FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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October 31, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-543-M
Petitioner	:	A.C. No. 10-01827-05514
	:	
	:	Docket No. WEST 2000-544-M
v.	:	A.C. No. 10-01907-05511
	:	
	:	Docket No. WEST 2000-545-M
BECO CONSTRUCTION COMPANY, INC.,	:	A.C. No. 10-01907-05512
Respondent	:	
	:	CH1 and CH2 Crushers

DECISION

Appearances: Jay Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Merrily Munther, Esq., Penland Munther Goodrum, Boise, Idaho, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Beco Construction Company, Inc., ("Beco Construction"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Idaho Falls, Idaho. The parties filed post-hearing briefs.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Discussion of General Issues Raised by Beco Construction

Beco Construction operates the CH1 and CH2 portable crushers in Bonneville County, Idaho. MSHA Inspectors Curtis Chitwood and Robert Montoya inspected the CH1 crusher on May 18, 2000. The CH1 crusher is a portable crusher and screening plant that produces sand and gravel. This crusher operates two shifts a day, five days a week and employs three miners each shift. On May 16, 2000, Inspector Chitwood inspected the CH2 crusher. This facility also includes a crusher and screening plant that produces sand and gravel. It has the same shift schedule but employs four miners on each shift.

Beco Construction raised a number of general issues at the hearing and in its post-hearing brief. First, it argues that the Secretary failed to demonstrate that MSHA safety standards were violated because she did not establish that accidents could result from the cited conditions. It contends that an injury could only result from "an intentional act and it is impossible for an employer to guard against intentional acts." (B. Br. 2). Furthermore, Beco Construction maintains that the Secretary failed to establish that there was any likelihood of an injury to employees as a result of the cited conditions.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. The risk of injury and the appropriate penalty for each citation is discussed below.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Beco Construction's operations is not a defense because there is a history of such injuries at crushing plants throughout the United States. Fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ). The likelihood of injury for each citation is discussed below.

Beco Construction also correctly notes that the Secretary bears the burden of proving that a violation occurred. In this regard, it argues that where "discretion is involved in determining

whether a standard was violated, the relative experience of the inspector and employer are reasonable considerations, as is the company's history of work injuries." (B. Br. 2). I agree that the relative degree of knowledge and experience of a witness is a factor I must consider when determining how much weight to give to that witness's testimony. Nevertheless, I cannot vacate citations on the basis that Beco Construction has not had any serious workplace injuries.

Beco Construction also argues that "[t]raining is a valid means of abating some working conditions." *Id.* All of the citations in these cases were rapidly abated in good faith. The method used to abate the citations was not at issue at the hearing. Employee training may be relevant when considering the negligence of the mine operator when assessing reasonable penalties.

Finally, Beco argues that "MSHA should not be allowed to cite an employer for a condition which was not cited in a previous inspection and which has not changed, until notice and an opportunity to correct the condition has been provided." *Id.* The argument is that the Secretary should be equitably estopped from applying a safety standard to a particular condition if the condition has existed for a period of time without being cited by MSHA, unless prior notice is given. The Commission has held that equitable estoppel does not apply to the Secretary in Mine Act cases. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). In *King Knob*, the Commission stated that "approving an equitable estoppel defense would be inconsistent with the liability without fault structure of the 1977 Mine Act." *Id.* The Commission further analyzed the issue, as follows:

> Such a defense is really a claim that although the violation occurred, the operator was not to blame for it. Furthermore, under the 1977 Mine Act, an equitable consideration, such as confusion engendered by conflicting MSHA pronouncements, can be appropriately weighed in determining the appropriate civil penalty.

Id. at 1422.

The Commission recently provided additional guidance on this issue in the context of guarding citations in *Allen Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001). In that case, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Allen Good* at 1002. The moving machine parts were guarded, but the MSHA inspector determined that the guarding was insufficient. The Commission stated that, in determining whether a mine operator has received fair notice of the Secretary's interpretation of a broadly written safety standard, the judge should consider a number of factors. In addition to prior enforcement by MSHA inspectors, the judge should consider "the language of the standard, its purpose, its regulatory history, whether MSHA has published notices informing the regulated community of its

interpretation of the standard, and the facts of each violation to determine whether [the mine operator] would have had notice that the standard required the moving machine parts to be guarded entirely." *Allen Good* at 1006 (opinion of Commissioners Jordan and Beatty).

Both the CH1 and CH2 crushers are portable and have been moved to different locations in the recent past. As a consequence, although the crushers are set up in the same basic configuration at each location, moving machine parts may be more or less accessible at the different locations. Thus, the fact that a citation was not previously issued for the failure to guard a particular moving part may not be decisive in evaluating whether adequate notice was provided. This issue is evaluated in more detail below with respect to each applicable citation.

B. Citations Issued at the CH1 Crusher, WEST 2000-543-M

Citation No. **7982112** alleges a violation of section 56.14107(a), because a protective guard was not provided for the return roller located on the discharge conveyor belt under the Pioneer shaker screen. The citation states that the roller was 45 inches above the existing ground level. Inspector Chitwood determined that the violation was significant and substantial ("S&S") and was the result of Beco Construction's moderate negligence. Section 56.14107(a) provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting . . . drive, head, tail, and takeup pulleys . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $90 for this alleged violation.

The inspector testified that the return roller was running when he observed it. He measured the distance above the ground as 45 inches. (Tr. 29; Exs. P-1, R-1). He stated that if anyone were cleaning out accumulations near the roller, his clothing could become entangled in the pinch point, and he could be pulled into the moving parts and suffer serious injuries. (Tr. 28-34). He determined that it was reasonably likely that someone would be seriously injured as a result of this violation. He observed footprints within two feet of the roller. (Tr. 31).

Harvey Herbertson, the crusher supervisor, testified that an employee will shovel out accumulated material in the vicinity of the roller about once a day. (Tr. 232). A backhoe is then used to remove the shoveled material. He stated that the only way a person could come in contact with the moving belt or roller is if he crawled on his hands and knees under the shaker screen. (Tr. 233). Doyle Beck, president of Beco Construction, testified that an employee would not come in contact with the moving machine parts unless he intentionally crawled under the shaker screen. (Tr. 262). He stated that the area is shoveled on a daily basis. Mr. Beck testified that the employee who shovels up the material "would have to reach to the other side of the roller to collect all the material." (Tr. 264-65). Mr. Beck also stated that this area of the crusher has been previously inspected by MSHA at least three or four times and has never been cited. (Tr. 266). Finally, he testified that there have been no injuries caused by the cited condition.

There is no dispute that the return roller was not guarded and that it was about 3.75 feet above a working surface. It is also clear that the roller was a moving machine part. I credit the testimony of Inspector Chitwood that if someone were to come in contact with the roller or the

belt where it feeds into the roller, he could be pulled between the belt and the roller. Such an event could cause a serious injury. Beco Construction contends that such an injury could only occur if someone were to crawl under the shaker screen. I disagree. An employee shovels in the area while the belt is running. There is no dispute that the area where this employee works is an uneven surface. (Exs. P-1, R-1). He must reach to the other side with his shovel. An employee could lose his footing or stumble while in the area. He could then accidentally get his hand or clothing caught in the pinch point as he attempted to catch himself. These types of accidents have occurred at other sand and gravel operations.

The first issue is whether the cited condition is covered by the requirements of the safety standard. The language of the standard states that moving machine parts that can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. The language is quite broad, but return rollers are not specifically included. In the preamble to the final rule, the Secretary emphasized the broad construction of this safety standard. The preamble states:

> [T]he final standard requires the installation of guards to protect persons from coming into contact with hazardous moving machine parts. The standard clarifies that the objective is to prevent contact with these machine parts. The guard must enclose these moving parts to the extent necessary to achieve this objective.

53 Fed. Reg. 32496, 32509 (Aug. 25, 1988). The preamble further provides:

> Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions.

Id. In rejecting these comments, the Secretary stated that most injuries caused by moving machine parts occur when persons are "performing deliberate or purposeful work-related actions with the machinery" and that the installation of a guard would have prevented these injuries. *Id.* The Secretary stated that "[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts." *Id.* Thus, the Secretary provided notice to the regulated community that she would interpret this safety standard vary broadly to protect persons from coming into contact with moving machine parts and that the standard covers deliberate actions by employees.

The Secretary's Program Policy Manual ("PPM") provides additional information to the public about the Secretary's interpretation of safety standards. The PPM provides, in part, as follows:

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.
>
> Conveyor belt rollers are not to be construed as "similar exposed moving machine parts" under the standard and cannot be cited for the absence of guards and violation of this standard where skirt boards exist along the belt. However, inspectors should recognize the accident potential, bring the hazard to the attention of the mine operators, and recommend appropriate safeguards to prevent injuries.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57.14107 (2000) ("PPM"). Although the PPM is not binding on the Secretary it does provide the mining community with notice of MSHA's interpretation of her safety standards. The PPM explains that using chains to rail off exposed moving parts is not acceptable. This provision indicates that MSHA does not require that conveyor belt rollers be equipped with guards if skirt boards are present. Conveyor belt rollers are generally understood to be the rollers that support the belt where the material is being transported. The roller cited in this instance was a return roller which was under the conveyor and kept the belt from sagging as it returned to the head pulley.

I find that the Secretary established a violation. The language of the safety standard makes clear that moving machine parts must be guarded. Although return rollers are not specifically mentioned, I find that the return roller in this case was covered by the safety standard because it could easily be contacted. The language of the standard is broad enough to include this return roller. In addition, the regulatory history states that the "standard applies where the moving machine parts can be contacted and cause injury." 53 Fed. Reg. at 32509. Employees must shovel accumulations in the vicinity of the roller while standing on uneven ground while the roller is in motion. It is foreseeable that someone could slip and come in contact with the roller while trying to brace himself to prevent a fall.

The most difficult issue is whether the Secretary provided fair notice that the requirements of the safety standard applied to the cited roller. The language of the standard, its purpose, and the regulatory history support the Secretary's interpretation and support the application of the standard to the cited roller. They provided sufficient notice of the Secretary's interpretation to the regulated community. The only factor that supports Beco Construction's position is its allegation of prior inconsistent enforcement. Mr. Beck testified that this "same piece of

equipment I know has been at least through three or four inspections and has never been cited." (Tr. 266). I credit this testimony. The record establishes, however, that the CH1 crusher is moved around. Although the violation was readily visible when Inspector Chitwood inspected the crusher, it is not clear how visible it was during previous inspections. The fact that this roller was not previously cited does not establish that Beco Construction was not provided with sufficient notice of her interpretation of the safety standard given the clear direction given by the Secretary in the regulation, the preamble, and the PPM. This determination must be made on a case by case basis. I find that sufficient notice was provided by the Secretary in this instance.

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

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

In this instance, the exposed moving parts were about 3.75 feet above the walking surface. A measure of danger to safety was present that was contributed to by the violation. Assuming continued mining operations, it was reasonably likely that someone would come in contact with the moving machine parts while cleaning accumulations in the area. Such contact would contribute to a reasonably serious injury.

The fact that the Pioneer shaker screen had been inspected by MSHA at least three times and that the roller was not cited significantly reduces Beco Construction's negligence. It was reasonable for Beco Construction to rely on MSHA's past inspections. A penalty of $60 is appropriate.

Citation No. **7982113** alleges a violation of section 56.11012, because a section of metal flooring was missing from the walkway on the south side of the Cedar Rapids shaker screen. The citation states that the opening was eight feet long and eleven inches wide. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's moderate

negligence. The safety standard provides, in part, that "[o]penings above, below, or near travelways through which persons or objects may fall shall be protected by railings, barriers, or covers." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that employees would be on the walkway a few times a week for scheduled maintenance. (Tr. 40). Employees would gain access to the walkway by using a ladder. He testified that an employee could accidentally fall into the opening or drop tools through the opening. (Tr. 43-45). He testified that an accident of this type was unlikely. Mr. Beck testified that the opening was partially protected by its location. (Tr. 268). He stated that it was unlikely that anyone would accidentally injure himself at that location. Beck testified that the missing piece had fallen the day before the inspection and was scheduled to be repaired. (Tr. 269, 272). The ladder had been removed to keep people off the walkway until it was repaired. *Id.*

I find that the Secretary established a violation. The opening was present and, although the ladder had been removed, someone could retrieve the ladder to gain access to the area. The violation was not serious. Beco Construction's negligence was low because it was aware of the problem; it had removed the ladder; and it had scheduled it for repair. A penalty of $25 is appropriate.

Citation No. **7982115** alleges a violation of section 56.14107(a) because the head pulley on the cone discharge conveyor belt was not properly guarded to prevent accidental contact with the moving head pulley. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that Beco Construction had placed plastic fencing about two feet away from the head pulley to barricade the area in lieu of guarding the moving machine parts. (Tr. 51-52; Ex. P-4, P-4). He further testified that moving parts were present that, if contacted, could injure anyone who came in contact with them. (Tr. 49-51). The moving machine parts were about 39 inches above the ground. The inspector testified that the plastic fencing was not adequate because it was attached with wire so that if someone were to trip and fall into the fence, it would not protect him from the moving machine parts. (Tr. 52). He also indicated that someone could lean over the fence and come into contact with the moving pulley. Inspector Chitwood determined that an injury was unlikely, but that Beco Construction's negligence was high. He based his high negligence finding on the fact that he saw brackets on the frame supporting the pulley that indicated to him that the pulley had been guarded in the past. (Tr. 55-56,162-63).

Mr. Beck testified that no employees would have any reason to work in the vicinity of the head pulley and that the plastic fencing was put there to keep them away (Tr. 277; Ex. R-8). He stated that the plastic fencing was about 30 to 35 inches from the head pulley. (Tr. 278). Because the cited pulley was a head pulley, no shoveling would be required in the area. Beck

further testified that the brackets were present on the frame for the pulley because rods are sometimes attached to support the frame if it is suspended from the equipment above it. (Tr. 279). He stated that this pulley was never guarded. Indeed, Beck testified that Beco Construction received a citation for its failure to have a guard present and the plastic fencing was installed as a barricade in response to the citation to keep people away from the area.. (Tr. 280). Beck testified that the fence was accepted by the MSHA inspector in lieu of a guard to abate the citation. *Id.* I credit Mr. Beck's testimony with respect to this citation.

Based on the Commission's decision in *Allen Good*, I vacate this citation. Although the safety standard was broadly written to include head pulleys, the Secretary did not provide adequate notice to Beco Construction that the fence it had installed to barricade the pulley was no longer sufficient to meet the requirements of the safety standard. One of the fundamental principles of due process requires that when "a violation of a regulation subjects private parties to criminal or civil penalties, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Allen Good* at 1004 (citations omitted). In this instance, although the intent of MSHA is reasonably clear in the safety standard and regulatory history, the agency directly misled Beco Construction as to what is required. By accepting the fencing to abate a previous violation, MSHA gave notice to Beco Construction that the fence met the requirements of the safety standard. To determine whether an operator received fair notice of the agency's interpretation, the Commission asks "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard." *Id.* (citation omitted). In Citation No. 7982112, above, I found that such a reasonably prudent person would have recognized that the standard required the cited roller to be guarded. With respect to the present citation, however, such a person would not have realized that a guard was required at the cited head pulley because MSHA previously accepted the fence to abate a guarding citation. MSHA is required to provide notice that fencing is no longer acceptable under the standard before a civil penalty can be assessed for the failure to have a guard at the cited location. Consequently, Citation No.7982115 is vacated.

Citation No. **7982116** alleges a violation of section 56.14108 because the overhead drive belts on the El Jay feed Conveyor were unguarded. The citation states that someone could walk under the drive and could be injured by the belt if it were to break. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's low negligence. Section 56.14108 provides that "[o]verhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the drive belt was about 13 feet above the ground. (Tr. 62; Ex. P-5). The overhead drive was about seven feet above the walkway of the Cedar Rapids shaker screen. (Tr. 62-63). The inspector believes that if the belt were to break while it was operating, it could come off with a great deal of force and hurt an employee in the vicinity. Inspector Chitwood believes that the drive belt was about six feet long. Thus, he concluded that if anyone were on the walkway performing routine maintenance when the belt broke, he could be

seriously injured by the whipping action of the belt. (Tr. 64). The inspector believed that such an event was not very likely because Beco Construction shuts the system down before anyone gets up on the walkways. (Tr. 66). He determined that the operator's negligence was low for the same reason and because the drive belt may not have been in the same position when the crusher was set up at other locations. In the notes that Inspector Chitwood took at the time of the inspection, he noted that "the power to the plant is turned off when employees work on the screen." (Tr. 164-65; Ex. R-2). He also wrote that "access to the area is removed till the plant is shut down for repairs." *Id.* The access referred to in the note is the ladder used to get to the walkway.

Mr. Beck testified that when this drive belt has broken in the past it has merely fallen onto the screen. (Tr. 283). He stated that employees are not allowed onto the walkway on the shaker screen when it is operating and that the subject drive motor never operates when the shaker screen is shut down. (Tr. 284). Beck testified that, because it is dangerous and somewhat frightening to be on the walkway when the screen is operating, it is unlikely that anyone would go up there. The access ladder was not at the shaker screen. He also stated that the drive belt has been observed during previous MSHA inspections and has never been cited for not having a guard present. (Tr. 285-86). MSHA inspectors have told him that a guard would be required if employees work or walk on the shaker screen walkway while the crusher is operating. *Id.*

In rebuttal, MSHA inspector Montoya testified that he has been at other crushers owned by different mine operators and has observed employees on walkways of operating shaker screens. (Tr. 361). He stated that it is very common to see employees on such walkways and that the vibration of the screen does not prevent people from being there. He has also observed drive belts whipping around when they break. Finally, Montoya testified that when a crusher is moved, the configuration can change significantly so it is possible that the drive belt was higher above the shaker screen's walkway when it was previously inspected by MSHA. (Tr. 363).

I conclude that this citation should be vacated for two reasons. First, the language of this particular safety standard requires that the Secretary establish that the cited condition created a safety hazard. Section 56.14108 states that an operator violates the safety standard only "if the whipping action of a broken belt . . . could be hazardous to persons." Thus, not all drive belts are required to be guarded, only those that are located where the whipping action of a broken belt could injure someone. The Secretary established that this drive belt could break and whip around. She did not establish that such whipping action could injure anyone. The testimony of the inspector and Mr. Beck, as well as the inspector's notes, make clear that employees do not work or walk on the deck of the shaker screen while it is in operation. The ladder had been removed to prevent anyone from getting up onto this walkway. There was no danger to employees on the ground. The Secretary's belief that someone might go up on the walkway while the crusher is operating is too speculative to establish a violation.

Second, I credit Mr. Beck's testimony that another MSHA inspector advised Beco Construction that a guard is required if employees walk or work on the shaker screen when the

plant is operating. It was reasonable for Beck to conclude that a guard was not required because of this statement and the fact that the drive belt was not previously cited by MSHA. In reviewing the language of section 56.14108, its regulatory history, and the enforcement history at Beco Construction, I find that the Secretary did not provide fair notice of the requirements of the standard. *Allen Good* at 1006. Consequently, Citation No. 7982116 is vacated.

Citation No. **7982608** alleges a violation of section 56.14107(a) because the alternator v-belt drive and sheaves on the Detroit diesel engine were unguarded. This engine powered the generator and was in a semi-trailer. The citation states that employees working around this equipment were exposed to the possibility of injury from the moving machine parts. Inspector Montoya determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood, who was with Inspector Montoya, testified that the pulley system for the alternator and the fan pulley were not guarded. (Tr. 70; Ex. P-6). He stated that the moving machine parts, which were about 2.5 feet above the floor of the trailer, presented a safety hazard to employees in the area. An employee would only be in the trailer to service the engine, to check the batteries, or to check the fluid levels. (Tr. 72). If he were to slip, his hand or clothing may come in contact with the moving machine parts and he could be seriously injured as a result. *Id.* He believes that an injury was unlikely because the moving parts were partially guarded by location in that the metal framework of the engine shielded the area to a limited extent. Inspector Chitwood also believed that the engine was usually shut down before it was serviced. Inspector Montoya's testimony is consistent with Chitwood's testimony. (Tr. 204-09). He stated that there was no reason for an employee to be in the area of the moving machine parts other than when he started and stopped the engine, "maybe [when he performed] some maintenance checks," or if someone were walking by the engine. (Tr. 206, 213-16).

Mr. Beck testified that maintenance is performed from the other side of the engine. Oil and radiator fluid are checked and added on the opposite side of the engine. (Tr. 288; Ex. R-14). He stated that the oil level and radiator fluid are never checked or supplemented when the engine is operating. Maintenance is performed by mechanics on the weekends when the generator is not operating. (Tr. 292). The controls for the engine are at the opposite end of the engine. (Ex. R-14). In addition, Mr. Beck stated that, even if someone were walking in the area adjacent to the alternator and tripped, the chance that he would get caught in the moving machine parts is "absolutely zero." (Tr. 292). Finally, he testified that he has used the cited engine and generator for about eight years. (Tr. 293). Beck testified that this generator has been inspected by MSHA on a number occasions and he is not aware of any citations being issued for lack of a guard at the alternator v-belt drive. *Id.*

The Secretary recognizes that the cited condition did not create a serious safety hazard to Beco Construction's employees because an accident was unlikely. She contends, however, that because a serious accident was possible, the v-belt drive was required to be guarded under the standard. Section 56.14107(a) is ambiguous, because "its language is broad and does not specify

the extent of the guarding required or explain how moving parts should be guarded." *Allen Good* at 1004. The generator trailer has been in the same condition for eight years and it has been inspected by MSHA on numerous occasions. The moving machine parts were not readily accessible and were on the opposite side of the engine from where it is serviced. I find that Beco Construction was not given sufficient notice that additional guards were required on the engine. Consequently, Citation No. 7982608 is vacated.

Prior to the hearing, Beco Construction withdrew its contest of Citation Nos. 7982114, 7982605, 7982606, and 7982607. I assess the Secretary's proposed penalty of $231 for these violations.

C. Citations Issued at the CH2 Crusher

WEST 2000-544-M

Citation No. **7982098** alleges a violation of section 56.15004 because an employee was observed working around the tail section of the C-5 conveyor belt without wearing safety glasses. The citation states that the belt was in operation and that loose material was being fed onto it from the conveyor belt above, exposing the employee to a possible eye injury. Inspector Chitwood determined that the violation was S&S and was the result of Beco Construction's moderate negligence. Section 56.15004 provides, in part, that "[a]ll persons shall wear safety glasses . . . when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes." The Secretary proposes a penalty of $90 for this alleged violation.

Inspector Chitwood testified that material from the shaker screen was dropping in the vicinity of the employee he observed. (Tr. 81; Ex. P-7). The employee appeared to be securing a nut on a guard at the tail section of the conveyor belt when Chitwood saw him. (Tr. 83). The employee was not wearing safety glasses. Another belt was dumping "sand and small gravel" onto the C-5 belt from a height of about four to five feet. (Tr. 84). The employee was about two feet from this dumping point. Inspector Chitwood stated that he was concerned that small particles of rock, dust, or sand could get into the employee's eyes. He believed that the employee could suffer a serious eye injury if a piece of rock flew into one of his eyes. (Tr. 87). He could also have suffered a scratched cornea. The inspector determined that it was reasonably likely that he would suffer a serious injury if he continued to work in the area without eye protection.

Mr. Herbertson, who was with Chitwood, testified that he did not see any rocks or dust flying out of the discharge conveyor. (Tr. 248). He further stated that the employee at the belt had safety glasses in his pocket at the time of the inspection and that Beco Construction requires employees to wear them when there is a hazard but that there was no hazard in this instance. Herbertson testified that the material that was being discharged near the cited employee was wet and that it was falling from a height of about 18 inches. (Tr. 255). Mr. Beck also testified that the cited employee was not required to wear safety glasses at that tail pulley because there was "no possible way that there could be any flying objects that could damage or harm his eyes."

(Tr. 298). The discharge conveyor moves at a slow rate of speed, the material was falling a short distance; and the material was quite wet to keep the dust down. He testified that a belt discharging larger rock would pose a hazard because a piece could fly off from the impact and strike someone in the eye. (Tr. 301-02, 302). Beck believes that there was no possibility that the employee would sustain an eye injury at the cited location. (Tr. 303).

The language of this particular safety standard requires that the Secretary establish that the cited condition created a safety hazard. Section 56.15004 states that all persons shall wear safety glasses "where a hazard exists which could cause injury to unprotected eyes." The Secretary is not required to prove that an injury will occur but that a hazard exists which "could" cause injury. In this instance, I find that the Secretary established that an eye injury was possible at the tail section of the C-5 belt. I also find that the preponderance of the evidence shows that it was not likely that the individual would be injured. I credit Mr. Beck's testimony in this regard. I note that the photograph introduced by the Secretary does not indicate that any dust or debris was being kicked up at this location. (Ex. P-7). Consequently, I affirm the citation, but find that the Secretary did not meet the third element to the Commission's S&S test. The negligence was moderate. A penalty of $50 is appropriate.

Citation No. **7982099** alleges a violation of section 56.20003(a) because poor housekeeping conditions were observed at the oil storage trailer. The citation states that fiberglass insulation, electrical motors, steel, and other debris was scattered all over the floor. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's low negligence. The standard provides, in part, that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the conditions in the trailer created a slipping and tripping hazard. (Tr. 94-95; Ex. P-8). He stated that he also observed hydraulic hoses and other material in the trailer. He believed that any injuries would be minor. He stated that there was a clear two-foot wide path without a tripping hazard on one side of the trailer that employees could use to walk through. (Tr. 177; Ex. R-3). Mr. Beck testified that there was a walking path through the trailer to the oil barrels. (Tr. 306). He stated that employees do not travel beyond these barrels.

I find that the Secretary did not establish a violation. The photograph taken by the inspector shows a trailer that is relatively clean and orderly. (Ex. P-8). Spare hoses and belts are hung from hooks on the wall; other hoses are coiled along one side; various cans, including oil barrels, are located along that same side; and a pathway leads into the area. The only slightly cluttered area is at the back of the trailer, but even that area is rather clear of impediments to walking. There are long pieces of metal along one side, but the floor is clearly visible along the path that both Chitwood and Beck testified about. The PPM does not provide any interpretive guidance on this standard. I credit the testimony of Mr. Beck as to how this trailer is used. The

Secretary did not establish that the operator failed to keep the trailer "clean and orderly." Citation No. 7982099 is vacated.

Citation No. **7982101** alleges a violation of section 56.11001 because safe access was not provided to the cone crusher work platform. The citation states that the steps and work platform had a build-up of loose rock and that several 480-volt electrical conductors were on the steps to the platform. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that he observed loose rock on the deck of the cone crusher and on the stairs leading up to the deck. (Tr. 97-98; Exs. P-9 & P-10). He believed that if there were a "plug-up" in the crusher or if the crusher needed to be serviced, an employee would face a tripping hazard. Chitwood testified that the employee might have to gain access quickly in the event of an emergency. He stated that an employee would need to be able to walk all around the cone crusher. (Tr. 101-03). He felt that the rock had been present for at least several days. Although Inspector Chitwood believed that an employee would receive a serious injury if he tripped and fell, he did not believe that such an occurrence was likely because there was a handrail all around the deck. He also took into consideration the fact that employees do not enter the area until the plant is shut down. (Tr. 179). He believed that Beco Construction's negligence was high because the condition had existed for several shifts and workplace examinations should have detected the problem. (Tr. 105-06). The inspector testified that the deck should have been cleaned off whenever loose rock accumulated, which he estimated to be necessary about every other shift. (Tr. 180-82).

Mr. Beck testified that no employees are allowed to walk onto the deck of the cone crusher while the plant is operating. (Tr. 308). He stated that the material accumulates on the deck as part of the normal operation of the crusher. The material is overflow that spills on the deck from the crusher "and we don't know if there is going to be an overrun five times an hour or not for two days." (Tr. 309). As a consequence, Beck testified that employees clear off the deck before they do any work at the crusher. He testified that he believes it is pointless to clean it off at the end of each shift because an employee would not need to get up on the deck every day. (Tr. 310, 314). He disputed the inspector's testimony concerning an emergency that would require an employee to rush on the deck before he had the opportunity to clean off the accumulations. Beck testified, as follows:

> I cannot for the life of me figure out what type of emergency may come up that would induce a man to . . . go up there on an emergency basis. There just isn't any. The operator of the crusher and the control man is the emergency shutdown guy and, if there is an emergency, he goes over and hits the shut-off button.

(Tr. 311-12). The shut-off button is not on the deck.

The safety standard is broadly written to be applicable to many situations. The term "working place" is defined as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. Inspector Chitwood was concerned that someone might walk up the stairs to the deck without cleaning them off in an emergency situation. He was also concerned about the electrical cables that were on the steps. There was no testimony that the area was entered during on-shift examinations required under section 56.18002 or that an employee would use the deck as a travelway to reach another area at the crusher. Mr. Beck testified, without contradiction, that an employee would typically be on the deck every few days to make adjustments and that his first order of business would be to clean up the accumulations.

I find that the cited area was not a travelway but that it was a working place. Given that the working place was cleaned of accumulations before anyone entered the area, I find that the presence of rocks on the deck at the time of the inspection did not establish that a safe means of access was not being provided by Beco Construction. The safety standard does not require that all working places be kept clear of rock at all times, but requires that a safe means of access be provided. I credit Mr. Beck's testimony that employees would not work on the deck in an emergency situation without first cleaning off the rocks.

The electrical cables on the stairs did present a minor tripping hazard. (Ex. P-9). I find that these wires were in violation of the requirement that safe access be provided. The violation was not serious. I find that Beco Construction's negligence was moderate. A penalty of $40 is appropriate.

Citation No. **7982102** alleges a violation of section 56.14112(b) because the protective guard for the v-belt drive on the discharge conveyor under the cone crusher was not securely in place. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. Section 56.14112(b) provides, in part, that "[g]uards shall be securely in place while machinery is being operated." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that a guard was present but that it was loose because two bolts were missing. (Tr. 111; Ex. P-11). The v-belt drive was in the area where employees use a loader to scoop up material that has fallen from the deck of the cone crusher. The inspector noticed that the screen was shaking with the vibration of the crusher. He believed that the guard "could possibly have fallen off at any time." (Tr. 111, 186-87). Inspector Chitwood testified that if the guard fell off, someone could become caught in the moving machine parts. He determined that an accident was unlikely because a guard was present but "it just wasn't secure." (Tr. 113). In addition, he did not observe any footprints in the area and the accumulations are cleaned out with a loader that is equipped with an overhead cab.

Mr. Beck testified that the guard was attached with bailing wire. (Tr. 317). He testified that it was attached with wire because about once a week an employee must remove the guard, while the plant is shut down, to inspect the underside of the cone crusher. Consequently, he believes that the guard was vibrating because it was attached with wire not because it was insecure. Other MSHA inspectors have inspected the cone crusher and some inspectors have questioned the use of bailing wire to secure the guard. (Tr. 319). He could not remember if any citations had been issued in the past for this guard.

I find that the Secretary did not establish a violation. The cited condition would create a hazard only of the guard fell off the crusher. Inspector Chitwood testified that it "possibly could have fallen off." I credit the testimony of Mr. Beck that it was secured with bailing wire. The guard would naturally vibrate when the crusher was operating because of the way in which it was installed. (Ex. R-11b). The Secretary did not meet her burden of showing that the guard was not securely in place. Consequently, this citation is vacated.

Citation No. **7982103** alleges a violation of section 56.14107(a) because the tail pulley on the stacker conveyor was not properly guarded to prevent serious injuries. The citation states that the front and both sides of the pulley were not guarded. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The cited tail pulley was protected by a partial guard. (Tr. 116; Ex. P-12). The openings were in the vicinity of the shaft for the pulley and in the front of the tail pulley. Inspector Chitwood was concerned that if anyone were in the area shoveling accumulated material, he might get his hand or clothing into the moving machine parts if he tripped and fell. (Tr. 118). The moving parts were about two feet above the ground. He determined that an accident was not likely because he did not see any footprints in the area. (Tr. 122). In addition, the tail pulley was under another conveyor belt. (Tr. 189; Ex. P-12). He determined that Beco Construction was highly negligent because there are other tail pulleys at the plant that are fully guarded.

Mr. Beck testified that the opening on each side of the tail pulley was about four by eight inches. (Tr. 320). He said that the moving machine parts were more than amply guarded because the openings were very small and the other conveyor belt kept employees from getting close to the tail pulley. "It's absolutely inconceivable to me that someone could walk up there and trip and, at the same time, get their hand or their foot or something through that opening." (Tr. 322). Mr. Beck also testified that another MSHA inspector previously inspected this tail pulley in the same condition and did not issue a citation. (Tr. 324). He believes that the likelihood of anyone being injured by the tail pulley was "zero." (Tr. 326).

Based in part on the Commission's decision in *Allen Good*, I find that Beco Construction did not receive fair notice that the condition violated the safety standard. I credit Beck's testimony that another inspector had inspected the same condition without issuing a citation. Consequently, Beco Construction was given notice by an authorized representative of the

Secretary that the guard on the tail pulley met the requirements of the safety standard. The openings that Inspector Chitwood cited were very small and inaccessible. Although the language of the safety standard is broad, as discussed above, a reasonable prudent person familiar with the mining industry and the protective purposes of the safety standard would not have recognized that the standard required additional guarding. The Secretary is required to provide notice that additional guarding is required before a civil penalty can be assessed. Consequently, this citation is vacated.

Citation No. **7982104** alleges a violation of section 56.14107(a) because a protective guard was not provided for several idler rollers on the El-Jay discharge belt. The citation states that the cited area was about 57 inches above the ground. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the idler rollers on the belt were not properly guarded. (Tr. 125; Ex. P-13). He stated that these rollers can create a pinch point especially if the belt is full of material. If a person stumbled while walking in the area, he could get his hand caught between the belt and the rollers. *Id.* The conveyor assembly was not equipped with a skirt board. (Tr. 126). The idlers along part of this conveyor were protected by plastic fencing. The inspector did not believe that an accident was likely because it did not appear to be in a heavily traveled area. (Tr. 128). He also testified that employees do not work along this conveyor until the system is shut down. (Tr. 190; Ex. R-6). Inspector Chitwood believed that the negligence was high because the operator had installed plastic fencing along part of the conveyor and the fact that all of it was not protected should have been detected during on-shift examinations.

Mr. Beck testified that about 15 feet of safety netting was placed along the conveyor to abate the citation. (Tr. 326). He said that employees work at the head pulley and tail pulley but not along the belt because there is nothing to do there. "You can't adjust, you can't fix, you can't repair" at the cited area. (Tr. 327). The belt would need to be shut down to replace a roller. Although this conveyor has been previously inspected by MSHA, Mr. Beck was not sure whether any citations had been issued because he did not know the configuration it may have been in at the time. (Tr. 329).

I find that the Secretary established a non-S&S violation, but that the negligence was not high. Because a skirt board was not present, that part of MSHA's PPM that instructs inspectors to provide a verbal warning does not apply. I credit Mr. Beck's testimony that the company provided protection along part of the conveyor because that section was near another conveyor where employees could be walking or working. (Tr. 327-28). Consequently, the fact that Beco Construction guarded that area does not establish high negligence in this citation. Beco Construction believed that guarding was unnecessary at the cited location because employees do not work or travel in that area. I find that Beco Construction's negligence was moderate. A penalty of $50 is appropriate.

Prior to the hearing, Beco Construction withdrew its contest of Citation No. 7982100. I assess the Secretary's proposed penalty of $55 for this violation.

WEST 2000-545-M

Citation No. **7982105** alleges a violation of section 56.12005 because several power cables were on the ground between the control trailer and the cone crusher that had been run over by a vehicle. The citation states that the outer jacket and insulation around the power conductors could be damaged from the weight of the vehicle. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's high negligence. Section 56.12005 provides, in part, that "[m]obile equipment shall not run over power conductors . . . unless the conductors are properly bridged or protected." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the cables were near the control trailer, that they provided power for the crusher, and that they were energized at the time of his inspection. (Tr. 130; Exs. P-14 & P-15). He observed tire tracks going over the cables where there was no bridging. He believes that the tracks were made by a pickup truck. Rubber mats were in the area but they did not cover the power conductors where he observed the truck tracks. (Tr. 134). Inspector Chitwood testified that the violation would create an electric shock hazard if the outer jacket and insulation were damaged by truck traffic. Because the outer jacket was in good condition when he issued the citation, he determined that such an accident was unlikely. He believes that the negligence is high because the violation was obvious and in an area where management would frequently travel. Both Inspector Chitwood and Inspector Montoya testified that the rubber mats would provide adequate protection for pedestrian traffic but would not meet the standard for truck traffic. (Tr. 134, 211).

Mr. Beck testified that pickup trucks do not travel in the cited location because it is a dead end. He stated that the tracks that the inspector observed were from a trailer-mounted welder. (Tr. 331). It weighed about 200-250 pounds and it was pushed around by hand. The mats were present to reduce the tripping hazard and to keep dirt from building up on the cables. Beck did not know when the mats became separated from the cables. He does not believe that the power conductors would be damaged by the weight of the welder. (Tr.333).

I find that the welding trailer was mobile equipment, as that term is used in the safety standard. MSHA's standards regulating machinery and equipment defines "mobile equipment" as "[w]heeled . . . equipment capable of moving or being moved." 30 C.F.R. § 56.14000. Another similar definition of the term includes "all equipment that is self-propelled or that can be towed on its own wheels . . . ." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 352 (2d ed. 1997). The Secretary established a violation. Mr. Beck testified that other MSHA inspectors had observed unprotected power cables during previous inspections and no citations were issued. (Tr. 335). Beck did not state whether these inspectors observed vehicles

crossing the cables or tire tracks in the vicinity of the cables. Consequently, Beco Construction did not establish that it was not provided with fair notice of the application of the safety standard.

I find that the violation was not serious. The cables were not damaged. In addition, it is unlikely that the welder trailer would damage the cables. I also find that Beco Construction's negligence was moderate. The fact that the violation was easily observed by plant management does not establish a high degree of negligence. Mr. Beck did not believe that the cables had been run over by trucks and testified that welder trailer would not damage the cables. A penalty of $50 is appropriate.

Citation No. **7982106** alleges a violation of section 56.12032 because the cover plate on the heater control power switch in the operations trailer was not properly closed and secured. The citation states that the cover plate was cracked open because the screws holding it down were loose. Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's low negligence. Section 56.12032 provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that the cover plate on an unenergized electrical box was not completely closed. (Tr. 140-41 ; Ex. P-16). The cover plate was loose because several of the screws were not tight. The inspector was concerned that if a miner tripped and fell against the electrical box, "it could possibly pop that cover open even more, exposing him to the electrical conductors inside." (Tr. 143). He believed that someone could be severely injured as a result, but that such an accident was unlikely. Inspector Montoya testified that an electrical arc could escape from the box. (Tr. 364). Inspector Chitwood marked the negligence as low because the company was not using that junction box at the time.

Mr. Beck testified the cited junction box was "out of commission at the time." (Tr. 337). This junction box was not being used while the crusher was being operated in the present configuration because it was not needed. (Tr. 339).

Although the Mine Act is a strict liability statute, there comes a point when a cited condition creates a hazard that is so speculative or insignificant that the citation must be vacated. The photograph shows that the cover plate was in place but it was not screwed down at the lower right hand corner. A slight opening was present. The box was not only not energized, it was locked out because it was not being used at all at this plant site. To be a hazard, someone would have to take off the lock, energize the box, fall against it causing the cover to pop open, and then get his hand inside the box as he fell. This scenario is highly unlikely. The citation is vacated.

Citation No. **7982108** alleges a violation of section 56.20003(a) because poor housekeeping conditions were observed on the work platform of the Nordberg cone crusher. Loose rock and other debris had accumulated. The citation states that the material covered an area of about 8 feet by 5.4 feet, which exposed employees to a slip, trip, and fall hazard.

Inspector Chitwood determined that the violation was not S&S and was the result of Beco Construction's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector Chitwood testified that poor housekeeping conditions on the work platform. (Tr. 145; Ex. P-17). He testified that employees would need to use the platform to gain access to the crusher and the controls on the platform. Loose rock, tools, and other debris were scattered over the platform. The presence of the tools convinced him that employees had been working on the platform without first cleaning the area up. (Tr. 148-49). The material presented a tripping hazard. Inspector Chitwood believed that an accident was unlikely because it was a small work platform that was surrounded by handrails.

Mr. Beck testified that employees of Beco Construction are required to clean the platform whenever they use it. (Tr. 340). He stated that the controls that the inspector saw are not used because there are hydraulic controls in the van. Beck further stated that the crusher was less than a year old and that employees did not have to go onto the work platform to make any adjustments. He testified that the chain across the entrance was to prohibit employees from entering the work platform. (Tr. 341). Finally, he stated that this crusher has been inspected by MSHA in the past and no citations were issued.

I find that the Secretary established a violation. Although it was not used frequently, the platform was a workplace. The presence of tools on the platform establishes that at least one employee had been in the area. The record does not reveal how quickly rock accumulates in the area. The photograph shows very little rock. (Ex. P-17). The other material that was lying about on the platform created a greater tripping hazard. If the area contained only the amount of rock shown in the photograph and nothing else, I would have vacated this citation. The fact that other MSHA inspectors did not issue any citations is irrelevant because there is no evidence as to the condition of the work platform at the time of these inspections. The violation is not serious. Beco Construction's negligence was moderate. A penalty of $40 is appropriate.

Prior to the hearing, Beco Construction withdrew its contest of Citation Nos. 7982107, 7982109, and 7982110. I assess the Secretary's proposed penalty of $223 for these violations. I granted the Secretary's motion to vacate Citation No. 7982111 at the hearing. (Tr. 7).

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. With respect to the history of paid violations, I find that eleven citations were issued at the CH1 crusher and no citations were issued at the CH2 crusher in the 24 months preceding these inspections. (Tr. 217-21). Beco Construction is a small operator that worked about 5,871 man-hours at the CH1 crusher in 1999 and 6,148 man-hours at the CH2 crusher in 1999, for a total of 12,019 hours at all Beco Construction facilities. (Tr. 6). All of the violations were abated in good faith. The penalties assessed in this decision will not have an

adverse effect on Beco Construction's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate. The reduction in the penalties is based on the small size of the operator and, where noted above, the gravity and negligence criteria.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
WEST 2000-543-M		
7982112	56.14107(a)	$60.00
7982113	56.11012	25.00
7982114	56.14107(a)	55.00
7982115	56.14107(a)	Vacated
7982116	56.14108	Vacated
7982605	56.12004	66.00
7982606	56.12008	55.00
7982607	56.12025	55.00
7982608	56.14107(a)	Vacated
WEST 2000-544-M		
7982098	56.15004	50.00
7982099	56.20003(a)	Vacated
7982100	56.4101	55.00
7982101	56.11001	40.00
7982102	56.14112(b)	Vacated
7982103	56.14107(a)	Vacated
7982104	56.14107(a)	50.00
WEST 2000-545-M		
7982105	56.12005	50.00
7982106	56.12032	Vacated
7982107	56.4101	55.00
7982108	56.20003(a)	40.00
7982109	56.14112(b)	55.00
7982110	56.14107(a)	113.00
7982111	56.14107(a)	Vacated

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Beco Construction Company, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $824.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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