FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

March 9, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-284-M
Petitioner	:	A. C. No. 04-04441-05514
	:	
v.	:	Docket No. WEST 2003-429-M
	:	A. C. No. 04-04441-05501
HANSEN TRUCK STOP, INC.,	:	
Respondent	:	Hansen Pit & Mill

DECISION

Appearances: Isabella M. Del Santo, Esq., U.S. Department of Labor, Office of the Solicitor, San Francisco, California, on behalf of Petitioner;
Charles F. Hansen, Sr., Fortuna, California, on behalf of Respondent.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 815. The petitions allege that Hansen Truck Stop, Incorporated, ("Hansen") is liable for fourteen violations of the Act and mandatory safety and health standards applicable to surface metal/nonmetal mines. A hearing was held in Eureka, California, and the parties submitted briefs following receipt of the transcript.[1] The Secretary proposes civil penalties totaling $1,935.00 for the violations. For the reasons set forth below, I find that Hansen committed the alleged violations and impose civil penalties totaling $1,366.00.

[1] Respondent's brief included several photographs, copies of photographs, and additional information regarding one of the citations at issue. The Secretary objected to Respondent's attempt to supplement the record, noting that no foundation was provided for the photographs, and arguing that the material should have been offered into evidence at the hearing. Respondent offered no explanation of either the materials, or the reason that they were not presented at the hearing. The additional evidence submitted with Respondent's brief will not be considered as part of the record upon which this decision is based.

Background

Charles F. Hansen, Sr., the 89 year old president of Hansen Truck Stop, Inc., owns a 160 acre ranch, which is located adjacent to U.S. Highway 101, two miles south of Fortuna, California. A number of business ventures are operated at that location, including a gas station and coffee shop. In the 1950's Mr. Hansen began to mine sand and gravel from a bar in a river that flows through the property. Sand and gravel is removed from the river bar by a front-end loader and is trucked to a processing area. The processing area includes a washer, a crusher, related conveyor belts, stockpiles and parking areas for loaders, haul trucks and other equipment used in the mining operation. The conveyors and other equipment, including mobile equipment, were assembled over the years as Mr. Hansen acquired used and discarded items. He fabricated the plant equipment almost entirely from parts that he bought as scrap metal. Mr. Hansen purchased used trucks and loaders for a few thousand dollars for use in the operation, or as a source of parts to keep other equipment operational.

The sand-gravel operation is an incidental part of Respondent's business activities. For the twelve-month period ending on July 31, 2003, Hansen had sales of nearly $8 million, the bulk of which was from sales of gasoline and diesel fuel. Only $89,368, just over one percent, was derived from the sale of gravel. Ex. P-40. Sand and gravel are recovered from the river bar only during a few weeks each year, and the plant equipment is operated very intermittently by Jim Shawver, a young employee who works in support of all of Hansen's commercial efforts.[2] As Mr. Hansen explained, the plant is run only when there is nothing else to do, or if processed material is needed. Tr. 175. Much of the material is used on Hansen's property. Gravel is used to surface the area around the coffee shop, and sand is used as bedding in lofting sheds for livestock. Hansen sells gravel to customers, whose employees use one of Hansen's loaders to remove it from the stockpile and place it into their trucks.

Regulations implementing sections 103(h) and 109(d) of the Act require that all mine operators file a legal identity report with the Department of Labor's Mine Safety and Health Administration ("MSHA"), identifying the mine, the mine's owners, persons who control it, and providing other information. 30 C.F.R. Part 41. On March 13, 1990, Charles Hansen, Sr., filed a Legal Identity Report Form No. 2000-7, identifying the sand and gravel mine as "Hansen Pit & Mill," and its owner, as Hansen Truck Stop, Inc. Mr. Hansen was identified as the president of the corporation and also as an "owner" of the mine. Ex. P-2. Section 103(a) of the Act requires that surface metal/non-metal mines be inspected by MSHA twice each year.

According to Mr. Hansen, when MSHA commenced inspections, "that's when we seemed to have all the trouble." Tr. 210. Hansen readily acknowledges that MSHA has jurisdiction over that portion of its operation in which sand and gravel is removed from the river

[2] One other person occasionally operates part of the plant. Tr. 176.

bar. It contests the citations at issue here, in part, to advance its principle contention that the plant area is not a mine and does not fall within MSHA's jurisdiction. Tr. 35, 126-29, 227. Secondarily, it challenges MSHA's jurisdiction to inspect the plant when it is not operating. Tr. 118, 179.

Jurisdiction

Section 4 of the Federal Coal Mine Health and Safety Act of 1969, as amended by the Federal Mine Safety and Health Act of 1977, provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h) of the Act defines the term "mine," in part, as:

> "coal or other mine" means (A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, . . . structures, facilities, equipment, machines, tools, . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing . . . minerals, ...

30 U.S.C. § 802(h)(1).

The legislative history of the Act makes clear that Congress intended that the Act's coverage provisions be interpreted broadly. The Senate Committee report emphasized that "what is considered to be a mine and to be regulated under this Act [should] be given the broadest possible interpretation, and . . . doubts [should] be resolved in favor of inclusion of the facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978).

The Commission and the courts have recognized that Congressional intent and have applied the Act's provisions to a wide variety of mining operations, including mining and preparation facilities similar to those at the Hansen Pit and Mill. In *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979), the court held that the processing of material dredged from a river bed, in which sand and gravel was separated from a burnable material, brought Stoudt's facilities within the Act's definition of the term "mine," even though Stoudt was not involved in the actual extraction of minerals from their natural deposits. The court noted:

> We agree with the district court that the work of preparing coal or other minerals is included within the Act whether or not extraction is also being performed by the operator. Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that

was to be conveyed by the word is much more encompassing than the usual meaning attributed to it – the word means what the statute says it means. (footnote omitted).

602 F.2d at 592.

In *Watkins Engineers & Constructors*, 24 FMSHRC 669, 672-76 (July 2002), the Commission held that cement plants were mines because their operations fell within the Act's definition of the term "milling," deferring to the Secretary's broad interpretation of that term as including processes like "crushing" and "grinding." *See also Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994) (sand dredging operation that included screening and separation of water from sand subject to Act's jurisdiction); *W.J. Bokus Industries*, 16 FMSHRC 704 (April 1994) (whether equipment is within Act's jurisdiction is determined by whether it is used or is to be used in the work of extracting or milling minerals, rather than by ownership or location on a mine site).

Hansen's mining operations easily fit within the Act's definition of the term "mine." The extraction of sand and gravel from natural deposits in the river bar is clearly covered, as Hansen readily concedes. Hansen fails, however, to recognize that the processing of sand and gravel through the crusher and wash plants constitutes "milling," as that term has been interpreted by the Commission and the courts, such that its facilities fall within the statutory definition of a "coal or other mine." As the court noted in *Stoudt's Ferry*, the concept of a "mine," as used in the Act, is "much more encompassing than the usual meaning attributed to it."

Hansen's challenges to jurisdiction must be rejected.[3] MSHA was statutorily obligated to inspect the "milling" operation, i.e., the crusher and wash plant and associated areas, and the equipment used in those operations.

The timing of MSHA's inspection was also appropriate. While Hansen operated only intermittently, its limited facilities were not officially shut down for any specified period. Hansen's quarterly reports to MSHA showed at least some hours worked for each of the four quarters preceding the inspection. Tr. 26-27. As discussed more fully *infra*, equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time. *See, e.g., Ideal Basic Industries, Cement Div.*, 3 FMSHRC 843 (April 1981) (equipment

[3] Although not raised by Hansen as an objection to jurisdiction, it is also clear that its operations affect interstate commerce. It sold $89,368.00 worth of gravel to customers in its 2002-2003 fiscal year, and used gravel on its own facilities, at least one of which is part of a business that engages in interstate commerce. It is well established that the Commerce Clause has been broadly construed and that Congress may regulate highly localized commercial activities because even small scale efforts, when combined with other similar operations, can influence interstate pricing and demand. *See Harless Towing, supra,* 16 FMSHRC at 686.

located in a normal work area and capable of being used must be in compliance with safety standards).

While Hansen cannot escape MSHA jurisdiction over its mineral extraction and milling operations, it does have some control over when those operations could be subjected to MSHA's scrutiny. Rather than operate its plant facilities on a sporadic basis, it could choose to operate the plant only during specified time periods, e.g., in conjunction with its removal of material from the river bar. During periods when the equipment would not be operated, Hansen could notify MSHA that it's milling operations would be temporarily shut down for some specified time, and it would not be subject to inspections during such periods. 30 C.F.R. § 56.1000; tr. 28. Of course, Hansen would have to notify MSHA before restarting operations, and would then be subject to inspection.[4]

The Inspections

David Small has served as an MSHA inspector for over three years and had thirty years of mining experience before joining MSHA. He attempted to inspect the Hansen Pit and Mill in July 2002, but was prevented from doing so by Mr. Hansen, who maintained that the plant was not within MSHA's jurisdiction. Hansen agreed to drive Small around the property in his pickup truck, and Small observed the plant, two haul trucks and a front-end loader in operation. Tr. 19-20. Small returned to the Hansen Pit and Mill on September 10 and 11, 2002, to inspect the plant and related equipment.[5] The parties stipulated that the plant was not in operation at the time of the inspection. In the course of the inspection he issued 26 citations, 14 of which are contested in these proceedings on jurisdictional and other grounds.[6]

Citation Nos. 6343225 and 6343248

Citation Nos. 6343225 and 6343248 allege violations of 30 C.F.R. § 56.9300(a), which requires that:

> (a) Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to

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[4] Whether customer use of a loader to move material from a stockpile to a truck would be deemed part of the mining operation is open to question. However, the sale and loading of finished material may not fall within the Act's definition of milling. *See Harless Towing, supra,* 16 FMSHRC at 684 n.3.

[5] Hansen was not removing material from the river bar at the time, and that portion of the operation was not inspected.

[6] The remaining citations are contested in other cases pending before the Commission. Proceedings in those cases have been stayed pending resolution of these cases.

overturn or endanger persons in equipment.

(b) Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.

Citation No. 6343225 was issued by Small on September 10, 2002, after he observed that no berm was provided on the access road leading to the pan feeder in the wash plant area. He estimated that the unbermed part of the road was about 13 feet wide and, for 75 feet of its length, there was an 8 foot drop-off. He questioned Shawver and determined that the road was used by loaders and smaller vehicles on a regular basis. He concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected, and that the violation was due to the operator's moderate negligence. A civil penalty of $207.00 is proposed.

Citation No. 6343248 was issued on September 11, 2002, after Small observed that there was no berm on a portion of the haul road next to the crusher plant area. He estimated that the unbermed part of the road was 175 feet long and that there was a 6 foot drop-off adjacent to it. He determined, through conversations with Shawver, that the road was used by loaders and smaller vehicles on a regular basis. Small concluded that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was significant and substantial, that one person was affected, and that the violation was due to the operator's moderate negligence. A civil penalty of $207.00 is proposed.

The Violations

There was virtually no evidence offered by Respondent to rebut Small's testimony regarding Citation No. 6343225. The hazard presented by the drop-off was that any vehicle that left the roadway might overturn, threatening serious injury or death to its operator. Even if the vehicle did not overturn, the threat of serious injury was substantial. Considering the size of the wheels on the largest pieces of equipment that used the road, there should have been berms at least three feet high on the sides of that portion of the roadway.

As to Citation No. 6343248, Respondent presented evidence that at least a portion of the road had a berm. Exhibit R-3 is a photograph depicting what appears to be a slope up to the elevated road and old conveyors and booms on either side of a portion of it. Small acknowledged that the equipment may have satisfied the berm requirement for the limited portion of the roadway affected, but reiterated that the portion which was the subject of the citation had no berms, much less any approaching the three foot minimum required.

These unbermed, elevated roadways had drop-offs sufficient to cause a vehicle to overturn or endanger persons in equipment that used the road. I find that these roads were maintained in violation of the regulation.

Significant and Substantial

A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other 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." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 1007 (Dec. 1987).

These violations of the berm standard presented a safety hazard, the possibility that a piece of mobile equipment would leave the roadway, travel out of control down the slope and either overturn or come to rest in a violent manner. Small testified, based upon his experience, that the operator of such equipment might be thrown about inside the cab and could suffer crushing injuries and/or cuts from broken glass during any rollover. Potential injuries from such events range from lacerations and contusions, to broken bones and death. Exhibit P-6 is a report of an accident that resulted in fatal injuries to the operator of a loader that traversed the unbermed edge of an elevated roadway, encountered a nine foot drop-off and overturned. A serious injury could easily result in the event that a piece of mobile equipment left the elevated portions of the roadways. Given that the roads were used with some frequency, it is also reasonably likely that such an event would occur.

I find that these violations were significant and substantial. I also agree with Small's assessment that the operator's negligence was moderate.

Citation Nos. 6343229, 6343233 and 6343235

Citation Nos. 6343229, 6343233 and 6343235 allege violations of 30 C.F.R. § 56.14107(a), which provides:

> Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drives, head, tail and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

Citation Nos. 6343229, 6343233 and 6343235 were issued on September 10, 2002, based upon Small's observation that the v-belt drive and fan blade units on Clark loaders 275A and 275B and a Euclid haul truck, company # 2, were not guarded. They were located about five feet above ground and could be reached by a person standing next to the engine compartments. Small determined that the violations were unlikely to result in a permanently disabling injury because persons were not required to be in the area when the units were running. He concluded that the violations were not significant and substantial, that one person was affected by each, and that the operator's negligence was moderate. A civil penalty of $55.00 is proposed for each violation.

Hansen offered no evidence to challenge Small's description of the conditions which led him to issue these citations. With the exception of the haul truck, its sole defense is based upon its challenge to MSHA's jurisdiction and its position that the equipment was not subject to inspection because it was not operating at the time.

The standard at issue, like other safety standards applicable to mobile equipment, is intended to protect miners from being exposed to hazards caused by the operation of defective equipment. In general, such standards must be complied with even though the equipment is not actually being used or is not scheduled to be used during a particular shift. *Allen Lee Good*, 23 FMSHRC 995 (Sept. 2001); *Mountain Parkway Stone, Inc.*, 12 FMSHRC 960 (May 1990).

In *Mountain Parkway*, the term "used" was interpreted broadly to include equipment that was "parked in the mine in turn-key condition and had not been removed from service." *Id*. at 963. The Commission relied on *Ideal Basic Industries, Cement Div., supra,* which held that equipment located in a normal work area, capable of being operated, had been "used" within the meaning of the standard there at issue.[7] In *Good*, the Commission reiterated that "[a]s long as the cited equipment is not tagged out of operation and parked for repairs" a standard requiring that braking systems be maintained in functional condition was fully applicable. 23 FMSHRC at 997. These cases make clear that the operator could properly be cited for any defective conditions on mobile equipment, unless the equipment had been effectively taken out of service.

Small had confirmed with Shawver that the plant and related equipment had been operated within the past week or two. Mr. Hansen testified that the plant was operated sporadically – "[w]henever we have nothing else to do or want something for ourselves." Tr. 175. Shawver, or the other employee who occasionally operated the plant, could have used the loaders or truck at any time. They were parked in an area where equipment would normally be found, were operable, and had not been tagged out or otherwise designated as equipment that could not be used. Mr. Hansen testified that he has never tagged or locked out any piece of equipment.[8] Tr. 170-71, 173, 177-78.

Respondent claimed that the Euclid haul truck was not operational and that the engine had been taken out of it in September 2002. Tr. 171-72. However, this claim, like other exculpatory information presented or alluded to during the hearing, was not presented effectively and appears to be erroneous. The claim was that the engine in the truck had blown up prior to the inspection and that it would not run for more than 30 seconds. Tr. 172, 195-96. To repair it, an engine was pulled from a similar truck and put into the Euclid #2. Tr. 171-72, 217-18. However, Small testified that Shawver told him that the truck was in good condition. At Small's request, Shawver started the truck and, after letting it warm up, drove it about 600 feet to a grade where the parking brake was checked. The truck was then driven back to its parking place and shut down. Tr. 150-52, 233. Small was not cross-examined on the status of the truck. The citation was terminated in March 2003, because the truck was then inoperable because the engine had been removed. Tr. 152; ex. P-37. It appears that the engine in the Euclid #2 that Small cited was pulled after the inspections, and was used to replace a blown engine in a vehicle different from the one cited. I find that the Euclid haul truck cited by Small was fully operational at the

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[7] The standard at issue in that case, 30 C.F.R. § 56.9-2 (1978), required that defects be corrected "before the equipment is used."

[8] Mr. Hansen testified that if he didn't want a piece of equipment to be used, the key was simply taken out of it and "probably" hidden in the office. Tr. 177-78. There was no evidence that keys to the mobile equipment were not readily available on the days the inspection was conducted.

time of the inspection.[9]

The Secretary has carried her burden with respect to these citations. The conditions at issue have been held to violate the standard in prior cases, *See, e.g., Wake Stone Corp.*, 23 FMSHRC 454, 457 (April 2001)(ALJ). I also agree with the assessments of gravity and negligence noted in the citations.

Citation No. 6343236

Citation No. 6343236 was issued on September 10, 2002, and alleges a violation of 30 C.F.R. § 56.14101(a)(2), which provides: "If equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." At Small's direction, Shawver parked an unloaded Euclid haul truck, Company #2, on an approximate 4% grade, placed the gear selector in neutral and set the parking brake. When he released the service brakes, the truck rolled downward. The truck was used to move material around the mine site and had been observed in operation in July 2002. Tr. 57. Because the service brakes on the truck were functional and the site was generally level, Small determined that the violation was unlikely to cause an injury, that any injury would result in lost work days, that the violation was not significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $55.00 is proposed.

Aside from the claim that the truck was not operational, *see* discussion *supra*, Hansen offered no evidence to rebut the Secretary's proof of this violation, relying instead on its jurisdictional challenges. I find that Hansen violated the subject regulation, as alleged, and that the gravity and negligence determinations made by Small were accurate.

Citation No. 6343237

Citation No. 6343237 was issued on September 10, 2002, and alleges a violation of 30 C.F.R. § 56.14132(a), which provides that "Seat belts shall be provided and worn in haulage trucks." Small observed that the Euclid haul truck, which was the subject of Citation No. 6343236, was not equipped with a seat belt. Tr. 63. He determined that the violation was reasonably likely to cause a permanently disabling injury, that the violation was significant and substantial, that one person was affected, and that the operator's negligence was low. A civil penalty of $150.00 is proposed.

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[9] Mr. Hansen's recollection regarding the inspection differed markedly from Small's in many respects and, in one instance, was contradicted by his own witness. Tr. 196. In general, I have credited Small's testimony as to the conduct of the inspection and descriptions of various conditions cited.

The Violation - Significant and Substantial

Hansen does not dispute that there was no seat belt in the truck. I have previously held that the truck was operational and available for use at the time of the inspection. The violation was also significant and substantial. As noted in the discussion of Citation Nos. 6343225 and 6343248, there were unbermed roads at the site that presented the possibility of the truck leaving the roadway and overturning. There were also other vehicles that operated on the site, increasing the likelihood of an unexpected encounter that might have resulted in a collision or the truck leaving the roadway. I find that the violation was significant and substantial and that the negligence of the operator was low.

Citation Nos. 6343241, 6343242 and 6343243

Citation Nos. 6343241, 6343242 and 6343243 allege violations of 30 C.F.R. § 14107(a), the guarding standard discussed *supra*. They were issued on September 11, 2002, and were addressed to three distinct conditions. Citation No. 6343241 was issued because there was no guard provided for the self-cleaning tail pulley on the jaw conveyor. This pulley was about two feet above ground level and Small believed that persons would be in proximity to it during normal operations. Tr. 69; ex. P-15, P-16, P-17. Self-cleaning tail pulleys are particularly dangerous because they have grooved surfaces that can easily grab and hold things, such as clothing or limbs, and draw a person into the pulley, resulting in serious injury or death. Tr. 74. Small determined that it was reasonably likely that the violation would result in a fatal injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $259.00 is proposed.

Citation No. 6343242 was issued because there was no guard provided for the smooth tail pulley on the 3/4 minus conveyor. Small observed that this pulley was located about one foot above ground level and believed that persons would typically be in the area during normal operations. Tr. 82-84; ex. P-19, P-20. He concluded that the violation was reasonably likely to result in a permanently disabling injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $207.00 is proposed.

Citation No. 6343243 was issued because no adequate guard was provided on the v-belt drive unit on the hammer mill drive motor. Small observed that the unit was about four feet above ground level and believed that persons were required to be in the area when the plant was running. Tr. 88-91; ex. P-21, P-22, P-23. He concluded that the violation was reasonably likely to result in a permanently disabling injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $207.00 is proposed.

The Violations

Hansen attempted to defend against these alleged violations by presenting evidence that the plant had not been operated for some time prior to the inspection and that adjustments were being made to the feeder. Shawver testified that the plant had not run in "about a year," except for a short period a week or two before the inspection to make adjustments in preparation for planned operations in September, when material was to be removed from the river. Tr. 212. However, he later stated that it had been a "few months" since it had been operated. Tr. 213. Mr. Hansen also claimed that the plant had not been operated for some time, but also stated that it was operated whenever there was nothing else to do or finished product was needed. Tr. 175. Small testified that the plant was operating in July and, when recalled to the witness stand, reiterated that Shawver had told him that the plant had been run for production purposes a week or two before and that nothing had changed at the plant since that time. Tr. 234.

This defense, like the "inoperable truck" defense discussed previously, was not presented in an organized fashion and was not supported with documentation. The evidence offered by Hansen as to when the plant was run is also inconsistent. I find that the plant, like much of the mobile equipment, was operated sporadically in the condition that it was in when the inspection was conducted. Guards may have been removed, but they were not removed solely to allow adjustment of the equipment, i.e., the equipment had been operated, and most likely would have been operated, without the guards having been replaced.

The conditions described by Small in his testimony, the citations, related documents and pictures, clearly establish that the moving machine parts in question were not adequately guarded, in violation of the subject regulation.

Significant and Substantial

The pulleys and belt drive that are the subjects of these three citations present obvious and serious hazards to any person who might come into contact with them while they are in operation. The self-cleaning tail pulley is particularly hazardous because of its capacity to pull persons into the pulley and fast-moving belt. Any injury suffered by a person encountering these hazards would clearly be serious, most likely fatal in the case of the self-cleaning tail pulley. Ex. P-18. The crucial issue is whether it was reasonably likely that an injury would result from these violations, the third *Mathies* criteria.

Small testified that his assessment that the violations were S&S was based upon his understanding, from his experience and information provided by Shawver, that persons were required to be in the area of the hazards while the equipment was operating to monitor operations and to clean. Tr. 72-73, 85-86, 94. He also observed several shovels in the area of the tail pulley. Tr. 73. However, Shawver testified that no clean-up was done while the equipment was running, because of the likelihood of injury caused by rocks falling off the equipment. Tr. 206, 216. Small's conclusions in that regard, as expressed in his testimony and related

documentation, were somewhat conclusory, and his only direct contradiction of Shawver's testimony was a one-word response to a leading question. Tr. 75-76.

Shawver was presented as a witness by Mr. Hansen, a person inexperienced in presenting a legal case, and he impressed me as a credible witness. I accept his testimony on this issue and find that he, the primary operator of the plants, did not clean around the pulleys or v-belt drive while the equipment was being operated. I also find that, because of their desire to avoid falling rocks, neither he, nor any other person, was likely to be in close proximity to those devices while they were in operation. In addition, the v-belt drive was at least partially guarded. Ex. R-1A, P-22. While the guarding was inadequate, it did significantly reduce the possibility that anyone in the area would encounter that hazard. The photographs of the tail pulley and the v-belt drive, exhibits P-17 and P-22, depict the absence or inadequacy of guards, but are of little value in determining the accessibility of those hazards to persons who might have been in the area.[10]

On the specific facts of this case, I find that the conditions at issue in these citations were not reasonably likely to result in an injury, and that these violations were not S&S.

Citation No. 6343251

Citation No. 6343251 was issued on September 11, 2002, and alleges a violation of 30 C.F.R. § 56.14130(i), which requires that seat belts on loaders and other mobile equipment "shall be maintained in functional condition, and replaced when necessary to assure proper functioning." Small observed that the buckle portion of the seat belt in Hansen's Caterpillar 988 front-end loader, Serial no. 87A9205, was missing, rendering it non-functional. Tr. 113. He concluded that the violation was reasonably likely to result in a permanently disabling injury, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $207.00 is proposed.

Hansen offered no evidence to contest the alleged violation. I find that the regulation was violated, as alleged. I also find, for the reasons discussed with respect to Citation No. 6343237, that the violation was significant and substantial. I agree with Small's assessment of the operator's negligence.

Citation No. 6343252

Citation No. 6343252 was issued on September 11, 2002, and alleges a violation of 30 C.F.R. § 46.11(b), which provides, in pertinent part:

> You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at

[10] Mr. Hansen cross-examined Small in an effort to show that the photographs were taken from positions that distorted or misrepresented the actual conditions. Tr. 96-104.

a mine site, including . . . [c]ustomers, including commercial over-the-road truck drivers.

Small determined that Hansen was not providing site-specific hazard awareness training to persons, such as truck drivers, who entered the mine site. He concluded that the violation was reasonably likely to result in an injury resulting in lost work days or restricted duty, that it was significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $161.00 is proposed.

The Violation - Significant and Substantial

Hansen stipulated that it had not provided site-specific hazard training to persons who entered the mine site. Small's determination that the violation was significant and substantial was based upon the fact that over-the-road truck drivers employed by customers regularly entered the mine site and self-loaded their trucks from the stockpile. That was the only area of the mine site in which he observed non-miners. Tr. 126-27. He testified that there was a risk of injury for such untrained persons because they might have encountered hazards that they were not aware of, such as, an electrical hazard or an unguarded tail pulley or v-belt drive. Tr. 123-24. Lack of knowledge of traffic patterns was also a concern.

The only significant evidence of the presence of non-miners on the site was of truck drivers who loaded their trucks from the stockpile.[11] There is nothing to suggest that they ever ventured into other areas of the plant, where they might encounter an electrical hazard, a v-belt drive or a conveyor tail pulley. Two such drivers testified at the hearing. Both were highly experienced drivers and operators of heavy equipment, and had been to the site hundreds of times. Tr. 185-86, 189. They were obviously very familiar with the limited plant/stockpile area and the road that led to the site. Hansen's sand/gravel operation is most likely quite localized, and the drivers that testified were most likely typical of the customers that entered the mine site. Under the circumstances, I find that it is unlikely that an injury would result from this violation, i.e., it was not S&S.

Citation No. 6343253

Citation No. 6343253 was issued on September 11, 2002, and alleged a violation of 30 C.F.R. § 56.4201(a)(2), which requires annual inspections of fire extinguishers and provides:

> 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

[11] There is evidence that recreational users, fishermen, etc., frequented Hansen's property. However, there is no evidence that such persons ever visited the plant area or any area of the mine site, other than the river bar and roads leading to it.

extinguishers will operate effectively.

Small examined tags on a number of fire extinguishers in the plant area and observed that the last maintenance check was recorded to have occurred in March 2000. He concluded that the violation was unlikely to result in an injury, that any injury that might result would produce lost work days or restricted duty, that the violation was not significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $55.00 is proposed for this violation.

Hansen asserts only its jurisdictional and procedural defenses to this alleged violation. I find that the regulation was violated, and that Small's assessments of gravity and operator negligence were accurate.

Citation No. 6343256

Citation No. 6343256 was issued on September 11, 2002, and alleged a violation of 30 C.F.R. § 56.12028, which provides:

> Continuity and resistence of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistence measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

Small reviewed Hansen's records of continuity and resistence testing and determined that the last test had been performed in May 2001, more than a year prior to his inspection. He determined that the violation was unlikely to result in an injury, but that if an injury occurred, it would be fatal. He also determined that the violation was not significant and substantial, that one person was affected, and that the operator's negligence was moderate. A civil penalty of $55.00 is proposed.

Hansen essentially admits this violation, relating in its post-hearing brief that its previously employed electrician had closed his business and that it now has a new electrician who will perform the testing and keep the required records. I find that the regulation was violated, and that Small's assessments of gravity and operator negligence were accurate.

The Appropriate Civil Penalties

Hansen is a small mine and very small controlling entity. A computer-generated report of Hansen's history of violations shows that seven violations were issued and paid as a result of inspections conducted over five days in the August 2001 time frame. Ex. P-39. Hansen does not claim that payment of the proposed penalties would impair its ability to continue in business. The violations, gravity and negligence assessments, with respect to each alleged violation, are discussed above.

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Citation Nos. 6343225 and 6343248 were affirmed as significant and substantial violations. Civil penalties of $207 were proposed for each violation, based upon an assessment that took into account the small size of the operator and the history of violations. Considering the factors enumerated in section 110(i) of the Act, I impose penalties of $207 for each of these violations.

Citation Nos. 6343229 and 6343236 were affirmed. Single penalty assessments of $55 were proposed for each violation. Considering the factors enumerated in section 110(i) of the Act, I impose penalties of $55 for each of these violations.

Citation No. 6343237 was affirmed as a significant and substantial violation. A civil penalty of $150 was proposed, based upon an assessment that took into account the small size of the operator and the history of violations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of $150 for this violation.

Citation Nos. 6343241, 6343242 and 6343243 were affirmed. However, the violations were not found to have been significant and substantial. Rather, they were found to be unlikely to result in a serious injury. Civil penalties in the amount of $259, $207 and $207, respectively, were proposed by the Secretary. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of $100 for Citation No. 6343241 and $55 for each of the other violations.

Citation No. 6343251 was affirmed as a significant and substantial violation. A civil penalty of $207 was proposed, based upon an assessment that took into account the small size of the operator and the history of violations. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of $207 for this violation.

Citation No. 6343252 was affirmed. However, it was not found to have been significant and substantial. Rather, it was found to be unlikely to result in a serious injury. A civil penalty in the amount of $161 was proposed by the Secretary. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of $55 for this violation.

Citation Nos. 6343253 and 6343256 were affirmed. Single penalty assessments of $55 were proposed for each violation. Considering the factors enumerated in section 110(i) of the Act, I impose penalties of $55 for each of these violations.

Docket No. WEST 2003-429-M

Citation Nos. 6343233 and 6343235 were affirmed. Single penalty assessments of $55 were proposed for each violation. Considering the factors enumerated in section 110(i) of the Act, I impose a penalty of $55.00 for each violation.

ORDER

Citation Nos. 6343225, 6343248, 6343229, 6343233, 6343235, 6343236, 6343237, 6343251, 6343253 and 6343256 and are **AFFIRMED**. Citation Nos. 6343241, 6343242, 6343243 and 6343252 are **AFFIRMED**, as modified. Respondent is directed to pay a civil penalty of $1,366.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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