FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, Suite 1000
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

September 13, 2000

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2000-44-M A. C. No. 45-03086-05512
v.	:	
ALAN LEE GOOD, an individual doing business as GOOD CONSTRUCTION, Respondent	:	Good Portable Crusher
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 2000-149-M A. C. No. 45-03086-05513
v.	:	
GOOD CONSTRUCTION, Respondent	:	Good Portable Crusher

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, on behalf of Petitioner;
James A. Nelson, Esq., Toledo, Washington, on behalf of Respondent.

Before: Judge Melick

This case is before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. the "Act" charging Alan Lee Good doing business as Good Construction (Good) with 10 violations of mandatory standards and seeking civil penalties of $854.00 for those violations. The general issue before me is whether Good violated the cited standards as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under section 110(i) of the Act.

Alleged Violations of 30 C.F.R § 56.14107(a)

This standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and take up pulleys, fly wheels,

couplings, shafts, fan blades and similar moving parts that can cause injury." This standard is alleged to have been violated in Citations No. 7974337, 7974340, 7974341, 7974342 and 7974343.

Respondent maintains in its post hearing brief that all of the cited areas had been inspected "many, many times before by a fairly large and representative number of MSHA inspectors over a period of 18 years or more and they had all considered these areas to be adequately guarded". Respondent argues that therefore the citing inspector herein was either "out of line" or the cited standard is unconstitutionally vague. Respondent raises questions that seem to arise with some frequency with a change of MSHA inspectors. Moreover Respondent could very well have prevailed in it's argument if any of those inspectors had offered credible testimony at trial that he had inspected the precise areas now cited and found those areas adequately guarded. Without such testimony however I find the allegations to be without necessary factual support.

In these cases the credible testimony of the citing inspector, who, it may be inferred is a reasonably prudent person familiar with the mining industry and protective purposes of the standard, is sufficient to meet the criteria set forth in *Ideal Cement Co.* 12 FMSHRC 2409, 241 (November 1990); and *BHP Minerals Int'l Inc.*, 18 FMSHRC 13342 (August 1996). The standard as applied here has not therefore been shown to be unconstitutionally vague.

Citation No. 7974337 charges as follows:

> The unguarded rollers on the roll crusher exposed workers to the hazard of moving machine parts. The rollers could be contacted by a worker standing on the work platform beside the rollers. The rollers where a worker could contact them were five (5) feet off the floor of the platform and the roll crusher was mounted on and within arms reach of this inspector. The foreman stated the moving machine parts of the crusher had passed previous MSHA inspections. Moving machine parts shall be guarded to protect persons from contacting the moving machine parts and causing injury.

Inspector Terry Miller of the Department of Labor's Mine Safety and Health Administration (MSHA) was performing a regular inspection at the Brown Road Quarry on June 29, 1999. According to Miller the cited roll crusher was located on a portable flat bed trailer with exposed roll crushers only two feet from where he was standing. The crusher was used to size rock as it passed through the rollers. Miller testified that he could reach and touch the moving parts while standing next to it, located 5 to 6 feet off of the platform. He noted that there was a handrail in front of the cited area but there was nothing to prevent him from touching the rollers. He discussed the violation with foreman Ken Gates who accompanied him on this inspection and according to Miller, Gates agreed that Miller was able to reach and touch the rollers. According to Miller, Gates responded only that the area had been inspected previously. Miller assessed the gravity of the violation as "unlikely" based upon representations that the

machinery was turned off to perform maintenance and servicing. According to Miller, there would be no other reason for persons to be on the platform and subject to exposure to the hazard unless there was a breakdown or the machinery was out of adjustment. Miller's conclusions that the violation was, in effect, of low gravity are not disputed.

Miller also found that the violation was the result of "moderate" negligence based on his belief that there were "no mitigating circumstances". He accepted Gates's explanation that based on previous inspections, Gates thought the roller had been satisfactorily protected. Gates testified that the areas here cited had been previously inspected twice a year for the previous eight years and had never previously been cited. Within this framework I conclude that Gates could therefore have entertained a good faith and reasonable (but mistaken) belief that he was not in violation as charged herein and that therefore the operator is chargeable with but little negligence.

Citation No. 7974740 charges as follows:

> The guarded 'V' belt drive for the cone crusher created a hazard for workers in the plant area. The 'V' belt drive was located under the trailer/platform the cone crusher was mounted on. The hazard was located approximately five (5) feet off ground level. A worker could access the hazard by ducking under the edge of the platform the crusher was mounted on and walking over to the 'V' belt drive pulley. The side of the platform where a worker could duck under to access the hazardous condition was approximately five (5) feet off ground level. Moving machine parts shall be guarded to protect persons from contacting them and causing an injury.

Inspector Miller observed that the cited cone crusher was located on a separate trailer from the roll crusher and there was no guard on the bottom of the V-belt drive. He observed that the cited area lay beneath the trailer where persons might be exposed if they checked a damaged belt. The V-belt drive was about 1 foot wide and passed 1 foot beneath the trailer bed. Miller asked Gates why there was no guard at that location and Gates purportedly responded that it had been guarded before. Miller acknowledged that the gravity was low and considered an injury "unlikely". He observed that very few people would be present in the cited area but that if an accident would occur it could result in permanently disabling injuries. Miller's findings of low gravity are undisputed and I therefore accept those findings. For the reasons previously stated with respect to Citation No. 7974337, I conclude that the violation was also the result of little negligence.

Citation No. 7974341 charges as follows:

> The unguarded tail pulley on the belt under screen for the cone crusher created a hazard to workers. The self cleaning tail pulley was six (6) feet off ground level. The tail pulley was located in the middle of the platform/trailer and was accessible

by ducking under the side of the platform and walking over to the tail pulley. The side of the platform where a worker could duck under and access the tail pulley was five (5) feet high. Workers perform scheduled maintenance on the plant daily. The foreman stated all the equipment is turned off before and any work is performed on the equipment. Moving machine parts shall be guarded to protect persons from contacting them and causing injury.

According to Inspector Miller the cone crusher also had an unguarded tail pulley i.e., the idler pulley, which was located 4 feet to 5 feet off the ground and beneath the platform. The pulley was 3 feet wide and 2 feet within the platform. Miller found that injury was "unlikely" because the area was not ordinarily accessed while the equipment was operating. Under the circumstances, a finding of low gravity is warranted. For the reasons previously stated with respect to Citation No. 7974337 I also find operator negligence to be low.

Citation No. 7974342 charges as follows:

> The inadequate guard on the tail pulley exiting the double deck screen exposed workers to the hazard of moving machine parts. The tail pulley was three (3) feet off ground level. The top of the pulley was well guarded. The lower back side of the pulley and the bottom of the pulley were exposed. The sides of the pulley could also have been accessed by a worker. Scheduled maintenance is performed on the plant daily. The foreman stated no work is performed on the equipment until the equipment is turned off. Moving machine parts shall be guarded to protect persons from contacting them and causing injury.

According to Inspector Miller, the double deck screen, which is used for sorting and sizing rock, had a deficient guard on its tail pulley so that a person could reach beneath the guard. He observed that the pulley was three feet above ground level and protruded beyond the machinery. Miller concluded that any injury was "unlikely" and that the only exposure to the hazard would be while servicing, inspecting or shoveling around the equipment. The violation was accordingly of low gravity. For the reasons previously stated with respect to Citation No. 7974337 I also find the operator chargeable with only low negligence.

Citation No. 7974343 charges as follows:

> The inside of the flywheel for the jaw crusher was unguarded. The unguarded part of the flywheel was two (2) feet out of the walkway used by the crusher operator to access the crusher control booth. The flywheel went between two (2) and (7) seven feet high where a worker could slip/trip and possibly contact the moving machine parts and be injured. The flywheel was usually running when the crusher operator accessed the walkway to enter/exit the control booth. Moving machine parts shall be guarded to protect persons from contacting them and causing injury.

Inspector Miller testified that the cited jaw crusher was a separate piece of mobile equipment. Miller opined that the fly wheel had an ineffective guard and the exposed area was adjacent to a walkway access ladder. The flywheel was about five feet in diameter and one foot wide. According to Miller, employees would pass this area on the way to the work station on the second level and it was as close as two feet from the walkway to the exposed flywheel area. I accept Miller's testimony as credible and, under the circumstances, I conclude that the violation is proven as charged.

The Secretary also alleges that the violation was "significant and substantial". A violation is properly designated as "significant and substantial" if, based on 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. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained:

> 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 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.

See also Austin Power Inc. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

In this regard Inspector Miller testified that since the equipment operator passed this area several times a day he was thereby frequently exposed to the hazard. In addition he noted that the crusher operator would check the conveyor periodically and there was no other means of access to the operator's compartment other than to pass the area of exposure. Miller concluded that fatal injuries "might" occur should the operator get caught in the flywheel. According to Miller his whole body would likely be pulled into the flywheel and crushed. Based on this testimony it may be inferred that it would be reasonably likely that reasonably serous injuries would occur. I find this evidence to be credible and I indeed conclude by inference that the violation was "significant and substantial" and of high gravity. For the reasons previously stated

with respect to Citation No. 7974337 I find the operator chargeable with low negligence.

Citation No. 7974336 alleges a violation of the standard at 30 C.F.R. § 56.14101(a)(3) and charges as follows:

> The inoperative park brake on the 88 Model Ford super duty shop truck exposed the operator and other persons int he pit to the hazard of possibly of being struck by unintentional movement of the truck. The truck was parked in the parking area next to the highwall above the pit where the crusher was located. The keys were in the truck, and the truck was ready for use. The foreman stated he did not know how long the park brake had been inoperative. The foreman also stated he did not know the last time the truck was used or when the truck would be used again. Braking systems installed on mobile equipment shall be maintained in a functional condition.

The cited standard 30 C.F.R. § 561401(a)(3), provides that "[a]ll braking systems installed on the equipment shall be maintained in functional condition."

Respondent does not deny that the cited parking brake was indeed inoperative on the 1988 model Ford Super Duty shop truck or that the keys were in the truck and that the truck could be used but argues that only equipment to be operated during a shift needs to be inspected on any given day. In support of its argument Respondent cites certain qualifying language in a different regulatory standard from that cited herein. Since the standard at issue herein, 30 C.F.R. § 56.14101(a)(3), does not contain any such qualifying language Respondent's argument is without merit. The cited standard requires proof only that a braking system on the truck was not maintained in a functional condition. Under the circumstances the violation is proven as charged. The Secretary's allegations that an injury or illness was unlikely and that the violation was a result of moderate negligence is undisputed and supported by the record. Gravity is therefore low.

Citation No. 7974338 alleges a violation of the standard at 30 C.F.R. § 56.11002 and charges as follows:

> No Handrails on the elevated platform where the roll crusher was mounted exposed workers to the hazard of possibly falling from the platform and being injured. The platform was six (6) feet off ground level. The ground under the platform where a worker would fall to was level and covered with pit run material. One worker accessed the platform daily to perform scheduled maintenance on the roll crusher. Elevated working and travel areas shall be provided with handrails and maintained in good condition.

The cited standard, 30 C.F.R. § 56.11002, provides as relevant hereto that "crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition."

Respondent argues that there was no violation at this location because the cited area was an elevated platform and not a travelway. The Secretary in her post-hearing brief did not respond to this argument so the Secretary's position in this regard is not known. It may reasonably be inferred however, from the testimony of the citing inspector, that the cited area although described as a "platform" was of sufficient size to permit actual "walking". Accordingly I conclude that the elevated platform cited in this case was indeed an "elevated walkway" within the meaning of the cited standard. Respondent's argument herein is accordingly rejected. The violation is proven as charged. The Secretary's findings that an injury or illness was unlikely is not disputed. Accordingly I find gravity to be low. In light of the evidence that this operation had been inspected many times over a number of years without prior citation leads me to accept Respondent's argument that it therefore, in essence, had a reasonable and good faith belief that it was not in violation of the standard at this location. Accordingly I find only low operator negligence.

Citation No. 7974339 alleges a violation of the standard at 30 C.F.R § 56.11002 and charges as follows:

> No handrails on the elevated platform where the Ell-Jay cone crusher was mounted exposed workers to the hazard of possibly falling from the platform and being injured. The platform was six (6) feet off ground level. The ground under the platform where a worker would fall to was level and covered with pit run material. One worker accessed the platform daily to perform scheduled maintenance on the cone crusher. Elevated working and travel areas shall be provided with handrails and maintained in good condition.

Respondent again argues that the cited area was a "platform" and not a "travelway" and that it therefore does not come within the terms of the cited standard. It may reasonably be inferred from the testimony of the inspector that the elevated platform cited in this case was of sufficient size to permit walking and that accordingly it may be considered to be an "elevated of walkway" within the meaning of the cited standard. Accordingly Respondent's argument is again rejected. There is no dispute with the Secretary's findings of low gravity. I also find that the operator chargeable with low negligence in light of his apparent good faith and reasonable belief that there was no violation at the cited location based on the absence of any citation over many previous inspections.

Citation No. 7974344 alleges a violation of the standard at 30 C.F.R. § 56.14100(b) and charges as follows:

> The operative brake lights on the Michigan L-190 F.E.L. S/N 828A00073S could create a hazardous condition for persons in the pit/plant area. The operator stated he performed his pre-operational check before operating the F.E.L. But did not notice the brake lights being inoperative. An off road haul truck and another F.E.L. operated regularly in the pit/plant area as well as a third F.E.L. used occasionally. Customer and mine operator highway trucks also entered the mine

area and were loaded by one (1) of the F.E.L.'s. The inoperative brake lights could cause another mobile equipment operator in the pit to misjudge the movement of the F.E.L. and possibly cause an accident resulting in injury to a worker.

The cited standard, 30 C.F.R. § 56.14100(b), provides that "defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

Respondent argues that even assuming that the inoperative brake lights affected safety, those brake lights had been found to be working during a pre-operational check of the cited equipment by Kenneth Gates on the morning of the inspection. It is not disputed that the defect was caused by a short in the brake light wire adjacent to the light. The Secretary does not appear to dispute the testimony of Gates and argues only that the brake lights were not working at the time of the inspection. Under the circumstances I conclude that the Secretary has failed to sustain her burden of proving that the defect was not corrected in a timely manner within the meaning of the cited standard. Accordingly the Secretary failed to sustain her burden of proving a violation herein and the citation must be vacated.

Citation No. 7974345 alleges a violation of the standard 30 C.F.R. § 56.18002(a) and charges as follows:

> An effective work place examination, checking each working place at least once each shift, for conditions which could adversely affect health or safety, was not being performed at this operation. This was evidenced by the nine (9) citations issued during the regular inspection. five (5) citations for missing or inadequate guards, two (2) citations for missing handrails, one (1) citation for inoperative brake lights on mobile equipment, and one (1) citation for an inoperative park brake on mobile equipment. All of these conditions could have went [sic] undetected and uncorrected if not for the regular MSHA inspection. Any one of the uncorrected conditions could have resulted in injury to a worker.

The cited standard, 30 C.F.R. § 56.18002(a), provides as follows:

> A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health. The operator shall promptly initiate appropriate action to correct such conditions.

The testimony of Kenneth Gates is undisputed that he indeed performed the examinations required by the cited standard and indeed produced a copy of his examination performed on the date of the citation, i.e. July 1, 1999 (Exhibit R-7). Gates described the procedures he followed in making his inspections as follows:

> I inspect all things on the list here personally myself around the pit area and on individual time cards that are wrote [sic] by each employee at the mine site, they state on theirs on each day, they have a check list for their safety inspection for each piece of equipment which they operate, and if there's any problems with it, it's reported to me and then we usually right underneath this if it needs to be fixed or if can be fixed in that shift. If it can be fixed on that shift, it is fixed and it's not stated, but it is still on theirs, and if it is not fixed, I put it on, whether it be hazardous, it would be red tagged or shut down. (Tr. 89).

The citing inspector in this case acknowledged that indeed the required examinations were being conducted but it was his opinion that, because of the number of violations he found, the examinations were not effective.

While I cannot conclude, because of the lack of credible evidence, that any MSHA inspector had previously actually approved of the conditions cited in the instant case, I nevertheless conclude that, based on MSHA's prior failure to have cited these conditions, the operator had a reasonable and good faith belief that the conditions were not violative. Under these circumstances the failure of Mr. Gates to have noted these same conditions as hazardous in his examinations under the cited standard is not surprising. I cannot therefore conclude that Mr. Gates' workplace examinations were not effective. Under all the circumstances I conclude that the Secretary has not sustained her burden of proving a violation as charged in the instant citation and that citation must accordingly be vacated.

Civil Penalties

Under section 110(i) of the Act the Commission and its judges must consider the following criteria in assessing a civil penalty: the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In this case the gravity and the negligence of the operator has been discussed with respect to each violation. The evidence regarding the remaining criteria are common to all of the violations. It has been stipulated that Respondent had a history at the subject mine of three assessed violations during three inspection days in the approximate 24 month period before the violations at issue. Accordingly Respondent has a low history of violations. It has been also stipulated that the subject mine and its controlling entity had reported 11,857 hours worked in the calendar year prior to the violation at issue. Accordingly the subject operator is small in size. The Secretary acknowledges that each of the violations was corrected and abated within the time set forth in the citations. Accordingly this operator is entitled to full credit for its abatement efforts. There is no claim and no evidence that the penalties herein would have any affect on the operator's ability to continue in business. In the absence of such evidence there is a presumption

that indeed the penalties would have no effect on the operator's ability to continue in business.

ORDER

Citations No. 7974344 and 7974345 are hereby vacated. The remaining citations are affirmed and Good Construction is directed to pay the following civil penalties within 40 days of the date of this decision: Citation No. 7974336 - $55, Citation No. 7974337 - $55, Citation No. 7974338 - $55, Citation No. 7974339 - $55, Citation No. 7974340 - $55, Citation No. 7974342 - $55, Citation No. 7974343 - $200.

Gary Melick
Administrative Law Judge

Distribution: (Certified Mail)

William W. Kates, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

James A. Nelson, Esq., Attorney at Law, 205 Cowlitz, P.O. Box 878, Toledo, WA 98591

\nt