [to] be guarded to protect persons from contacting gears, sprockets, chains . . . [various specified types of] pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

Section 56.14107(b) exempts from guarding "exposed moving parts that are at least seven feet away from walking or working surfaces." Tide Creek does not argue about the lack of guarding, but rather contends that the counterbalance was more than seven feet from any working surface or walkway and that the Secretary failed to show otherwise (Resp. Br. 13). I find, however, that the Secretary proved the violation.

At trial, the inspector credibly testified that although the counterbalance was guarded on its front, top and back sides, it was not guarded on its right side and that there was room for a miner to gain access to the moving counterbalance while the screen was in operation. He also testified that the counterbalance was approximately 30-inches above the walkway that ran along the right side of the shaker and that miners were required to be in the area of the screen when the shaker was in operation (Tr. 134). Despite the company's assertions, the record contains no convincing evidence to the contrary.

I also find that the violation was S&S and serious. The lack of a guard on one side of the counterbalance was reasonably likely to cause death or serious injury as mining continued. The guarding of moving machine parts is among the most important of the Act's safety requirements. Numerous serious injuries and fatalities have occurred when miners became caught in unguarded parts. Here, there was a walkway adjacent to the unguarded machine part. While mining was in progress, miners occasionally were required to be in the vicinity of the screen. The unguarded area was of a size (approximately 29 inches by 30 inches) and location (approximately 30-inches above the walkway) that if a miner slipped when the walkway was wet, or otherwise tripped and fell, and reached toward the counterbalance, the miner could be seriously injured by the moving

machinery.

The lack of a guard was visually obvious. The presence of guards on the top, front and back of the counterbalance indicated that Tide Creek was aware of the guarding requirement. Had Tide Creek exercise the care required, a guard would have been present. It did not, and in failing to guard the part, the company exhibited its negligence.

Citation No.	Date	30 C.F.R.§
7978126	9/27/1999	56.14103(b)

The citation alleges that the two top door windows and the left front window on a front-end loader were broken and sharp edges were exposed. Section 56.14103(b) states:

> If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed. Damaged windows shall be replaced if absence of a window would expose the equipment operator to hazardous environmental conditions which would affect the ability of the equipment operator to safely operate the equipment.

Tide Creek concedes that the windows were broken but contends that they did not create a hazard because Robert Petersen, the only person operating the equipment, was aware of their condition. In addition, he kept the door open so that visibility through the door windows was not obscured (Resp. Br. 20). Despite the company's argument, I conclude the broken windows were hazards and that they should have been replaced or removed.

No one takes issue with the fact that the windows were damaged, and I find that the inspector accurately described their state. The inspector believed that at some point Robert Petersen had to clean the windows, and in so doing, he could cut his hand on the sharp edges of the glass (Tr. 166-167). The inspector's testimony established that the operator of the loader was subject to the possibility of a cut hand. This established the presence of a safety hazard, and the broken windows, combined with the hazard they created, established the violation.

Although the Secretary proved the violation, I agree with Tide Creek that she failed to prove the violation was S&S. The inspector based his S&S finding on the fact that when it rained and the ground became muddy, the loader's tires tended to "kick up" mud on the windows. This meant that the windows had to be cleaned often, which in turn made it reasonably likely that Robert Petersen would cut his hand (Tr. 166-167). However, Robert Petersen testified that the windows in the doors almost never were cleaned because when he used the loader he always tied back the doors and that the other cited window (the left front window) also rarely had to be

washed. Further, he stated that on the occasions when he washed the windows, he used a squeegee and he did not touch the windows (Tr. 295-296).

Robert Petersen's testimony was not contradicted. Therefore, I conclude that the lack of a need for regular cleaning and the use of a squeegee meant that as mining continued it was unlikely Petersen's hands would come in contact with the broken windows. In addition, because there was only a remote chance of injury to one person, the violation was not serious.

The condition of the windows was obvious, and if Tide Creek had exercised the care required then the windows would have been removed or replaced. Therefore, the company was negligent.

Citation No.	Date	30 C.F.R.§
7978130	9/28/99	56.14132(b)

The citation alleges that the back-up alarm on a haulage truck was not audible above the surrounding noise level. Section 56.14132(b)(2) provides that an audible alarm on self-propelled mobile equipment, "shall be audible above the surrounding noise level." The inspector testified that at approximately 9:47 a.m. on September 28, 1999, he was in the area where the rock crusher is located. As he looked around, he saw a haulage truck begin to back-up. The truck was used to haul material from the storage bunker to the crusher. The inspector did not hear the truck's back-up alarm (a bell) sound when the truck began to move (Tr. 186), and at almost the same time, a front-end loader backed into the middle of the truck.

The inspector's first-hand testimony was not refuted. The company did not produce any witness who testified the alarm was heard. Nor did it produce any witness who countered the inspector's testimony that a front-end loader backed into the middle of the truck. Given the fact the inspector could not hear the alarm and the fact that the loader backed into the truck, the conclusion that the alarm was not audible above the surrounding noise level was reasonable, is credited, and establishes the violation (Tr. 186, 188).

The inspector found that the violation was S&S, and he was right. Audible back-up alarms are required because the visibility of mobile equipment operators frequently is restricted when equipment moves in reverse. Also, miners working in the vicinity of mobile equipment may be more intent on the job they are doing than on equipment moving near them. The sound of an alarm warns those working nearby or traveling behind a moving vehicle.

Here, the haulage truck was operating in an area where other mechanized moving equipment was present. The fact that a front-end loader backed into the moving haulage truck does not in itself establish the violation as the actual cause of the accident, but it is the type of

accident that is reasonably likely to occur when a back-up alarm cannot be heard. Moreover, when a haulage truck strikes another piece of equipment or strikes a miner working or traveling behind the truck, it is reasonable to expect the operator of the other equipment or the miner will be seriously injured. Therefore, in addition to being S&S, the violation was serious.

The violation should have been detected and corrected by Tide Creek. It was audibly obvious. I conclude the violation existed because Tide Creek failed to exercise the care required.

Citation No.	Date	30 C.F.R.§
7978131	9/28/99	56.14107(a)

The citation alleges that the v-belt drives and the cooling fan on a haulage truck (the same truck that lacked the audible backup alarm) were not guarded in that the front hood of the truck was missing. The inspector found the conditions to constitute an S&S violation. As noted previously, section 56.14107(a) requires moving machine parts, that can cause injury, to be guarded. Tide Creek concedes the hood was missing (John Petersen testified that it was lost in a flood (Tr. 361)), but argues that the inspector's S&S finding was erroneous. It was not reasonably likely that anyone would be injured because few miners worked around the truck; the hood had to be removed or raised in any event to change the oil; and no one ever had been injured changing the oil (Resp. Br. 31; Tr. 363-364).

I conclude, however, that the inspector's findings should stand. The hood had to be raised or removed to change the oil, which does not negate the fact that a person could slip or trip or loose his or her balance and catch a hand or an arm in the pinch points of the v-belts or be cut by the fan. According to John Petersen, the only person around the truck was the driver (Tr. 361). Yet, John Petersen also testified that when the truck was idling the driver occasionally checked the oil (Tr. 361-362). When the truck was idling, the v-belts and fan were moving. Thus, the driver was in the immediate vicinity of the pinch points and the fan when he checked the oil. The lack of a hood means that the driver was subject to the danger of slipping, tripping or otherwise inadvertently coming in contact with the v-belts' pinch points or with the fan's blades. Nothing was present to prevent such contact. An accident easily could have happened because, as the citation makes clear, the pinch points of the v-belts and the blades of the fan were within reach.

The standard is designed to guard against just such an inadvertent accident. As mining continued and the truck continued to be operated, I conclude an accident was reasonably likely to occur. Moreover, anyone entangled in a pinch point or hit by a fan blade could expect to suffer the loss of a finger and/or a severe cut. Thus, the violation was both S&S and serious.

In addition, Tide Creek was negligent. The fact that the hood was missing was visually obvious, and was known to John Petersen (Tr. 361). If Tide Creek had exercised the care

required, the violation would not have existed.

OTHER ALLEGED VIOLATIONS

DOCKET NO. WEST 368-M

Citation No.	Date	30 C.F.R.§
7973902	9/28/99	56.12008

The citation alleges that a power cable entering a junction box on the back side of the load-out bin was not provided with a proper fitting where it entered the box. Section 56.12008 requires power wires to enter the metal frames of electrical compartments "only through proper fittings." The inspector testified that he observed the junction box and found that an oversized bushing had been used where the power cable entered the box. In addition, the inner conductor wires of the cable were exposed. On the day of the inspection the load-out bin was not in operation. In fact, it had not been operating for the past two to three weeks.

I conclude the violation existed as charged. Tide Creek presented no evidence refuting the inspector's first-hand observation that the bushing used where the cable entered the box was oversized and thus improper (Tr. 40-42). Indeed, John Petersen conceded that the power cable was not provided with proper fitting (Tr. 61).

The inspector found that the violation was unlikely to cause an injury and I agree. The junction box was located in an infrequently traveled area of the mine, and miners rarely came in contact with it. In addition, although the load-out bin was not out of service at the time the violation occurred, the bin was infrequently operated. Thus, the possibility of an injury, caused by the violation, was very remote.

Tide Creek argues that there is no proof of its negligence because the junction box is far from usual work areas and no one was aware of the condition of the fitting (Resp. Br. 44). I reject this contention. Regardless of the location of the junction box, Tide Creek had a duty to ensure it was in proper working order. Equipment cannot be neglected because it is located in places that are only occasionally visited. The junction box had to be inspected by Tide Creek, and the company should have known of its condition. The violation was due to the company's failure to exercise the care required.

DOCKET NO. WEST 2000-446-M

Citation No.	Date	30 U.S.C.§
7973999	1/19/00	814(b)

The citation alleges that Tide Creek allowed a front-end loader to be used even though it had been removed from service by an order issued pursuant to section 104(b) of the Act (30 U.S.C. § 814(b)). In response to Tide Creek's pending motion to dismiss, counsel for the Secretary explained that the citation was vacated prior to the hearing and that the alleged violation of the Act should not have been assessed (Tr. 16-17). Therefore, I advised counsels that I would grant the motion (Tr. 17).

DOCKET NO. WEST 2000-437-M

Citation No.	Date	30 C.F.R.§
7978127	1/27/00	56.14101(a)(3)

The citation alleges that the front brakes on a front-end loader were not working because the air lines to the front brakes cams were disconnected. However, the rear brakes were operable. Section 56.14101(a)(3) requires that "[a]ll braking systems installed on equipment . . . be maintained in functional condition."

Tide Creek did not contest the existence of the cited condition. In fact, John Petersen admitted that the front brakes air lines were disconnected (Tr. 97-98). Petersen thought the company had no choice but to disconnect the air lines because when the ground conditions were muddy, the front brakes continually clogged and locked. In his opinion, the only way to ensure that the back brakes would continue to work was to disable the front brakes (Tr. 97-98, 100).

I conclude that the violation existed as charged. The testimony established that the front brakes were not functional. Tide Creek asserted that disabling the front brakes did not create a hazard because the loader was used on flat land 99 percent of the time and the back brakes alone were sufficient to stop the equipment (Tr. 111). However, the assertion was confounded by the testimony of Robert Petersen, who admitted that the brakes did not work at their full capacity as he brought the loader down a hill on the day the citation was issued (Tr. 112). The record also reflects that the loader was used on a hill on other days, too (*Id.*). Even if these instances represent only one percent of the loader's use, they nonetheless establish the seriousness of the violation. An accident easily could have occurred as the result of using the loader on a hill when

the front brakes were not functioning. The driver of the loader could have been injured seriously.[2]

Moreover, the violation was due to Tide Creek's negligence. It is clear from the testimony that John Petersen was aware of the condition of the brake lines, yet he did nothing about it. His failure represented a lack of care that was required of him.

Tide Creek was given until the following day to reconnect the brake lines and to comply with section 56.14101(a)(3). When it failed to do so the Secretary issued an order removing the loader from service until the front brakes were operable. As a result of the order, the Secretary charged that Tide Creek failed to make a good faith abatement effort. Tide Creek, on the other hand, argued that due to a family illness it was unable to abate in a timely manner (Tr. 96, 100). At that time John Petersen's mother-in-law, who lived in the Petersen's home near the mine, required a great deal of on-site assistance and attention due to a stoke and a broken hip.

I conclude the company established good cause for its failure to timely abate the citation. The company is small and family oriented. The testimony of John Petersen, the statements of John Petersen's counsel and wife, Agnes Petersen, and the testimony of the Petersens' daughter, Mary Ann Anderson — established that at the time of the violation the illness of John Petersen's mother-in-law was causing the family a great deal of stress. Frequent trips to the hospital for medical attention, disrupted not only the Petersen's family life but also the conduct of their business.[3] Had it not been for the illness, I conclude the condition of the brake lines would have been attended to within the time required. As it were, the requirements of the citation became "lost in the shuffle" of the Petersen's then more immediate worries and concerns.

DOCKET NO. WEST 2000-561-M

Citation No.	Date	30 C.F.R.§
7973901	9/27/99	56.11001

The citation alleges that a safe means of access was not provided on the path to the crusher control platform. The traveled path was composed of loose, unconsolidated material and uneven ground. Section 56.11001, requires "a safe means to access [to] be provided and maintained to all working places."

[2] As I have noted previously, to the extent that Tide Creek believed maintaining the front brakes in functional condition diminished the safety of its miners, its recourse lay in petitioning the Secretary of Labor to modify application of the standard, not in unilaterally disconnecting the front brake air lines (30 U.S.C.§ 811(c)).

[3] Some of the trips were necessitated by sudden medical emergencies.

I conclude the Secretary proved the violation. First, the crusher control platform was the place where the controls for the crusher were located. The area had to be visited from time to time. Thus, the platform was a working place and the path was the means by which miners accessed the platform. The inspector testified that the path, which at one point narrowed to 12 inches, not only was loosely composed, but also dropped to a 14-inch deep pool of water on one side while on the other side there was a low, overhanging metal piece. There was no handrail along the path (Tr. 373-374).

The nature of the path; the drop to the water on one side; and the overhanging metal on the other, made the path hazardous—especially after a rain when the danger of slipping increased. John Petersen sometimes used the path and he testified he has "two bad knees" and only one toe on one of his feet (Tr. 95). These conditions, which made him more prone to slipping and falling than a miner without similar disabilities, heightened the danger. I conclude that any person traveling the path, but most especially John Petersen, easily could have tripped or slipped and fallen into the pool of water or could have struck the overhanging metal. Access to the platform was not safe. The violation was serious.

I also conclude that Tide Creek was negligent. The nature of the path and the hazards associated with it were visually obvious. Due care required the path be made safe. Tide Creek argues that if, in fact, it was negligent—its negligence was diminished by the fact that prior MSHA inspectors did not previously cite the company for failing to provide safe access to the control platform. I agree. Tide Creek's assertion that it had not been cited in the past, was not refuted by the Secretary. While the lack of a prior citation does not relieve Tide Creek of responsibility for the violation, it somewhat lessens Tide Creek's lack of care.

Citation No.	Date	30 C.F.R.§
7973904	9/28/99	56.18010

The citation alleges that no individuals at the mine site were currently trained in first aid. Section 56.18010 provides in part that "[a]n individual capable of providing first aid shall be available on all shifts."

I conclude the Secretary established the violation. The inspector testified that he asked John Petersen whether someone had been trained in first aid and that Petersen responded "yes"—but could not say who it was (Tr. 396). This testimony was not refuted by Tide Creek, and I find the conversation happened as described. I also find it reasonable to infer from the conversation that a currently trained person was not available on that shift. The facility was small. Very few persons worked at the mine. John Petersen operated the mine. Had a currently trained person been available, John Petersen surely would have known who it was.

In addition, I find that the violation was serious. When accidents happen, rapid, knowledgeable, first aid can minimize debilitating consequences and can save lives. Without the presence of a currently trained person there was a greatly reduced chance an injured miner would receive timely help. The failure to ensure the presence of such a person was far more than a technical error, it was a violation that could have cost lives.

I further find that Tide Creek was negligent. Had the company exercised the care required, a currently trained person would have been available.

Citation No.	Date	30 C.F.R.§
7973905	9/28/99	56.5050

The citation alleges that the miner who was working at the jaw feeder was exposed to noise levels in excess of those allowed by the standard. Section 56.5050(a) sets forth permissible levels of exposure and section 56.5050(b) provides that when a permissible level is exceeded, feasible administrative or engineering controls shall be implemented by the operator.

The inspector testified that Robert Petersen was the miner who was tested for exposure to noise and that the dosimeter affixed to Petersen for an eight-hour shift measured an excessive noise level (Tr. 398). However, as Tide Creek accurately notes, evidence of exposure to an excessive noise level does not of itself establish a violation of the regulation. In *Callanan Industries, Inc.*, 5 FMSHRC 1900,1909 (November 1983), the Commission enumerated the elements the Secretary must prove to establish a violation of section 56.5050. They are:

> 1. Sufficient credible evidence of a miner's exposure to noise levels in excess of the limits specified in the standard;
>
> 2. Sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source;
>
> 3. Sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control;
>
> 4. Sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and
>
> 5. A reasoned demonstration that in view of elements 1- 4. . ., the costs of the control is not wholly out of proportion to the expected benefits.

The Secretary failed to meet all of the requirements of *Callanan*. The Secretary did not address whether there were engineering (or administrative) controls that could be applied to the source of the noise to achieve the required reduction and, if so, the costs and benefits of the controls. Therefore, I find the Secretary did not prove the alleged violation.

Citation No.	Date	30 C.F.R.§
7978137	9/29/99	50.30

The citation alleges that a copy of the quarterly employment and production report was not available at the mine for review by the inspector. Section 50.30, requires an operator to "maintain a copy of [each quarterly employment and production report] . . . at the mine office closest to the mine for five years."

The testimony focused on the company's failure to have the reports available for inspection. The inspector stated that when he requested the reports from the Petersens' daughter, Mary Ann Anderson, who told the inspector the reports were at the family's home, but she was not sure where (Tr. 410). She stated she would "have to look around the house to see if she could find [them]" (Tr. 412). The testimony was not controverted.

The standard requires the company to maintain copies of the reports at the mine office. Tide Creek asserted throughout the hearing that its effective mine office was the Petersen's nearby home. Mrs. Andersen, of whom the request was made, was acting on behalf of the company. Since she could not produce the reports upon request, they were not "available" where and when the regulation requires, and the regulation was violated.

I agree with the inspector that this was not a serious violation. The inspector described it as a "paperwork violation" (Tr. 413). I also agree that the company's negligence was low. As Mrs. Anderson told the inspector, the illness of Mrs. Petersen's mother disrupted the household and the family's management of its business, and I find that this mitigated the company's lack of care (Tr. 412).

DOCKET NO. WEST 2000-519-M

Citation No.	Date	30 C.F.R.§
7978122	9/27/99	56.18002(b)

The citation alleges Tide Creek had no records of examinations of working places. Section 56.18002(a) requires each working place to be examined once each shift. Section

56.18002(b) requires the records of the on-shift examinations to be kept for one year and be made available to the inspector on request.

I conclude that the violation existed as charged. The inspector testified without contradiction that when he requested the records, he was told by John Petersen that the records were not at the workplace (Tr. 128). The standard requires the records to be produced when the inspector asks. They were not, and the standard was violated. The violation was not serious, however, in that the records later were found.

Tide Creek asserts that John Petersen is dependent upon others to handle his paperwork, particularly his wife, who could not work from August 1999 until the late Summer of 2000. The company also asserts that Robert Petersen, not John, was the keeper of the records (Resp. Br. 57).

These arguments have no bearing on the existence of the violation, but they impact the negligence of the company. As previously noted, the request to see the records came at a time when the Petersen household was disrupted by the illness of Mrs. Petersen's mother. The Petersens were distracted and they could not devote their full attention to their business. While it is true that they then did not exhibit the care required of them, their lack of care was mitigated.

Citation No.	Date	30 C.F.R.§
7978124	9/27/99	56.14107(a)

The citation alleges that the belt conveyor's self cleaning tail pulley, which was located eight inches above ground level and between the frame of the jaw crusher, was not guarded to prevent contact.

The inspector testified that the fins on the pulley were accessible to miners working or traveling near the pulley because the fins were not more than seven feet from a travel-way or working place (Tr. 142). Tide Creek argues that there is nothing in the standard regarding the distance a moving machine part must be from a travel-way or work place and therefore the citation should be vacated. It also argues, that in any event, the tail pulley was more than seven feet from a walkway or workplace as evidenced by its exhibits (Resp. Br. 58).

I find that the violation existed as charged. Tide Creek did not challenge the inspector's testimony that a physical guard did not separate the tail pulley from the surrounding area. Nor did it challenge his assertion that the fins on the pulley could cause injury to any miner who contacted them (*See* Tr. 143-144). As I noted previously, section 56.14107(b) recognizes that moving machine parts can be guarded by distance by exempting physical guards where "exposed moving parts are at least seven feet away from walking or working surfaces." The inspector testified that the pulley was less than seven feet from the ground (Tr. 142) and that "a person could walk right

up to the side of the tail pulley" (Tr. 145). He believed that because the pulley was located between the frame of the jaw crusher, access to the pulley, while possible, was not easy (*Id.*).

There is no testimony in the record controverting the inspector's contention that the physically unguarded tail pulley could be accessed by a person who walked up to it, and I find that the unguarded pulley was within seven feet of a walking surface, and that a guard was required.

There also is no testimony controverting the inspector's opinion that the location of the tail pulley meant that it was not likely to be touched by miners (Tr. 145). Therefore, I find that although a fatality easily could have resulted if a miner was caught in the pulley, the relatively inaccessible location of the pulley meant that the chance an accident would happen was remote and the violation was not serious.

Finally, the inspector testified the relatively inaccessible location of the tail pulley mitigated Tide Creek's negligence (Tr. 147). Again, I agree and conclude that the violation was not caused by an undue lack of care but rather by the company's mistaken, but good faith belief that because of the pulley's location, physical guarding was not required.

Citation No.	Date	30 C.F.R.§
7978125	9/27/99	56.12032

The citation alleges the cover plate was missing on the 480-volt electrical termination box for the drive motor of the shaker screen. Section 56.12032, requires that "cover plates on electrical equipment and junction boxes . . . be kept in place at all times except during testing or repairs." John Petersen admitted that the plate was not in place (Tr. 330). No testing or repair of the equipment was in progress. Therefore, I conclude the company violated the standard.

Tide Creek asserts that this violation was not hazardous. It argues that because the crusher's electrical system was grounded, there was no danger that anyone would be shocked (Resp. Br. 61). I agree that the violation was not serious, but for reasons other than those advanced by the company. First, the fact that the crusher's electrical system was grounded did not necessarily diminish the chance that someone would be injured due to the violation. Tide Creek did not establish the efficacy of the grounding system. John Petersen stated at trial that the company had tested the grounding system on several occasions. However, when he was asked to produce the test reports, the most current record he could find was dated 1997. There is no way to determine from a 1997 test how safe the grounding system was in September 1999.

Moreover, the lack of a cover plate meant that a person inadvertently could contact wires inside the termination box. If the insulation on the wires was defective or if the leads were

exposed, a person could have been seriously injured or worse. However, the Secretary did not establish that the insulation on the wires inside the box was faulty, nor did she offer testimony regarding otherwise exposed electrical components inside the box. Further, very few miners came near the box during the course of their work. For these reasons I find that the violation presented little chance of injury.

John Petersen explained that the cover plate was affixed to the box by a single bolt and that he was unaware the bolt had become dislodged. He also testified that the wires inside the box did not short-out when the cover plate was off, and he therefore was not alerted that the cover plate was missing (Tr. 324-325). I find, however, that the violation was the result of the company's negligence. John Petersen knew the cover plate was attached by one bolt. Since failure of the bolt meant the plate's loss, the exercise of due care required the bolt and plate to be checked periodically. Tide Creek did not check. Rather, it apparently relied on a short circuit of the wires inside the box to signal the lack of a cover plate. This was inadequate care.

Citation No.	Date	30 C.F.R.§
7978129	9/28/99	56.14101(a)(3)

The citation alleges that the service brakes on the rear axle of a haulage truck were not functional. Half of the right rear brake cam was missing and both back brakes were disconnected. The truck was used to haul rock from the crushing plant area to the stockpile area. As has been noted, section 56.14101(a)(3) requires all of the braking systems on self-propelled mobile equipment to be maintained in functional condition.

I find the violation existed as charged. John Petersen indicated that he was aware the rear service brakes were disconnected (Tr. 176). Because the brakes were not connected, they could not function (Tr. 176). The citation states the front service brakes alone could hold the truck with a typical load, however, the standard requires all brakes to be maintained in functional condition and the fact that the front brakes were fully functional does not vitiate the violation.

This was a serious violation. John Petersen testified the rear brakes were disconnected because he was afraid mud would enter the braking mechanisms and cause the brakes to lock (Tr. 176-177). However, disabling the rear brakes meant that if the front brakes malfunctioned, then no service brakes were available to stop the truck. This seriously endangered both the driver of the truck and any miners in its path.

I conclude, as well, that Tide Creek was negligent. John Petersen knew that the brakes were disconnected (Tr. 176). As I have stated previously, if he believed compliance with the standard actually diminished safety, John Petersen should have filed a petition for its modification

with the Secretary (30 U.S.C. § 811(c)).

Citation No.	Date	30 C.F.R.§
7978132	9/28/99	56.14101(a)(2)

The citation was issued because the parking brakes on a haulage truck were not capable of holding the truck without a load on the elevated haulage road leading to the feeder. The truck was used to haul material from the rock crushing plant to the feeder. The inspector testified he tested the parking brakes of the truck when the truck was unloaded and found that the brakes would not hold the truck (Tr. 215). He also testified that he believed the truck regularly traveled the road uphill to the feeder, although he never actually observed the loaded truck make the trip (Tr. 215).

Section 56.14101(a)(2) requires parking brakes on self-propelled mobile equipment to be able to hold the equipment with its typical load on the maximum grade it travels. I find that the violation existed as charged. The inspector's testimony that the brakes would not hold the truck when it was unloaded was not refuted. If the parking brakes would not hold the truck without a load, they surely would not hold a loaded truck. Further, the inspector's testimony that the truck traveled up the road to the feeder was not disputed. The inspector's testimony was essentially corroborated by John Petersen who confirmed at times the truck did travel up to the feeder (Tr. 353-354).[4]

The inspector was not specific about where on the road the parking brakes were tested, but it can be assumed it was on a grade since a test on level ground would have revealed nothing about the ability of the parking brakes to hold the truck. Further, since the brakes would not hold the truck on the grade where the test occurred, it logically follows that they would not hold the truck on the maximum grade the truck traveled.

The inspector was concerned that if the parking brakes were set and the truck was parked on an incline, it could roll and hit someone. He agreed, however, that the service brakes held the truck on an incline and that this diminished the gravity of the violation (Tr. 216-217). I find the violation was not serious. It was unlikely that the truck would have been parked on an incline. The most likely use of the parking brakes on an incline would have been to assist in holding the loaded truck once it stopped on the grade. Since, the service brakes alone were capable of holding the loaded truck on a grade, I agree with the inspector that an accident was unlikely to occur as a result of the violation.

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[4] I also note that although John Petersen at first asserted the truck was not in use, he later said it could have been used as recently as two or three days before the inspection.

The inspector believed correctly that Tide Creek was negligent. The defective brakes should have been reported, and they were not (Tr. 217). Had Tide Creek meet the standard of care required, the parking brakes would have functioned properly or the truck would have been removed from service.

Citation No.	Date	30 C.F.R.§
7978133	9/28/99	56.14101(a)

The citation was issued because of air leaks in the left front brake cam and in the air line to the right rear brake on the same truck that was the subject of the previous citation. The inspector testified that he tested the air lines on the truck and found that they were leaking so that as the brakes were applied they lost some of their effectiveness (Tr. 221-222). Section 56.14101(a) requires that "[a]ll braking systems . . . on . . . [self-propelled mobile] equipment . . . be maintained in functional condition." Tide Creek conceded that the air leaks existed, and in so doing admitted the braking system on the truck was not fully functional. I find there was a violation as charged.

The inspector explained what he feared could happen, "[I]f you were going down a hill in the truck and you continued to loose air pressure, you would loose brakes" (Tr. 222). Still, he stated that despite the leaks, there was sufficient air pressure to stop the truck (Tr. 223). This greatly reduced the possibility of an accident, and I find that the gravity of the violation was less than serious.

I further find that Tide Creek was negligent in allowing the violation to exist. Not only should the driver of the truck have noticed and reported that the brakes tended to fade (a sign of leaking air lines), but the leaking air was audibly obvious (Tr. 224).

Citation No.	Date	30 C.F.R.§
7978136	9/28/99	56.14100(d)

The citation was issued because when the inspector asked John Petersen to see the records of defects on self-propelled mobile equipment, Petersen did not show him any (Tr. 225). Section 56.14100(d) requires uncorrected, safety-affecting defects on self-propelled mobile equipment to be reported to and recorded by the operator. The standard also requires that the records be kept at the mine or the nearest mine office and that they be made available for inspection by the inspector. The company does not dispute that Petersen did not show the

inspector the records when the inspector asked. I find that the violation existed as charged.

The inspector did not believe this was a serious violation (Tr. 225). The failure to have the records available for review was unlikely to result in or to contribute to a miner's injury. However, Tide Creek was negligent in failing to produce the records. Tide Creek stated in its brief that it has been keeping such records for years (Resp. Br. 65). If so, it should have known that their availability also was required.

DOCKET NO. WEST 2001-76-M

Citation No.	Date	30 C.F.R.§
7978121	9/27/99	56.12028

The citation alleges that the company failed to conduct yearly continuity and resistance testing of grounding systems. Section 56.12028 requires such testing annually after grounding systems have been installed. It also requires records of the test be made available to an inspector. Tide Creek argues that testing was done but admits that it was not done annually (Resp. Br. 74). (The inspector testified that the system had been tested last on March 10, 1997, (Tr. 547)). Also, it does not dispute the fact that it had no records available to show the inspector. Therefore, I find that a violation of the cited standard existed.

The inspector properly determined that the violation was not serious. The Secretary did not offer any testimony to refute the company's contention that the facility never has experienced electrical continuity problems. The fact that the mine has no history of continuity malfunctions lessens the chance that the violation would result in an injury. (I note in passing that the company had undertaken at least a partial test of the grounding system in June 1999 (Tr. 547), and no problems were detected.)

With regard to the company's negligence, the inspector observed that Tide Creek had been cited previously for a similar violation (Tr. 549). Tide Creek did not disagree, and I find that it knew annual testing and record keeping were required. It's failure to comply was due to its negligence.

Citation No.	Date	30 C.F.R.§
7978134	9/28/99	56.14132(a)

The citation alleges that the horn on a front-end loader did not work when tested. The inspector testified that he asked the operator of the front-end loader to activate the horn by pushing the horn button. The operator did as requested, and the horn did not work (Tr. 552). Section 56.14132(a) requires manually operated horns on self- propelled mobile equipment to be operable. The violation existed as charged.

The violation was not serious. The loader was operating in an area where few other pieces of equipment and few other miners were present. The loader operator had unrestricted frontal visibility. He could slow, stop, or redirect the vehicle if he saw a miner or a piece of equipment come into the loader's path. That the horn was not operating was unlikely to cause or contribute to an accident.

However, the company was negligent. It was easy to determine that the horn did not work and the violation should have been discovered during the required pre-shift examination of the equipment. Had the company exercised the care required, the horn would have been repaired or the loader would have been removed from service until the horn was repaired.

Citation No.	**Date**	**30 C.F.R.§**
7978135	9/28/99	56.14101(a)(2)

The citation alleges the parking brakes on the same front-end loader were incapable of holding the loader without a load on the elevated haul road in front of the load out bunkers for the rock crushing plant. The inspector testified he saw a miner set the front-end loader's parking brakes on a grade. He described the grade as "a little elevated area" and he testified that the loader had been operating in the area (Tr. 559). The brakes did not hold the loader which rolled until it came to a level area, or until the operator applied the service brakes (Tr. 555-556).

As has been noted, the standard requires parking brakes to be able to hold self-propelled mobile equipment with its typical load on the maximum grade it travels. Inadequate testimony was elicited by the Secretary to support the alleged violation. There was no testimony about the maximum grade the front-end loader traveled, nor was there any testimony about whether or not the bucket was loaded. While I might have been able to infer that the parking brakes could not hold the loader on its maximum grade since they could not hold it on a slight grade, I can make no such inference about the equipment's "typical load." There was no testimony about whether the bucket contained a load, nor about what a "typical load" might be. The loader might have been carrying nothing; it might have been carrying its typical load; or, it might have been carrying more than its typical load. Since there is no way to determine from the record whether the parking brakes were "capable of holding the equipment with its typical load", I conclude that the Secretary did not prove the alleged violation.

ABILITY TO CONTINUE IN BUSINESS

The operator bears the burden of proof as to the effect of a civil penalty on its ability to continue in business. In the absence of such proof, the judge will presume that no adverse affect will occur. Tide Creek argues that paying the proposed civil penalties will have a detrimental affect on its ability to continue operating. Steven Brittle, a licenced CPA, appeared as a witness for Tide Creek (Tr. 478). He has been the company's accountant for many years.

Mr. Brittle described the company as "a struggling entity attempting to achieve success" (Tr. 478). He stated that he believes the company's continued existence is precarious, and he described the company as being in a "survival mode" (*Id.*). He testified that due to diminished sales, the company's owners continually must lend the company money to meet its payroll (Tr. 477-478). The company's income between 1994 and 1999 (the last year in which a federal income tax return was filed [5]) ranged from a low of $143,788 to a high of $278,181 (Tr. 469). Since 1999, the company has suffered an increasingly severe financial impact due to continually lower sales and to the intermittent nature of those sales (Tr. 467). As a result, the company has no steady source of income.

The company's principle current asset is its equipment, but Mr. Brittle maintained some of the equipment only has scrap value (Tr. 478). In his view, any additional costs to the company will have a "very severe" impact on the company's viability and will mean that the owners will have to put even more money of their own into the company. Mr. Brittle stated that if the owners do not continue to give the company out-of-pocket subsidies, the business, "is not going to survive (Tr. 477). However, Mr. Brittle also was of the opinion that the company might be able to pay the assessed penalties, if payments are contingent on the company first generating a positive revenue (Tr. 484).

The Secretary argues that Mr. Brittle's testimony is unreliable because it was based on documents supplied by Tide Creek and because Mr. Brittle has not visited the mine in several years. I reject these arguments. All in all, he was a persuasive and credible witness. There is nothing remarkable in the fact that Mr. Brittle used Tide Creek's documents. CPAs usually rely on financial information and documents furnished by their clients (*See* Tr. 481). Nor do I find the fact that Mr. Brittle has not been to the mine in several years to detract from the credibility of his testimony. Mr. Brittle has worked as a CPA for the company since the mid-1970's. Among other things, he has prepared the company's tax returns. Certainly, he is privy to the company's financial information and informed about its fiscal situation, the topics about which he testified.

The fiscal picture of Tide Creek that emerged from Mr. Brittle's testimony is not encouraging. He made clear that since 1999 the company's financial situation has deteriorated, a

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[5] The company received an extension for filing its year 2000 tax return (Tr. 469).

fact underscored by John Petersen's undisputed testimony that he has cashed in his life insurance policies to fund the company (Tr. 479). Based on his description of the company's fiscal situation, I accept Mr. Brittle's opinion that to become financially healthy, the company must sell more product and must do so on a regular basis—something that has yet to happen.

Therefore, I conclude Tide Creek has met its burden of proving that the civil penalties assessed herein will have a detrimental affect on its ability to continue in business. To lessen that affect, I will assess lower penalties than otherwise would be warranted. In addition, Tide Creek may pay penalties on a structured basis. Structured payments should make it easier for the company to manage the new debt the penalties represent. However, I will not implement Mr. Brittle's suggestion that the structured payments be conditioned on increased sales. Nothing in the Act warrants making payments dependent on future revenue.

SIZE

As stated at the beginning of this decision, the company is small in size.

GOOD FAITH ABATEMENT

There were four instances in which the Secretary issued orders to the company for failing to abate within the time as originally set. In one instance, Citation No. 7978127 (Docket No. WEST 2000-437-M), I have found that extenuating circumstances excused the company's lack of timely compliance. In the other three: Citation No. 7978121; Citation No. 7978134; and Citation No. 7978135 (Docket No. WEST 2001-76-M), the Secretary subsequently vacated the orders. I, therefore, conclude in all instances the company complied in good faith.

HISTORY OF PREVIOUS VIOLATIONS

At the hearing, counsel for the Secretary stated that the company had no applicable history of previous violations, and I so find (Tr. 568-569).

CIVIL PENALTY ASSESSMENTS

DOCKET NO. WEST 2000-368-M

Citation No.	Date	30 C.F.R.§	Proposed Assessment

7973902	9/27/99	56.12008	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given fact that the proposed assessment adversely will affect the company's ability to continue in business, that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

DOCKET NO. WEST 2000-437-M

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978127	1/27/00	56.14101(a)(3)	$371

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that extenuating circumstances excused its lack of timely compliance; and that the company lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate.

DOCKET NO. WEST 2000-446-M

Citation No.	Date	30 U.S.C.§	Proposed Assessment
7973999	1/19/00	814(b)	$600

At the hearing the Secretary explained that this citation has been vacated (Tr. 16-17). Therefore, no penalty is assessed.

DOCKET NO. WEST 2000-519-M

Citation No.	Date	30 U.S.C.§	Proposed Assessment
7978122	9/27/99	56.18002(b)	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's mitigated negligence. Given these criteria, and given fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $25 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978123	9/27/99	56.14107(a)	$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that the company lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate for this violation.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978124	9/27/99	56.14107(a)	$188

I have found the violation was not serious. I also have found that it was the result of Tide Creek's mitigated negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small, that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $25 is appropriate for this violation.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978125	9/27/99	56.12032	$264

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978126	9/27/1999	56.14103(b)	$66

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978129	9/28/99	56.14101(a)(3)	$55

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate for this violation.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978130	9/28/99	56.14132(b)	$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate for this violation.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978131	9/28/99	56.14107(a)	$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given fact that the proposed assessment adversely will affect the company's ability to continue in business, that the company is small, that it exhibited good faith in abating the violation, and that the company lacks an applicable history of

previous violations, I conclude an assessment of $70 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978132	9/28/99	56.14101(a)(2)	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978133	9/28/99	56.14101(a)	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978136	9/28/99	56.14100(d)	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

DOCKET NO. WEST 2000-561-M

Citation No.	Date	30 U.S.C.§	Proposed Assessment
7973901	9/27/99	56.11001	$215

I have found the violation was serious. I also have found that it was the result of Tide Creek's lessened negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $60 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7973904	9/28/99	56.18010	$162

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7973905	9/28/99	56.5050	$215

I have found that the Secretary did not prove the violation. No civil penalty is assessed.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978137	9/29/99	50.30	$66

I have found the violation was not serious. I also have found that it was the result of Tide Creek's mitigated negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $25 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978438	3/29/2000	56.9301	$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978439	3/29/2000	56.9300(b)	$90

I have found the violation was serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $70 is appropriate.

DOCKET NO. WEST 2001-76-M

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978121	9/27/99	56.12028	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment

7978134	9/28/99	56.14132(a)	$55

I have found the violation was not serious. I also have found that it was the result of Tide Creek's negligence. Given these criteria, and given the fact that the proposed assessment adversely will affect the company's ability to continue in business; that the company is small; that it exhibited good faith in abating the violation; and that it lacks an applicable history of previous violations, I conclude an assessment of $40 is appropriate.

Citation No.	Date	30 C.F.R.§	Proposed Assessment
7978135	9/28/99	56.14101(a)(2)	$55

I have found that the Secretary did not prove the violation. No civil penalty is assessed.

ORDER

Tide Creek's motion to dismiss Docket No. WEST 2000-446-M is **GRANTED**. Citation No. 7973905 (Docket No. WEST 2000-561-M) and Citation No. 7978135 (West 2001-76-M) are **VACATED**.

Further, Tide Creek **IS ORDERED** to pay the following penalties on the structured basis set forth below:

Docket No. WEST 2000-368-M	$ 40
Docket No. WEST 2000-437-M	70
Docket No. WEST 2000-446-M	0
Docket No. WEST 2000-519-M	530
Docket No. WEST 2000-561-M	260
Docket No. WEST 2001-76-M	80
Total:	**$980**

Tide Creek shall pay $330 within 30 days of the day of this decision, $325 on or before June 24, 2002, and $325 on or before September 24, 2002.

David F. Barbour
Chief Administrative Law Judge

Distribution:

Matthew Vadnal, Esquire, Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Agnes Petersen, Esquire, Tide Creek Rock, Inc., 33625 Tide Creek Road, Deer Island, OR 97054

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