FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 13, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-585-M
Petitioner	:	A.C. No. 35-03309-05509
	:	
v.	:	Docket No. WEST 2000-586-M
	:	A.C. No. 35-03309-05510
MELVIN BARLOW, d/b/a BARLOW ROCK,	:	
Respondent	:	Barlow Pit

DECISION

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Lenora Barlow, O'Brien, Oregon, 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 Melvin Barlow, an individual doing business as Barlow Rock ("Barlow Rock"), 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 Grants Pass, Oregon.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Barlow Rock operates the Barlow Pit in Josephine County, Oregon. On June 7, 2000, MSHA Inspector Randy Cardwell inspected the Barlow Pit. MSHA had inspected the Barlow Pit many times, but this was the first time that it had been inspected by Inspector Cardwell. Barlow contested nine citations in these cases.

Melvin Barlow, the owner of Barlow Rock, testified that he has operated the Barlow Pit for about 41 years. (Tr. 98). The pit has been inspected by MSHA since its inception and it generally received no more that three or four citations per inspection. He testified that he never contested any citations issued during previous inspections. He further testified that Barlow Rock received 37 citations resulting from Inspector Cardwell's inspection. *Id.* He stated that some of the citations issued by Inspector Cardwell were legitimate and he did not contest them. (Tr. 102). He contested other citations issued by this inspector, including the citations at issue here, because he does not believe that they are legitimate, as set forth below.

A. Citation No. 7986908

Citation No. 7986908 alleges a violation of 30 C.F.R. § 56.11002, as follows:

> Handrails were not provided along the outer edges of the elevated walkways that were located on the sides of the orange universal flat deck screen. The walkway was approximately 20 inches wide, approximately eight feet long, and approximately 89 inches above the ground level. There was a portable ladder leaning up against the end of the walkway allowing access up to the walkway. Employees access the walkway when adding air to the air bags on the side of the screen and when performing regular maintenance.

Inspector Cardwell determined that the violation was of a significant and substantial nature ("S&S") and was the result of Barlow's moderate negligence. Section 56.11002 provides, in part, that "elevated walkways, elevated ramps, and stairways shall be ... provided with handrails...." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986976 under section 104(b) of the Mine Act alleging that Barlow had removed the ladder up to the walkway, but had not provided handrails along the outer edges of the walkway. The Secretary proposes a penalty of $453 for this alleged violation.

There is no dispute that the cited area lacked handrails. Mr. Barlow testified that the cited area has never had a handrail and that MSHA has never required a handrail at that location in the past. (Tr. 102). He testified that MSHA has inspected this screen many times and handrails were never required. He stated that employees do not climb up onto the cited boards to maintain the air bags or to service the equipment. (Tr. 103). He stated that employees perform these functions while standing on the ladder. He further testified that the only function that these boards serve is to provide "a flat surface to lean the ladder against." (Tr. 104). The ladder is not present except when someone needs to service the screen.

Inspector Cardwell did not observe anyone on the cited boards. He stated that he issued the citation because of the presence of the ladder. (Tr. 20). There is no testimony that Inspector Cardwell was advised that the cited area was used as a walkway. Inspector Cardwell did not testify that he observed direct proof, such as footprints in the accumulated dirt, that anyone had used the boards as a walkway. He believes that employees went up on the boards because of the nature of the work that had to be performed. (Tr. 20, 68, 92). He does not believe that all of these tasks could be performed from a ladder.

The safety standard requires that elevated walkways must be provided with handrails. The term "walkway" is not defined in the Secretary's regulations. The term "travelway" is defined as a "passage, walk or way regularly used and designated for persons to go from one place to another." 30 C.F.R. § 56.2. I find that the Secretary did not establish that the cited area was an elevated walkway. The cited area was simply two boards that had been placed across supports on

the screen. (Ex. R-3). These supports apparently are used to carry various hoses for the screen. *Id.* The testimony of Mr. Barlow establishes that employees do not stand or walk on the boards to perform maintenance on the screen. Inspector Cardwell believes that employees would have to stand or walk on these boards to perform these tasks or, at the very least, that these boards are available for such purpose. The inspector's belief is not enough to establish a violation in this case. The fact that a ladder is leaning against a horizontal surface does not establish that the surface is a walkway. I find that the Secretary did not establish a violation. *See Tide Creek Rock, Inc.*, 18 FMSHRC 390, 410-412 (March 1996)(ALJ). Consequently, Citation No. 7986908 is **VACATED**. If Barlow employees begin standing on these boards for any purpose, Barlow must install handrails or provide fall protection (§ 56.15005).

B. Citation No. 7986909

Citation No. 7986909 alleges a violation of 30 C.F.R. § 56.14107(a), as follows:

> The V-belt drive on the drive motor of the orange universal flat deck screen was not guarded to prevent employee contact. The pinch points were approximately two feet and five feet above the elevated walkway that ran along side the universal screen. There was not a guard for the V-belt drive and this condition allowed the moving machine parts to be accessible to employee contact.

Inspector Cardwell determined that the violation was not S&S and was the result of Barlow'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." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986977 under section 104(b) of the Mine Act alleging that Barlow had not made any effort to guard the cited V-belt drive. The Secretary proposes a penalty of $371 for this alleged violation.

There is no dispute that the cited V-belt drive was not guarded. Inspector Cardwell estimated that the two pinch points were about two and five feet above the "elevated walkway" discussed in the previous citation. As discussed above, I found that the cited boards are not an elevated walkway. Section 56.14107(b) provides that "guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces." The cited pinch points are more that seven feet above the ground. Nevertheless, I find that the Secretary established a violation. Mr. Barlow testified that his employees perform maintenance from the ladder. The drive motor is regularly greased from the ladder. (Tr. 136-38). Employees would be within seven feet from the pinch points when greasing the motor. In such instances, the ladder would constitute a working surface.

As is true at most facilities, ordinary maintenance activities are performed at the Barlow Pit before the equipment is turned on. Nevertheless, the Commission has interpreted this guarding standard to take into consideration "ordinary human carelessness." *Thompson Bros.*

Coal Co., 6 FMSHRC 2094, 2097 (September 1984). The construction of safety standards involving the behavior of employees "cannot ignore the vagaries of human conduct." *Id.* It is conceivable that someone might attempt to perform minor maintenance on the operating deck screen while standing on the ladder without first shutting it down. In such an instance, the employee's clothing could easily become entangled in the pinch points and a serious injury could result. Guards are designed to prevent just such an accident.

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

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

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

I find that the Secretary established a violation and I affirm the citation. I agree with Inspector Cardwell that an accident was unlikely and that the violation was not S&S. If an accident did occur, a severe injury could result. I find that Barlow's negligence was low because this condition had existed for years through many MSHA inspections and had never been cited. Barlow did not rapidly abate the condition and a section 104(b) order was issued. Consequently,
I find a lack of good faith abatement and I increase the penalty from what I would have otherwise assessed. I assess a penalty of $110 for this violation.

C. <u>Citation No. 7986915</u>

Citation No. 7986915 alleges a violation of 30 C.F.R. § 56.14107(a). Barlow withdrew its contest of this citation. (Tr. 8-9). This citation was abated within the time set for abatement. Consequently, this citation and the Secretary's proposed penalty of $55 are affirmed.

D. <u>Citation No. 7986917</u>

Citation No. 7986917 alleges a violation of 30 C.F.R. § 56.11002, as follows:

> The elevated walkway on the left side of the Cedar Rapids washing screen was missing one of the floor boards. The outer floor board

> was in place and it was approximately 9 inches wide and 14 feet long. The distance from the missing floorboard to the material inside the chute where a person would fall was approximately 58 inches. Employees access the walkway when performing maintenance to the Cedar Rapids washing screen.

Inspector Cardwell determined that the violation was S&S and that it was the result of Barlow's moderate negligence. Section 56.11002 provides, in part, that "elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986978 under section 104(b) of the Mine Act alleging that Barlow had not made any effort to install an additional floor board on the washing screen. The Secretary proposed a penalty of $453 for this citation.

Inspector Cardwell issued this citation because the elevated walkway was not "maintained in good condition." He based this conclusion, in part, on the fact that when he asked Mr. Barlow if he knew that there was a board missing from the walkway on the washing screen, Mr. Barlow replied "no." Evidence at the hearing revealed, however, that there had never been a board in the cited location. (Tr. 108). The single floor board that was present is about 9 inches wide and about 14 feet long. (Tr. 32). The distance between the floor board and the washing screen was about 13 inches. (Tr. 34). A handrail was provided on the other side of the single board. (Ex. P-1). Inspector Cardwell was concerned that the 13-inch gap could cause an employee to trip or fall thereby causing an injury.

The gap was present because every time the washing screen is used, an employee must walk on the walkway and climb down through the 13-inch gap to clean the bottom deck of the screens and to install a baffle. (Tr. 106-07, 111). On cross-examination, Mr. Barlow admitted that employees must also use the walkway to grease the screens and to change the screens. (Tr. 141-43). He stated that the gap is not necessary when performing those tasks.

I find that Barlow violates the safety standard when employees use the walkway for purposes other than gaining access to the bottom deck through the 13-inch gap. The walkway was not being maintained in "good condition" under those circumstances because of this gap. Consequently, I find that the Secretary established a violation. I find, however, that the secretary did not establish that the violation was serious or 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).

I find that the Secretary did not establish a reasonable likelihood that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. First, the walkway is frequently used to access the bottom deck. In those instances, the gap must be present. Second, a handrail was present and the gap was immediately adjacent to the frame of the washing screen. If someone were to stumble as a result of the gap, a serious injury is not likely. In addition, the existing plank is wide enough to provide solid footing for an employee greasing the screens. I also find that Barlow's negligence was low. The washing screen had been operating in this manner for years and no citations had been issued despite the fact that the washing screen had been inspected by MSHA on many occasions. I increase the penalty from what I would have otherwise assessed because Barlow failed to abate the citation within the time set by Inspector Cardwell. I assess a penalty of $110 for this violation.

E. <u>Citation No. 7986923</u>

Citation No. 7986923 alleges a violation of 30 C.F.R. § 56.14132(a), as follows:

> The automatic reverse activated signal alarm on the 550 International Hough front-end loader ... was not maintained in a functional condition. The front-end loader is used in various area around the rock crushing plant around employees and equipment.

Inspector Cardwell determined that the violation was S&S and that it was the result of Barlow's moderate negligence. Section 56.14132(a) provides, in part, that "audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of $196 for this alleged violation.

Inspector Cardwell testified that "whenever the loader was put into reverse, the backup alarm did not sound." (Tr. 36). He stated that he observed the loader moving in reverse. *Id.* Mr. Barlow testified that the backup alarm worked, but only after the loader actually starts backing up. (Tr. 111-13). He testified that he was basing this information on statements made by his mechanic Mike Neville. Mr. Barlow did not personally observe the loader while traveling in reverse at the time of Inspector Cardwell's inspection and he was not present when the mechanic tested the alarm. When Inspector Cardwell returned to the pit on July 12, he abated the citation.

Mr. Barlow testified that his mechanic did not do anything to repair the alarm. (Tr. 113). This testimony was based on statements made to him by the mechanic.

I credit the testimony of Inspector Cardwell that the backup alarm was not working on the day of his inspection. He observed the loader moving in reverse without the alarm working. Mr. Barlow did not have any direct knowledge of the critical events. His testimony was based entirely on information provided by others. It is possible that the alarm works on an intermittent basis. Consequently, I affirm this citation.

I find that the violation was reasonably serious and was S&S. Many employees throughout the country have lost their lives or have been seriously injured when struck by self-propelled mobile equipment moving in reverse without backup alarms. I also find that Barlow's negligence was moderate. I assess a penalty of $140 for this violation.

F. Citation No. 7986924

Citation No. 7986924 alleges a violation of 30 C.F.R. § 56.4201(a)(2), as follows:

> The yearly inspection had not been conducted on the red 19 lb fire extinguisher that was located in the cab of the International Hough front-end loader. The last maintenance inspection was conducted in 1997....

Inspector Cardwell determined that the violation was not S&S and that it was the result of Barlow's high negligence. Section 56.4201(a)(2) provides, in part, that "at least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively." On July 12, 2000, Inspector Cardwell returned to the pit to see if the cited conditions had been abated. He issued Order No. 7986975 under section 104(b) of the Mine Act alleging that Barlow had not made any effort to inspect the cited fire extinguisher. The Secretary proposes a penalty of $396 for this alleged violation.

There is no dispute that the fire extinguisher in the cab of the loader had not been inspected within the previous twelve months. The dial on the fire extinguisher indicated that it was charged. (Tr. 41). Mr. Barlow testified that there were two fire extinguishers in the loader. (Tr. 114-18). One was in the cab as observed by the inspector and one was mounted on the outside of the loader. (Ex. R-6 & R-7). Mr. Barlow testified that the mounted extinguisher had been inspected within the previous 12 months. (Ex. 114-18). He stated that the extinguisher in the cab was placed in the cab along with an axe for a specific job that he did for a neighbor. He believes that because the extinguisher mounted outside the loader complied with the safety standard, the citation should be vacated.

I find that the Secretary established a violation. All fire extinguishers at the pit must comply with this safety standard, even where there are two extinguishers in a vehicle. There is no indication that the cited extinguisher would not have functioned properly. I find that the violation was not serious. I also find that Barlow's negligence was low. I credit Mr. Barlow's testimony that the fire extinguisher was in the cab for work he performed off mine property. The citation was abated by removing the cited fire extinguisher following the issuance of a section 104(b) order. I increase the penalty from what I would have otherwise assessed because Barlow failed to abate the citation within the time set by Inspector Cardwell. I assess a penalty of $110 for this violation.

G. Citation No. 7986929

Citation No. 7986929 alleges a violation of 30 C.F.R. § 56.14132(b)(1). At the hearing, the Secretary moved to vacate this citation. (Tr. 4-5). The motion is granted and the citation is vacated.

H. Citation No. 7986931

Citation No. 7986931 alleges a violation of 30 C.F.R. § 56.14131(c), as follows:

> The seat belt in the yellow Kenworth haul truck ... did not meet the requirements of SAE J386, "Operator Restraint Systems for Off-Road Work Machines." The seat belt in the haul truck had a GM stamp on the seat belt buckle. The haul truck was not in use at the time of the inspection but it was available for use.

Inspector Cardwell determined that the violation was not S&S and that it was the result of Barlow's low negligence. Section 56.14131(c) provides, in part, that "[s]eat belts required under this section shall meet the requirements of SAE J386 ... which is incorporated by reference...." The Secretary proposes a penalty of $55 for this alleged violation.

The truck at issue was manufactured in 1966 and Barlow bought it in 1981. (Tr. 123). It was equipped with a seatbelt designed for over-the-highway trucks. The MSHA safety standards require special off-road seatbelts. There is no dispute that the cited truck was not so equipped. Barlow maintains that this truck was out of service. Mr. Barlow testified that it had been used for a project for the city of Cave Junction and that when it was returned, the spring was broken and it had two flat tires. (Tr. 121). He stated that it could be operated and it had been moved from one place to another at the pit on one occasion but that it was out of service.

I find that the Secretary established a violation. The truck had not been tagged out and was available for use. Mr. Barlow's son, who worked at the pit, may not have known that the truck should not be used. (Tr. 45, 150). Although it is highly unlikely that anyone would have used this truck to haul heavy loads, it might have been used for other purposes. I find that the

violation was not S&S, was not serious, and that Barlow's negligence was low. I assess a penalty of $20 for this violation.

I. Citation No. 7986934

Citation No. 7986934 alleges a violation of 30 C.F.R. § 56.12032, as follows:

> The cover plate was not in place on the 110/120 volt pressure control switch for the green Speed Aire air compressor. The pressure control switch was approximately 3¾ inches wide and approximately 37 inches above the ground level. The bare electrical conductors were exposed where they were screwed onto the pressure control switch. Employees access the area on a regular basis when working in and around the shop area.

Inspector Cardwell determined that the violation was S&S and that it was the result of Barlow's high negligence. Section 56.12032 provides, in part, 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 $224 for this alleged violation.

The cited air compressor was by the door in the shop. (Tr. 48). The compressor was not operating. There is no dispute that the pressure relief valve did not have a cover plate on it. The pressure relief valve is at the front of the compressor about 37 inches above the ground. (Tr. 49; Ex. R-9). Inspector Cardwell testified that because there were bare conductors under the cover and the area was accessible, it was important to keep the cover on. (Tr. 50). He stated that the compressor is used on a regular basis and the employees would need to use the switch at that location on a regular basis. *Id.*

Mr. Barlow testified that the power for the compressor was turned off at the time of this inspection. (Tr. 126). Both the control box for the compressor and the control box for the shop were in the off position. Accordingly, he believes that the citation should not have been issued.

I find that the Secretary established a violation. It is not clear why the cover was not present. The standard requires such covers to be in place at all times, except when it is necessary to remove the plate for testing or repairs. Nothing in the record indicates that Barlow was testing or repairing the compressor. The fact that the power was off does not preclude my finding of a violation. The electrical control boxes were not locked out, so they could have been switched on at any time. The cover plate must remain in place at all times, except when necessary for testing or repairs. I find, however, that the violation was neither serious nor S&S. The power was off and the control boxes were immediately adjacent to the compressor. It was not likely that anyone would turn on the power while another employee was working at the compressor. I find that Barlow's negligence was moderate to low rather than high. There is no proof that bare wires were energized while the cover plate was off. I assess a penalty of $50.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that five citations were issued at the plant during the 30 months prior to this inspection. (Ex. J-1). Barlow is a small operator that worked about 4,930 man-hours in the previous calendar year and employed five people. (Ex. J-1; Tr. 129). Except as noted above, the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Barlow'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 primarily 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 2000-585-M		
7986908	56.11002	Vacated
7986909	56.14107(a)	$110.00
7986915	56.14107(a)	55.00
7986917	56.11002	110.00
7986923	56.14132(a)	140.00
7986924	56.4201(a)(2)	110.00
7986929	56.14132(b)(1)	Vacated
WEST 2000-586-M		
7986931	56.14131(c)	20.00
7986934	56.12032	50.00
	Total Penalty	$595.00

Accordingly, the citations and section 104(b) orders contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Melvin Barlow, doing business as Barlow Rock, is **ORDERED TO PAY** the Secretary of Labor the sum of $605.00 within 40 days of the date of this decision, unless the parties agree upon an alternate payment schedule. The parties are hereby authorized to agree upon a delayed payment schedule. Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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RWM