FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

December 22, 2006

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-264-M
Petitioner	:	A.C. No. 45-03224-22959
	:	
	:	Docket No. WEST 2004-316-M
	:	A.C. No. 45-03224-25667
	:	
v.	:	Docket No. WEST 2004-345-M
	:	A.C. No. 45-03455-20609
	:	
	:	Docket No. WEST 2004-352-M
	:	A.C. No. 45-03224-20531
	:	
	:	Champion Pit #1
	:	
WASHINGTON ROCK QUARRIES, INC.,	:	Docket No. WEST 2004-309-M
Respondent	:	A.C. No. 45-03455-25761
	:	
	:	Docket No. WEST 2005-151-M
	:	A.C. No. 45-03455-44593
	:	
	:	Docket No. WEST 2005-307-M [1]
	:	A.C. No. 45-03455-53752
	:	
	:	King Creek Pit

DECISION

Appearances: Bruce L. Brown, Esq., U.S. Department of Labor, Seattle, Washington, on behalf of the Petitioner;
Paul M. Nordsletten, Esq., Davis Grimm Payne & Marra, Seattle,Washington, on behalf of the Respondent

Before: Judge Barbour

[1] This docket was not included in the consolidated cases, but was included in the parties' settlement of violations addressed as a result of the consolidation. Therefore, the docket is included in the caption.

These cases concern proposals for the assessment of civil penalties filed by the Secretary of Labor (Secretary) on behalf of her Mine Safety and Health Administration (MSHA) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 815(d)) (the Act). She seeks civil penalty assessments for 35 alleged violations of mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations ("30 C.F.R.").[2] The violations allegedly occurred at two facilities operated by Washington Rock Quarries, Inc. (WRQ), Champion Pit No.1 (Champion Pit) and King Creek Pit (King Creek). The cases were heard in Tacoma, Washington. At the close of the hearing, the record was left open to accommodate the telephone testimony of a witness. Following the taking of that testimony, the record was closed, and the parties submitted post-hearing briefs.

STIPULATIONS

At the Tacoma hearing, the parties agreed to the following stipulations:

> 1. [MSHA] has jurisdiction over the mines involved in the citations;
>
> 2. [The Administrative Law Judge] has jurisdiction to hear [the] matter[s];
>
> 3. Annual hours worked at the mine[s] in each of the years 2002, 2003 and 2004 was over 30,000 hours, but less than 60,000 [[3]], and;
>
> 4. Imposition of the combined proposed assessments will not adversely impact [WRQ's] ability to stay in business.

See Joint Exh. 1 at 1-2; Tr. 16. In addition to the stipulations, the parties agreed to the accuracy of a report containing WRQ's history of previous violations (Tr. 188; Gov. Exh. 29).[4] They also agreed WRQ timely abated all of the alleged violations. Tr. 15.

---

[2] Prior to the hearing, the parties settled 23 of the alleged violations, and I will approve that settlement at the close of this decision. Tr. 11.

[3] Counsel for the Secretary stated that the numbers are indicative of a small mine. Tr. 189.

[4] The report sets forth what counsel for the Secretary describes as a "small to average" history. Tr. 189.

WRQ'S OPERATIONS

Harry Hart, the president of WRQ for the past 15 years, described the two quarries. Hart was involved personally in the design and construction of both facilities. At Champion Pit, basalt is extracted by drilling and blasting. King Creek, on the other hand, is a sand and gravel operation. TR 194-195. Champion Pit opened in 1990. King Creek opened in 1998. *Id.* The land on which the mines are located, and much of the land surrounding the mines, is owned by the International Paper Company (International Paper). WRQ pays International Paper a royalty on each ton of material it removes from the two sites. Tr. 196.

DOCKET NO. WEST 2004-352-M

______	Citation No.	Date	30 C.F.R. §
	6350795	1/13/04	56.16006 [5]

Citation No. 6350795 states:

> The acetylene, oxygen and [a]rgon mixed gas cylinder valves, on the [F]ord maintenance truck . . . were not protected by covers during transport. The mixed gas valve was about 18 inches above the cab of the pick-up and the acetylene, oxygen valves were about 4 inches off the side and 5 inches above the cab of the truck without being protected. This creates the hazard of the valves breaking when accidentally hit and for serious injuries to occur. The maintenance truck is used on a daily basis for repairing mobile equipment.

Gov. Exh 3.

Ron Jacobsen is a MSHA supervisory mine inspector. He works in the agency's Boise, Idaho office. Prior to taking the position in Boise, Jacobsen worked as an inspector in the

---

[5] Section 56.16006 states:

> Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by safe location when the cylinders are in use.

agency's Belleview, Washington, office. He has been employed by MSHA since 2001.

On January 13, 2004, Jacobsen traveled to the Champion Pit to conduct a general inspection of the mine. After arriving at the mine, Jacobsen met Jerry Joliffe, the mine foreman. Jacobsen testified that as he and Joliffe were standing near the mine office, Jacobsen noticed a Ford pickup truck drive up. The truck was carrying compressed gas cylinders. The cylinders lacked protective covers. Tr. 32-33; *see also* Tr. 360. Jacobsen photographed the truck. Tr. 33; Gov. Exhs. 1, 2. Because the cylinders were being transported without covers, Jacobsen believed the cylinders were not protected as required by section 56.16006. Tr. 36.

Jacobsen explained that when cylinders are transported without covers, there is a danger that the valves at the top of the cylinders will be dislodged, which in turn will lead to the cylinders blowing up or to them being propelled like missiles. Tr. 37. Such accidents can cause fatal injuries to the vehicle driver or to anyone standing nearby. However, in Jacobsen's opinion, accidents involving the subject cylinders were unlikely because the cylinders did not have to pass under low clearances at the mine, and there was nothing that might hit the top of the cylinders and damage them. *Id., 40, 42.* Moreover, Jacobsen had "no doubt" (Tr. 43) the cylinders were securely held in place on the truck because they were placed in semicircular metal cradles. Tr. 39; Gov. Exhs. 1 and 2. Still, in Jacobsen's view, the company violated the standard by transporting the cylinders without covers. Jacobsen spoke with the maintenance mechanic who told Jacobsen that he (the mechanic) never heard of section 56.16006. The mechanic thought that securing the cylinders in the cradles was sufficient. Tr. 38, 40.

As a result of what he saw and was told, Jacobsen issued the subject citation. He believed the violation was the result of WRQ's negligence. The citation was abated when covers were placed over the cylinders' valves. Tr. 40.

Harry Hart explained that WRQ obtained its compressed gas bottles from a welding supplier. When the bottles arrived at WRQ's shop, which is on mine property, they were protected by covers. Tr. 197. He further explained that when the bottles were placed on WRQ's service truck, they were put in the cradles. Hart added that the cradles were bolted to the truck frame and the bottles were secured further with chains "so they can't fall over." *Id*. The cradles were designed for the truck. Tr. 198. Hart described the cylinders as being located "below where anything would hit them." Tr. 201.

Hart added that the bottles remained upright and secured in the truck's cradles until they were used. Tr. 201; *see also* Tr. 200. Once the bottles were taken off the truck, the covers were removed and gauges were installed. When the bottles were empty, the covers were replaced, the bottles were put back on the truck, and they again were chained. Tr. 198.

WRQ used the truck to transport liquid gas cylinders since 1992 or 1993. Tr. 200. Prior to the subject citation, WRQ never was cited by MSHA for any condition relating to the cylinders' transportation. Tr. 198.

THE VIOLATION

I conclude the violation existed as charged. The parties do not dispute that the cylinders contained compressed gases. Section 56.16006 requires the cylinders' valves to be protected by covers when the bottles are transported or stored. Jacobsen testified that the cylinders were being transported on the truck and that they did not have covers. Tr. 37, 360. Hart, who was present, along with Jacobsen and Joliff, stated the truck was parked, and it was "not [his] recollection" the truck was moving and was transporting uncovered cylinders. Tr. 202. However, Jacobsen was certain about what he saw, and I credit his version of the facts. Therefore, I find the cited cylinders were being transported without protective covers in violation of section 56.16006. I also note even if the truck was parked, as Hart maintained, I still would find a violation. Hart's testimony made clear the cited cylinders were stored on the truck until they were ready to be used. Tr. 198-200. The storage of full cylinders without protective covers is also a violation of the standard.

GRAVITY AND NEGLIGENCE

The violation was not serious because there was little likelihood it would result in an injury-causing accident. Both Jacobsen and Hart noted the cylinders were secured in cradles on the truck. Tr. 43, 197-198. Moreover, Jacobsen testified there were no low clearances under which the truck had to pass and, thus, no obstructions that might damage the cylinders' unprotected valves (Tr. 37, 40, 42). The essence of Hart's testimony as to the violation's gravity was consistent with Jacobsen's. Tr. 198-201.

In transporting the uncovered cylinders, WRQ failed to meet the standard of care required of a reasonably prudent mine operator. The lack of protective covers was visually obvious. Management personnel knew or should have known the covers were missing. Therefore, I find the company was negligent in failing to ensure the presence of the required covers.

DOCKET NO. WEST 2004-316-M

Citation No.	Date	30 C.F.R. §
6350797	1/13/04	56.14112(b) [6]

Citation No. 6350797 states:

---

[6] Section 56.14112(b) states:

> Guards shall be securely in place while machinery is being operated, except when testing and making adjustments which cannot be performed without removal of the guard.

> The guard of the tail pulley of the #2 feed conveyor was not secure. Nor was there a bottom guard on this conveyor. The guard was not secure on the bottom and was just hanging down over the tail pulley. This exposes miners to entanglement hazards that could cause serious injuries. The area is accessed when the plant is off and clean-up is conducted with a bobcat.

Gov. Exh. 5.

Jacobsen testified when he inspected the No. 2 Feed Conveyor tail pulley, he noticed the guards for the pulley consisted of overlapping pieces of conveyor belt material. Tr. 45. The top piece of material covered the upper part of the tail pulley and the lower piece covered the lower part.

Jacobsen recalled the conveyor belt was moving "at a high rate of speed". Tr. 50, *see also* Tr. 47. He was concerned because the pieces of the guard were "only secured with a bolt at the top" and because the top part of the guard was hanging in such a manner as to create a four-inch wide gap between the inside edge of the top piece of belting and the frame of the pulley. Tr. 47. He also was concerned about the use of belting material as a guard. While he agreed the material was accepted by MSHA for guarding purposes (*id.*), in his view the material did not make "a strong guard." Tr. 46.

Jacobsen stated section 56.14112(b) is designed to prevent persons from contacting moving machine parts. Tr. 49. Jacobsen believed a violation of the standard existed because the top of the guard was "flimsy" and a person could push through the belting if he or she fell toward the pulley. Tr. 55-56. The bottom part of the guard also was "flimsy" and a person shoveling could push through it and the shovel and shoveler could be pulled into the pulley. Tr. 50, 56. Jacobsen further thought the four-inch gap "could be part of the violation". Tr. 56.

Jacobsen acknowledged, however, that an injury was unlikely. Tr. 49-50. Someone told him the area was only accessed by miners when the equipment was not operating. Tr. 58.

With regard to negligence, Jacobsen stated that the condition of the guards "wasn't real obvious" and that WRQ was only moderately negligent in allowing the violation to exist. Tr. 51.

Hart disagreed about the strength of the belting. According to Hart, the material was "extra heavy-duty . . . one inch thick belt, five-ply." Tr. 204. Because the conveyor material from which the guards were constructed was very stiff, he believed if a person pushed or fell against the top guard, the person would not be able to move the guard and encounter any moving machine

parts. Tr. 204, 206. [7] Hart testified that the cited guards were installed in 2001 at MSHA's suggestion and that they never were previously cited. Tr. 208. He added that miners did not work near the pulley, nor walk within five feet of it while the conveyor belt was running. Tr. 205, 209.

To abate the condition, WRQ secured the top piece of belting with additional bolts and closed the four-inch gap. Tr. 51-52. Jacobsen could not recall what else, if anything, WRQ did. Tr. 52, 58.

THE VIOLATION

The standard requires guards to be "securely in place when machinery is being operated." 30 C.F.R. §56.14112(b). I accept Jacobsen's undisputed testimony that the conveyor belt was moving. Tr. 50. I infer from the fact the four-inch gap was closed by using addition bolts to secure the top piece of belting (Tr. 51-52) that the guard was not "securely in place when the machinery [was being] operated," and I, therefore, find the violation existed as charged. Tr. 51-52. It seems clear to me that if a guard provides access that can be eliminated by better affixing it, it is not "secured in place." Here, tightening the guard to the frame of the tail pulley eliminated the gap that provided access to the pulley's moving parts.

The finding of violation is in no respect based on the material WRQ used for guarding. As Jacobsen and Cain acknowledged, while MSHA has qualms about guards made with conveyor belting, the agency allows its use. Nor is the violation based on an allegation the guards were flimsy. Jacobsen did not physically test the guard.

GRAVITY AND NEGLIGENCE

The violation was not serious. Jacobsen was told, and did not dispute, that shoveling in the vicinity of the pulley took place only when the equipment was not operating. Tr. 58. Hart also testified miners neither walked nor worked adjacent to the pulley when it was operating. Tr. 205, 209. Jacobsen believed, that an injury-causing accident resulting from the violation was unlikely. Tr. 58. Jacobsen's assessment of the situation accurately reflects the testimony, and I accept it.

The violation was visually obvious. An inspection should have revealed the gap. I infer from this that if WRQ had exercised reasonable care, it would have detected and corrected the condition. In failing to do so, it behaved negligently.

---

[7] Another view on the merits of the belting material was expressed by supervisory mine inspector Stephen Cain, who explained that although it is permissible to use belting, the material is pliable and does not "offer the same measure of protection as guards made of metal mesh." Tr. II 13.

DOCKET NO. WEST 2004-352-M

Citation No.	Date	30 C.F.R. §
6350798	1/13/04	56.14112(b) [8]

Citation No. 6350798 states:

> The guard to the tail pulley of the surge tunnel conveyor was not secure on the bottom. This exposed about a 4 inch opening to the tail pulley, and entanglement hazards that could cause serious injuries to a miner. The area is accessed when the plant is off and clean-up is conducted with a bob-cat [a small front end loader].

Gov. Exh. 7.

During the inspection, Jacobsen noticed that the tail pulley guard on top of the surge tunnel conveyor belt was "hanging loose." Tr. 59; *see* Gov. Exh. 6. Only the top part of the guard was attached to the frame of the belt, creating a triangular gap between the frame and the guard. Jacobsen measured the gap at the base of the triangle and found it to be four inches. Tr. 60, 66-67. The belt was running. Jacobsen did not attempt to move the guard, but he noticed that the tail pulley was exposed through the gap. Tr. 60-61.

Jacobsen believed the loose guard was a hazard, because a miner could get an arm or a hand through the gap and could be caught by the pulley. Tr. 62, 64. He also noted the area near the guard was muddy and that a miner could slip, fall toward the gap, and his or her arm or hand could pass through the gap into the hazardous area. Tr. 65. Such an accident "would remove [the miner's] arm or hand." Tr. 64.

However, Jacobsen viewed an accident as unlikely. Tr. 62-63. He believed he was told the area near the pulley was not regularly traveled, and his visual observation of the area confirmed this. Tr. 62-63, Tr. 70. He also thought he was told miners were in the area only when the equipment was shut down. Tr. 62-63.

In Jacobsen's opinion, the company was moderately negligent. He again noted the area was not regularly accessed, and he recalled company officials telling him that the condition "may have just happened." Tr. 64, 72.

Hart testified, to his knowledge, bolts never were used to fasten the sides of the guard. The guard had been as Jacobsen found it since 2000, and the condition never was previously cited. Tr.

[8] The standard is set forth in n. 6 *supra*.

213, 214, 216. Hart agreed that the opening between the guard and the tail pulley frame was approximately four inches at its widest point. Tr. 211-212; *see* Gov. Exh. 6. Because the tail pulley was located approximately one foot behind the guard, Hart did not think it possible for a miner accidentally to contact the pulley if he or she were to fall near the guard. Tr. 214. Access was available only through the widest part of the gap, which was at the bottom of the guard. Because the tail pulley was mounted at an angle, to reach its moving parts from the bottom, "you would have to be on your knees and you would have to stick your arm in and then turn your arm at a 90-degree turn to get to [the] . . . pulley." Tr. 215.

WRQ's expert witness, Kim Redding, a former MSHA inspector and a current private mine safety and health consultant (*see* WRQ Exh. 21), believed the only contact possible was intentional contact. Tr. 308. However, Redding was not present on the date of the inspection and only saw the tail pulley after the alleged violation was abated. Tr. 305.

THE VIOLATION

As I have noted, the standard requires guards to be "securely in place when machinery is being operated." Jacobsen's testimony that the tail pulley was operating when he conducted the inspection was not disputed. Tr. 61. Also essentially undisputed was the existence of the gap, which measured up to four inches between the frame of the tail pulley and the guard. Tr. 60, 66-67, 211-212; Gov. Exh. 6. While contact with the pulley was difficult, it was not impossible, and I find the presence of the gap violated the standard. In this instance, being "securely in place" means that the guard should have been snug against the frame of the tail pulley. To find otherwise would defeat the purpose of the standard by allowing entry to the moving pulley parts.

GRAVITY AND NEGLIGENCE

Like the inspector, I conclude the violation was not serious. The testimony established miners infrequently visited the area. The testimony also permits finding when they visited, the conveyor belt usually was shut down. In addition, as the citation states, miners most often cleaned in the vicinity of the pulley with a bobcat. Nevertheless, common sense dictates that as mining operations continued there would be times when miners were on foot in the area and the belt was running. Belts that are "always" shut off when miners are present sometimes are not, and equipment from which miners "always" work sometimes malfunctions. This stated, there was only a remote possibility a miner who was on foot in the vicinity of the pulley would actually contact its parts. Hart's description of the contortions required for such contact was not refuted (Tr. 214-215), and although the focus of the civil penalty gravity criterion is on the effect of the hazard were to occur (*Consolidation Coal Company*, 18 FMSHRC 1541, 1550 (September 1996)), the criterion also has a "likelihood" component, which in this instance mitigates the seriousness of the possible result.

As for the company's negligence in allowing the violation to exist, I agree with the inspector that the lack of regular travel in the area by management personnel militates against finding more than moderate negligence on the company's part. Tr. 64. In addition, the relatively small size of the gap and the fact that the company never was previously cited for a guarding violation with respect to the subject pulley further lessens WRQ's neglect. Tr. 216.

Citation No.	Date	30 C.F.R. §
6350799	1/13/04	56.14107(a) [9]

Citation No. 6350799 states:

> The 2 by 2 belt has an inadequate guard on the tail-pulley. The conveyor is about 4 feet off the ground, has an 8 inch opening on the back, and a 12 inch exposure on the bottom. This creates entanglement hazards to miners that access the area when the equipment is off.

Gov. Exh. 8.

Jacobsen testified that upon examining the tail pulley for the 2 by 2 belt on the ballast stacker, he noticed the pulley was lacking a bottom and a rear guard. Tr. 73; *See* Gov. Exh. 8. In Jacobsen's opinion, the lack of guarding endangered miners because they might contact the moving parts of the pulley. Tr. 74-75. His memory refreshed by contemporaneous notes, Jacobsen recalled that the tail pulley was located approximately four feet off the ground, which, he believed, meant that the pulley's unguarded bottom parts could be "easily accessed." Tr. 75. Jacobsen noted that material occasionally built up under the pulley and to be rid of the material, a miner would "use a shovel to try to clear . . . [it]." Tr. 361; *see also* Tr. 75, 83. Jacobsen feared a miner doing this work accidentally would contact moving parts, which would "grab [the shovel handle] and pull [the miner] up into [the pulley]" (Tr. 361); or, he or she would inadvertently reach up and his or her hand would be caught in the pulley. Tr. 84. In either case, the miner's fingers, hand or arm could be lost. *Id*.

However, Jacobsen did not believe contact was likely because the unguarded openings on the rear and underside of the tail pulley were restricted in size. Tr. 76-77; *see also* Gov. Exh. 8-A. Moreover, Jacobsen was told by management personnel that the tail pulley was not accessed while it was operating and that the area in which the equipment was located was not regularly traveled.

---

[9] 30 C.F.R. § 56.14107(a) states:

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

Tr. 77. In addition, he admitted he never was told miners cleaned with shovels at the mine, nor had he ever seen miners do so. Tr. 361.

Hart testified that access to the pulley was impossible. He emphasized the pulley was one foot behind the guard. He added the opening about which Jacobsen was concerned and which Jacobsen described as measuring eight inches actually was four inches. Tr. 218. Hart did not think a person could contact the tail pulley through the space because he or she would have to reach in and then up about one or two feet. In Hart's view, there was no reason a person would do this. Tr. 219.

While Hart acknowledged there was a 12-inch opening underneath the tail pulley, he maintained if a person traveled under the pulley and stood up, three crossbars would prevent the person from coming in contact with the moving parts. Tr. 220, 222-223. Finally, Hart noted the sides of the tail pulley were fully screened to prevent access. Tr. 224.

Kim Redding, like Hart, also believed the crossbars prevented accidental contact from underneath. Tr. 288. In addition, Redding stated miners most often worked from a bobcat when in the area and usually would not position themselves under the pulley to clean up material. Tr. 289, 295. He acknowledged, however, that if a miner were shoveling under the pulley, his or her shovel could come in contact with the moving pulley, but he thought this would be "pretty hard to do unless . . . [the miner] intentionally [was] trying to scrape something off the pulley." Tr. 295. On the whole, he believed the frame structure around the pulley offered adequate protection. Tr. 291.

With regard to WRQ's negligence, Jacobsen testified that it was high. The lack of adequate guards was obvious. He added that the foreman who supervised the area was not conducting workplace examinations. Jacobsen recalled the foreman stating he was "too busy" to do the examinations and that mine management had not given him the forms required for the examinations. Tr. 86. Although Hart emphasized the openings on the tail pulley had existed since 2000 and never had been cited previously by MSHA (Tr. 224), Jacobsen countered that conditions change constantly and there was no way to be sure the conditions he (Jacobsen) saw had been seen by other inspectors. Tr. 87.

THE VIOLATION

I conclude the violation existed as charged. The standard is designed to prevent miners from accidentally contacting pinch points and/or becoming entangled by moving machine parts.[10]

---

[10] The Commission has held section 56.14107(a) "imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling, falling, inattention, or carelessness" (*see, e.g.*, *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983)). The Commission also has held applying these concepts requires taking into consideration all relevant exposure and injury variables. *Thomas Brothers Coal Company,*

The tail pulley mechanism contained pinch points and moving parts. They created the possibility of entanglement. As a result, the pulley was required to be guarded. Jacobsen's testimony established the guarding was insufficient because the tail pulley mechanism could be accessed. Tr. 76-77. In this regard, I do not credit Hart's testimony that the gap about which Jacobsen was concerned was four inches. Comparing the gap as depicted in Gov. Exh. 8 with the other pictured parts of the frame described as measuring two inches, I conclude the actual measurement of the gap was approximately eight inches, as stated by Jacobsen. Tr. 76-77; Gov. Exh. 8. Although the location of the pulley mechanism meant that contact with a pulley mechanism through the gap or from below the pulley frame was unlikely, it was not impossible. Cleanup activities under or alongside the belt and travel next to the belt provided the opportunity for such contact, and although Redding indicated miners usually used a bobcat when working around the pulley, the fact that on occasion miners were required to be on foot near the pulley was not refuted by WRQ.

GRAVITY AND NEGLIGENCE

I agree with the inspector that there was a danger to miners cleaning under or around the tail pulley or passing it. As Jacobsen testified, and as Redding agreed, a miner cleaning under the pulley might catch his or her shovel in the pulley's moving parts. Tr. 84, 295. In addition, a miner working under the pulley might reach up and his or her hand or arm might contact the parts. Tr. 84. It also was possible a miner working or traveling around the pulley might trip and enmesh his or her arm or hand in the moving parts. However, and as Jacobsen also testified, miners' access to the pulley was usually restricted while it was operating, travel in the vicinity of the pulley was infrequent, and the openings to the moving machine parts were relatively small. Therefore, I conclude injuries were unlikely and the violation was not serious. Tr. 76-77.

NEGLIGENCE

The testimony establishes that WRQ was moderately negligent. The openings to the pulley were visually obvious. Reasonable care required the installation of adequate guards, which were not installed.

Citation No.	Date	30 C.F.R. §
6355401	1/13/04	56.14107(a) [11]

Citation No. 6355401 states:

> The Seco Screen [[12]] has an inadequate guard on the drive/counter-

---

Inc., 6 FMRHRC 2094, 2097.

[11] The standard is set forth in n. 9, *supra*.

[12] The screen is a portable machine used to sift topsoil. Tr. 233-234.

> balance parts. There is about a 7 inch exposure to the fast moving counterbalance that has catch hazards, and the walkway past the balance is about 2 ½ feet. This exposes miners that access this deck as needed to serious injuries, it was stated that this deck would not be accessed while the equipment was in operation.

Gov. Exh. 11.

Jacobson testified that he observed an inadequate guard on the Seco Screen's belt drive. Tr. 88. A two-and-one-half foot wide walkway ran alongside the belt drive and counterbalance. According to the inspector, although an "excellent" (Tr. 89) guard was in place for the front of the belt and although that guard was immediately adjacent to the walkway, a gap of approximately seven inches existed between the back of the screen and the moving parts of the belt drive and counterbalance. Tr. 92; *see* Gov. Exh 10. Jacobsen believed if a miner tripped while using the walkway, he or she would reach across the top of the screen to grab its backside for support. This would subject his or her hand or arm to contact with the moving parts of the belt drive and counterbalance. (The top of the screen was approximately three-and-one-half feet above the walkway.) Tr. 89-90, 92, 96-97; *see* Gov. Exh. 10. However, Jacobsen also believed this scenario was unlikely to happen. He noted the foreman stated miners did not access the area while the plant was operating, and Jacobsen agreed that the narrow nature of the gap and its location limited access to the moving parts. Tr. 92.

Hart testified that a handrail was present along the walkway, opposite the screen. He believed a tripping miner was more likely to grab the handrail for support than to reach across the top of the screen. Tr. 332-333. [13] Hart also maintained miners did not access the screen while it was operating. Tr. 230-231. In addition, he testified the exposed moving parts of the screen were smooth and did not present a "catch hazard". Tr. 230, *see also* Tr. 391. ("There's no bolts or anything else in the backside of this [equipment]." Tr. 391.)

Kim Redding too was of the opinion existing guarding on the screen prevented access to the screen's moving parts. He stated a "person would have to be a contortionist" to reach across the top of the screen and contact the parts. Tr. 289. Redding reiterated Hart's opinion that should a miner stumble on the walkway, he or she would most likely reach for the handrail, and he also believed no work was required that would put a miner in a position from which he or she could access the parts. Tr. 297-298.

Jacobsen thought the company was negligent. Jacobsen was told that in the past the screen had operated without a guard, and he noted, "the foreman stated that he had not done a workplace

---

[13] Jacobsen countered because miners commonly used two handrails, if a miner tripped, he or she would be likely to reach not only for the handrail, but also toward the gap and the moving parts. Tr. 365.

exam on [the screen]." Tr. 93.

THE VIOLATION

I conclude the violation existed as charged. As previously stated, the standard is designed to prevent miners from contacting moving machine parts. Here, Jacobsen's testimony established that the seven-inch gap existed between the inside edge of the screen guard and the outside edge of the belt drive structure. (The gap is clearly depicted in Gov. Exh. 10.) This gap provided a means of access to the screen's moving parts. The inspector credibly described how a miner walking down the narrow walkway might slip and reach across the top of the screen guard to steady himself or herself. If the miner's hand entered the gap, it could contact the moving parts. Even though WRQ established that the moving parts were smooth and contained no protrusions to snag or catch the miner, contact with the moving parts still could have caused an injury. Tr. 89-90, 92, 96-97. Access to the moving parts through the gap should have been prevented by a guard, and it was not.

I recognize that Jacobsen was told miners did not visit the area while the plant was operating (Tr. 92). Even assuming this was true a great majority of the time, the goal of the standard is not only to protect against the hazards of frequent access, but also to protected against aberrant and unusual situations. Thus, restricted access to the belt drive while the screen is operating bears upon the likelihood of injury resulting from the lack of adequate guarding, but does not negate the violation. *See e.g.*, *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 400-401 (March 1996) (ALJ Manning).

GRAVITY AND NEGLIGENCE

I agree with Jacobsen that the violation was not serious. Like Jacobsen, I accept that access while the screen was operating was limited, and I find that a miner who slipped or tripped while using the walkway would be likely to grab the adjacent handrail for support. He or she could, but rarely would, reach across the top of the front part of the drive belt guard in such a way as to contact moving parts. Tr. 92.

I also find that WRQ was negligent. The gap was visually obvious, and it should have been detected. A guard should have been installed. In allowing the unguarded gap to exist, WRQ failed to meet the standard of care required.

DOCKET NO. WEST 2004-309-M

Citation No.	Date	30 C.F.R. §
6355441	3/16/04	56.11002 [14]

[14] 30 C.F.R. § 56.11002 states in relevant part:

Citation No. 635544 states:

> The elevated walkway along the [p]owerscreen was bent, broken, and missing bolts to secure the walkway. There is a piece of the walkway protruding about 1 inch in the air just before the ladder, and the walkway is loose due to lack of a bolt. This exposes miners to a tripping hazard and fall of about 5 feet to the ground below. The walkway is used about 1 time every two months to change screens.

Gov. Exh. 13.

Jacobsen testified that during the course of an inspection on March 16, 2004, he was accompanied by Al Evans, WRQ's pit foreman. Tr. 101. Upon examining the elevated walkway along the power screen (a machine used to screen topsoil), Jacobsen noticed two things that concerned him: part of the walkway was raised about an inch above the rest of the walkway, creating what he maintained was a trip hazard; and a bolt was missing on the edge of the walkway. Tr. 103, 110, 115. Jacobsen thought the bolt was part of the structure that attached the walkway to the frame of the screen. Tr. 115. He believed the walkway was designed so all of its bolts held it in place. Because the walkway vibrated when the screen was operating, Jacobson thought the missing bolt subjected the walkway to added stress, which could cause the walkway to collapse. Tr. 108.

As for the raised portion of the walkway, Jacobsen speculated if a miner were to trip on it, he or she might fall off the walkway because there was an open ladder at the walkway's end. The fall would be approximately five feet to the ground and the result could be fatal. Tr. 105-106. However, Jacobsen did not believe such an accident was likely. He noted there was minimal access to the walkway. Tr. 105-107.

Jacobsen also testified that Evans explained the power screen had been operating for two days before the inspection and he, Evans, had not traveled the walkway. Tr. 107. Therefore, while Jacobsen thought that the company should have known about the condition of the walkway, he believed the company was only moderately negligent. *Id.*

Hart agreed with Jacobsen that the bolt was missing (Tr. 234), but he did not feel the missing bolt functionally affected the walkway. Tr. 237. The power screen was portable and, Hart explained, "when you move the screen, you take the ladder off and fold the walkway." Tr. 234-235. After the screen is moved, the walkway is reinstalled. Hart testified that the bolt did not

---

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.

support the walkway. Rather, the walkway was held in place by three sliding steel tubes. Tr. 235-236.

Further, Hart did not agree that one part of the walkway was raised an inch above the other part. Tr. 237. In Hart's view, the difference in elevation was one-eighth inch to one-fourth inch. Tr. 354-355.[15]

Redding, too, did not agree the difference in elevation was one inch. Tr. 319-320. In Redding's view, the difference in the levels of the two parts of the walkway was not significant, and a resulting accident was unlikely. Tr. 320-321.

THE VIOLATION

I find the walkway was in violation of section 56.11002. The standard requires walkways to be "maintained in good condition." The evidence supports finding that one part of the subject walkway was elevated above the other. I am persuaded the difference in elevation was such that a tripping hazard was created. Whether the difference was one inch or was one-eighth to one-fourth inch, the walkway was not level, contrary to the reasonable expectations of those using it. Miners would not be "on the lookout" for a protrusion that might catch their feet and cause them to stumble. The regulatory mandate to maintain a walkway in "good condition" requires an operator to maintain it consistent with reasonable expectations of safe use. WRQ failed to meet this requirement and violated the standard.[16]

GRAVITY AND NEGLIGENCE

The violation was not serious. The relatively small difference between the walkway levels and the limited number of times miners used the walkway made it unlikely the violation would result in a tripping accident. Moreover, even if a miner were to trip, the fact that there was a handrail on one side of the walkway and the fact that the opening to the ladder was at the end of the walkway meant that he or she was likely to grab the handrail to steady himself or herself or to fall on rather than off the walkway.

---

[15] Although Hart acknowledged that when answering an interrogatory he stated the difference in elevation between the walkway's two parts was "approximately one inch" (Tr. 323 (*quoting* Petitioner's First Set of Discovery to Respondent and Supplemental Answers Thereto 7, which states, "Respondent admits there was a piece of metal approximately one inch high." Tr. 356.)), Hart explained in making the statement he was only "admitting that the citation says there was a piece of metal protruding one inch high." Tr. 354.

[16] The finding of violation is based solely on the walkway's disparate levels. I conclude that the Secretary failed to establish the missing bolt affected the walkway's condition. Indeed, given Hart's uncontradicted explanation of how the walkway was secured to the frame of the screen, the bolt seems unlikely to have served any purpose affecting safety. Tr. 235-236.

WRQ was minimally negligent in allowing the violation to exist. I note that Evans explained to Jacobsen that the screen had been operating only for two days. Moreover, the difference in the walkway's elevation was such as to be easily overlooked.

Citation No.	Date	30 C.F.R. §
6355444	3/16/04	56.11003 [17]

Citation No. 6355444 states:

> The ladder to the grizzly hopper tunnel is a wooden pallet stood upright. This creates the hazard of a fall due to a poorly constructed ladder. The ladder is used to access the tunnel for clean-up and servicing duties about 2 times per week.

Gov. Exh. 15.

Jacobsen testified that during the March 16 inspection he noticed a wooden pallet used as a ladder to access a hopper. *See* Gov. Exh. 14. Jacobsen believed the cross pieces of the pallet (the slats) either were secured to the upright pieces (the struts) with pneumatically driven staples or with nails. Tr. 122.[18] The slats were about four to six inches apart, whereas the rungs of a ladder typically are 12 inches apart. *Id.*, Tr. 123. Although Jacobsen acknowledged that the slats and struts were "in good shape" (Tr. 125[19]), Jacobsen never had seen a pallet used this way. Tr. 375. He believed the situation created a slip and fall hazard. Tr. 117-118.

Jacobsen was asked by his counsel about the requirements and meaning of section 56.11003. Jacobsen noted that although the standard mandates ladders be "of substantial construction and maintained in good condition," it does not define the word "ladder." Nonetheless, based on his training and experience, Jacobsen believed a "ladder" was "something with rungs that you step on and side rails that you hold on to." Tr. 119. He also believed a ladder must be substantial enough to bear the weight required by the job with which it is associated. Tr. 124. He stated ladders are "rated for the weight that they are to [carry]". *Id.* A pallet has no rating. Therefore, the pallet was "not a ladder." Tr. 119.

---

[17] 30 C.F.R. § 56.11003 states:

> Ladders shall be of substantial construction and maintained in good condition.

[18] Hart testified the slats were secured with nails. Tr. 239.

[19] Hart more than agreed. He described the pallet's condition as "[e]xcellent." Tr. 238.

When he first saw the pallet, Jacobsen did not think a miner was likely to slip or fall while using it. The pallet was sturdy, was accessed only two times a week and there were handholds on the frame of the hopper. Tr. 120. However, Jacobsen changed his mind about the likelihood of injury, and at the hearing testified he believed a miner was reasonably likely to slip or fall. Tr. 117-118, 120. In addition, a miner's foot could be caught in the four- to six-inch space between the slats. As a result, a miner could sprain or break a leg and could lose workdays or be transferred to less demanding duties. Tr. 121. In his revised view, using the pallet as a ladder created a "very high hazard." Tr.123.

To Kim Redding, the pallet was "constructed like a ladder." Tr. 324. It was "very sturdy . . . made of hardwood . . . smooth . . . [and lacking] slivers or anything that would cause injury". *Id.* He added the pallet, "was securely in place." *Id.* In addition, the distance between the slats did not, in his view, create a slip hazard. Tr. 327.

THE VIOLATION

I conclude the Secretary failed to establish the violation. As Jacobsen acknowledged, there is nothing in the regulations that defines a "ladder," there is nothing that otherwise specifies the type of "ladder" an operator must use, and there is nothing that sets forth how a ladder must be constructed. Tr. 124-125. Further, there is no agency program policy memorandum that gives a definition and/or specifications.

A ladder is defined in the mining dictionary as "[a] framework consisting of two parallel, or roughly parallel, posts connected by bars at regular intervals along their length, thus providing a series of steps which enables the ladder to be used as an aid to climbing to different levels." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 620 (2ed. 1997). The pallet functionally met this definition. Moreover, it is clear from the testimony that the pallet/ladder was "substantially constructed" and was in "good condition," as the standard requires. Tr. 125, 139.

For these reasons, the citation will be vacated.

Citation No.	Date	30 C.F.R. §
6355477	3/16/04	56.14112(b) [20]

Citation No. 6355447 states:

> The guard to the gear box and drive assembly of the sand stacker is not secure. This exposes the v-belt drive and couplers to be contacted. Contacting these moving parts would cause serious injuries to a miner [who] enters the area

[20] The standard is set forth at n. 6, *supra*.

as needed for cleaning.

Gov. Exh. 16.

Jacobsen testified during the March 16 inspection he noticed the guard for the gearbox drive assembly on the sand stacker conveyor was loose and drooping so that moving parts of the stacker were exposed. (The parts Jacobsen specifically mentioned were the gearbox drive, the V-belt assembly and the couplers. Tr. 126.) As Jacobsen recalled, the wires or "zip ties" holding the gearbox assembly had come loose or broken so that the guard was "hanging off a bit." *Id.* Jacobsen believed that the exposed parts posed "catch hazards" to miners. Tr. 127, 129. A miner who was cleaning in the area could slip, and his or her hand could contact the moving V-belts and couplers. Tr. 128. As a result, the miner could suffer cuts, sprains, or even broken bones, resulting in lost work days. Tr. 128-129. However, Jacobsen recognized such an accident was unlikely because miners cleaned in the area only on an "as needed" basis. Tr. 128-129. Thus, they "weren't in the area very often." Tr.128.

In Jacobsen's view, WRQ was only moderately negligent in allowing the parts to go unguarded, because the defective guard looked secure. One had to come within four or five feet of the equipment to realize it was not. Tr. 129-130. As Jacobsen put it, the violation "was not obvious." Tr. 129.

THE VIOLATION

The standard requires guards to be "securely in place while machinery is being operated." Jacobsen observed the subject guard was loose and drooping and the moving parts of the coveyor were exposed. Tr. 126. Jacobsen's testimony regarding the state of the guard essentially was undisputed, and I find that the violation existed as charged. [21]

GRAVITY AND NEGLIGENCE

The inspector's testimony regarding the "catch hazards presented to miners by the violation (Tr. 127, 129) likewise was not undisputed, nor was his view that an accident resulting from the condition was unlikely. Tr. 128-129. I accept and adopt Jacobsen's belief the violation was not serious.

I further agree that the violation was due to WRQ's negligence. However, like Jacobsen I find that the drooping guard was not so obvious as to be readily noticeable, and I conclude the

---

[21] Jacobsen did not photograph the drooping guard. Following the presentation of MSHA's case in chief, counsel for WRQ moved to dismiss the citation, as well as another citation discussed subsequently, because they were based solely on Jacobsen's recollections. I denied the motion, noting that it was not unusual for violations to be established solely through the credible testimony of an inspector. Tr. 192-193.

company was only moderately negligent.

DOCKET NO. WEST 2005-151-M

Citation No.	Date	30 C.F.R. §
6355596	9/14/04	56.14101(a)(2) [22]

Citation No. 6355596 states:

> The parking brake on the Cat 980C Front-end Loader . . . did not hold on the maximum grade it traveled with a loaded bucket. The ramp that the loader was tested on was a feed ramp that is traveled by this loader several times per day. A parking brake is needed to stop equipment from inadvertently moving and running personnel over. The loader is used on a daily basis and generally parks on flat ground.

Gov. Exh. 17.

On September 14, 2004, Jacobsen returned to the mine. During the course of the visit he inspected a front end loader (loader). When he first observed the loader, it was traveling a ramp, and its bucket was full of material. Tr. 132. Jacobsen decided to test the loader's brakes.

First, he tested the service brakes. Finding they worked well, he next tested the parking brakes. He instructed the loader operator to set them. The loader's full bucket was low, but was not touching the ground.[23] The parking brakes did not hold the loader, and Jacobsen issued the subject citation. Tr. 133. Jacobsen acknowledged the grade on which he tested the loader was not

---

[22] 30 C.F.R. §56.14101(a)(2) states:

> 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.

[23] Jacobsen explained that when parking brakes are tested, the loader should be stationary. Because there is no danger material will spill from the bucket while the loader is at rest, the test is conducted when the loader's bucket is full and raised. Tr. 136-137. By keeping the bucket full, a conclusion can be reached whether the parking brakes can hold the loader "with its typical load." Tr. 139. MSHA supervisory mine inspector Stephen Cain added conducting the test with the bucket in a raised position prevents the bucket from digging into the ground and acting as a *de facto* braking mechanism. Tr. II 20.

the maximum grade at the mine. However, it was a grade the loader frequently traveled, and if the brakes would not hold the equipment on the lesser grade, they would not hold it on the steeper grade. Tr. 137-138.

The inspector noted that the standard is designed to prevent accidental movement of parked equipment and the subsequent serious or fatal injury of miners working around such equipment. Tr. 134-135. However, Jacobsen believed an accident involving the subject loader was unlikely. He emphasized the service brakes worked well and the loader operator told him the equipment was primarily parked on flat surfaces. Tr. 134-135.

WRQ questioned whether Jacobsen correctly tested the brakes. Hart testified when WRQ tests parking brakes, it does so on an incline with the loader's bucket empty and lowered to the ground. Tr. 240. In Hart's opinion, because of stability problems, it is not safe to test brakes with a loaded, raised bucket. Tr. 241, 243.

Kim Redding believed the standard is "designed to hold the equipment when parked in its normal fashion." Tr. 329. He agreed with Hart that when a loader is parked, its blade is lowered to the ground, and that its "typical load" is an empty bucket. Tr. 330. "Otherwise," he stated, "you have spillage." *Id*. Because the test used by the inspector did not simulate how the parking brakes were actually used, the test result did not reflect the true effectiveness of the brakes. Tr. 331-332.[24]

Redding was asked by counsel for the Secretary whether he agreed with WRQ's statement in a response an interrogatory that the cited front end loader usually carried approximately nine tons of crushed rock. Redding responded the statement "sound[ed] about right." Tr. 335. Further, he acknowledged that in another response the company stated, at the time of the test, the front end loader was carrying "approximately nine tons of crushed rock." Tr. 336.

Turning to the issue of whether the company met its standard of care, Jacobsen believed it did not, and that it was moderately negligent. Jacobsen noted the loader operator had not checked the condition of the parking brakes on his pre-operation check list. Jacobsen also noted that management did not even list "park[ing] brakes" on the check list. Rather, there was a generic reference to the "braking system." Tr. 136.

---

[24] Redding maintained on the very few occasions when a loader is parked on a grade, the bucket is lowered, the transmission is put in gear, the parking brakes are set, chocks are placed under the tires, and the tires are turned into a berm or rib. Parking brakes never are used in and of themselves on a grade. Tr. 343-344.

THE VIOLATION

I conclude the violation existed as charged. The standard is clear. Parking brakes must be capable of "holding the equipment with its typical load on the maximum grade it travels." By testing the loader with its raised bucket carrying a load of approximately nine tons (Tr. 335-336), Jacobsen met the "typical load" requirement of the standard. Tr. 335. By determining the brakes did not hold on a grade that was less than the maximum grade the loader travels, he established by deduction that the brakes would not hold on the maximum grade. Tr. 137-138. Although WRQ takes issue with the way in which Jacobsen tested the brakes, and while there may be other ways to test parking brakes, I conclude the test used by the inspector squarely met the requirements of the standard and, without question, established a lack of compliance.

GRAVITY AND NEGLIGENCE

Jacobsen did not believe the violation was serious, and I agree. Tr. 134-135. He acknowledged the loader's service brakes worked well. He accepted the fact that when the loader was parked, it was usually parked on level ground. *Id.* There is nothing in the record to contradict Jacobsen's testimony in this regard. These factors lead me to conclude that injuries arising from the violation were not likely.

As for negligence, I conclude WRQ failed to meet its mandated standard of care. WRQ was required to ensure that the parking brakes held the loader "with its typical load on the maximum grade it travels." 30 C.F. R. §56.14101(a)(2). Here, the brakes did not do what was required. Had WRQ made sure pre-operational inspection of the equipment included the parking brakes, the violation might not have happened. Tr. 135-136. Reasonable care required the parking brakes be functional, and they were not.

Citation No.	Date	30 C.F.R. §
6355597	9/14/04	56.14112(b) [25]

Citation No. 6355597 states:

> The tail pulley guard to the hopper belt was not secured in place. The bottom of the guard was hanging down and not secure, and about a 8 [inch] by 12 [inch] piece of the guard was lying on the ground. This exposes the hazard of entanglement into the tail pulley and for serious injuries to occur. The area is accessed 2 times per week for clean-up and other duties.

---

[25] The standard is set forth at n. 6 *supra*.

Gov. Exh. 19.

On September 14, Jacobsen also inspected the tail pulley on an operating hopper belt. He noticed that one of the side guards was missing. The missing guard had once been in place, but had slipped or fallen from the pulley structure. As a result, the pulley was exposed, and an opening eight inches wide by twelve inches long provided access to its moving parts. Tr. 141, 144-145, 149-150. In Jacobsen's view, exposure created an entanglement hazard for miners who cleaned up around the pulley.

Jacobsen believed if a miner was caught in the pulley, he or she would suffer cuts or even dismemberment. Tr. 147, 148. However, he did not think such an accident was likely. Tr. 146. He noted the opening to the pulley was relatively small, eight inches by 12 inches, and the area in which the tail pulley was located was accessed by miners only two times a week. *Id*.

He also believed the missing guard was caused by WRQ's moderate negligence. The plant foreman simply failed to notice it had slipped and fallen. Tr. 148-149.

THE VIOLATION

I find the violation existed as charged. Jacobsen's testimony established that moving parts of the tail pulley were not completely guarded, in that the side guard had slipped off, creating an opening through which the moving parts of the pulley could be contacted. Tr. Tr. 141-145, 149. The standard requires moving parts to be guarded to prevent access. As Jacobsen recognized, any miner cleaning up around the pulley was subject to the danger of tripping or falling and having his or her hand or arm pass through the opening and into the moving parts. Jacobsen accurately described such an accident as likely to result in cuts or dismemberment. Tr. 147, 148. [26]

GRAVITY AND NEGLIGENCE

Because the opening was limited in size and because access to the area also was limited, Jacobsen believed an accident was unlikely. Tr. 146-148. Based on this testimony, I conclude that Jacobsen was correct and that the violation was not serious.

I also find that WRQ did not meet its required standard of care. Even though the area around the guard was not accessed frequently, WRQ had a duty to ensure that all guards on the tail pulley were in place. The opening was visible, and mine management or its agents should have detected and reinstalled the missing guard. In failing to do so, WRQ exhibited its negligence.

---

[26] As with Citation No. 6355447, Jacobsen did not photograph the unguarded pulley. Before he could take a picture, the mine foreman repaired the defect. Tr. 141, 145. Therefore, WRQ's counsel moved to vacate Citation No. 6355597. For the reason stated in n. 21, *infra*, I denied the motion. Tr. 192-193.

DOCKET NO. WEST 2004-316

Citation No.	Date	30 C.F.R. §
6350897	2/24/04	56.9100 [27]

Citation No. 6350897 states:

> There were no signs stating the mine speed limit, direction of travel or hazard warning signs on the haul road, entrance to the quarry, at or near the scale, or in the quarry stockpile area where there is a large volume of truck and equipment traffic. There is also no sign to tell visitors to stop at the scale for instruction and/or training. The quarry is visited several times daily by company trucks, customer trucks, visitor vehicles and by sales and vendor personnel.

Gov. Exh. 20.

On February 24, 2004, MSHA Inspector Rickie Dance visited Champion Pit. When he arrived at the entrance to the mine, Dance "noticed that they had done some landscaping on the entrance, widened the road a little . . . put up a new sign and . . . a new gate." Tr. 156. However, once on mine property he also noticed: "[T]here was no signage [sic], as far as speed or direction of travel [rules of the road] or anything to watch for." *Id*.

Dance identified a photograph he took at the entrance to the pit. Gov. Exh. 21. In the photograph the gate is visible, as is the back of a stop sign at the gate, and about 80 to 100 feet inby the stop sign, on the same side of the road, another sign is seen. The stop sign orders vehicles to stop before they leave the mine road and merge onto a public road. The other sign reads in part, "Washington Rock Quarries, Camp 1 Road." Tr. 156, 159, 161-162; Gov. Exhs. 21 and 22.

---

[27] Section 56.9100 states:

> To provide for the safe movement of self-propelled mobile equipment –
>
> (a) Rules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine; and
>
> (b) Signs or signals that warn of hazardous conditions shall be placed at appropriate locations at each mine.

Continuing past the "Washington Rock Quarries, Camp No. 1" sign for a quarter of a mile, Dance saw no other signs. Tr. 163-164; Gov. Exh. 23. Nor did he see any signs as he proceeded along the same road to the scale, scale house and shop building. Tr. 164-165; Gov. Exh. 24. Although the company's trucks and those of its visitors traveled the road, there were no speed limit or traffic rules signs; nor were there signs instructing visitors to stop and get information. Tr. 165, 168. WRQ offered into evidence photographs of six traffic control signs, but Dance was adamant he saw none of them during his February 24 inspection. Tr. 175, *see* WRQ Exh. 20.

Dance asked Hart how visitors were informed of mine hazards, and Hart replied the scale operator was supposed to give rules of the road instruction to those who passed the scale and scale house. Tr. 165,167; *see also* Tr. 157-158. [28] Dance observed, however, that before the scale and scale house, the road branched to the right. The branch lead to the stockpile area and to other parts of the mine. Therefore, it was possible for drivers going to these areas to bypass the scale and scale house. Tr. 165. As Dance put it, "anybody going into that mine does not necessarily go by the scale to enter the hazardous area where the equipment is running. . . . [T]he way the scale is set up, there's no window where the scale operator can see anybody coming into the area, and they can go to the right, around the shop without even going by the scale and enter the mine site." Tr. 179. Dance maintained the only thing posted at the scale was a digital board that registered the weight of the trucks for the scale operator. Tr. 166; Gov. Exh. 25.

Dance agreed that section 56.9100 does not specifically require an operator to post signs that state rules of the road. Tr. 167. Nevertheless, Dance cited WRQ for a violation of the section because, "There has to be some way for people coming onto the mine site to get the information, as far as any hazards at the mine." *Id.* Moreover, in Dance's view, under section 56.91001(a) an operator must establish rules of the road, whether or not there are hazardous conditions. Tr. 180.

Dance was asked if there was a hazardous condition at Champion Pit that required a warning sign. He replied, "When you have heavy equipment running around in the pits . . . and you have haul trucks running around, there's always hazardous conditions." Tr. 177.

Dance feared that with no signs to communicate rules, "a person not knowing what's going on could easily be [run] over". Tr. 168. However, such an accident was unlikely, because drivers at the pit were experienced. ("[T]he people that go out there have visited several operations before, and it's just rare that . . . [an accident] would happen." *Id.*) In addition, the trucks and other

---

[28] Dance testified that Hart also told him there was nothing written regarding rules of the road. Tr. 167. Dance denied anyone from the company showed him a card that stated on its front "All Drivers, Hard Hats, Safety Glass & Steel-Toed Shoes Are Required While Out of Truck on Mine Property" and on its back, "Site Specific Hazard Forms Must Be Completed By All Persons Entering Mine Property. If you have not filled one out stop by the scale house." Tr. 171; *See* WRQ Exh. 19; *see also* Tr. 378.

equipment he saw during the inspection "travel[ed] slow[ly] and [the drivers were] watchful of other traffic." Tr. 178.

Dance believed WRQ was moderately negligent in failing to comply with the regulation, and he again noted that even if some oral instructions were given at the scale, other drivers could access different parts of the mine before reaching the scale. Tr. 170.

Kim Redding described WRQ's traffic control rules as consisting of a number of things: including road signs seen by drivers upon entering the property, cards given to drivers containing the traffic control rules, and instructions given to drivers to "sign paperwork saying they understood [the] rules." Tr. 309; WRQ Exh. 19 at 1 and 2. [29]

THE VIOLATION

As the parties recognize, the requirements of section 56.9100 are set forth in two parts. 30 C.F.R. § 56.9100(a) is aimed at ensuring the safe movement of self-propelled mobile vehicles by requiring the establishment and following of specified rules of the road. Section 56.9100(b) is aimed at alerting miners and visitors to specific hazardous conditions by requiring the installation of warning signs or signals where the conditions exist. In issuing the citation, Dance's primary concerns seem to have been that WRQ violated section 56.9100(a) by failing, either through appropriate signs or other effective instructions, to establish rules of the road. I conclude the record supports Dance in this regard, and I affirm the citation to this extent.

While I accept Dance's testimony that he was told by Hart that instruction in rules of the road was given orally to mobile vehicle operators by the scale operator, there is no credible evidence in the record that such instruction actually took place. Tr. 165, 167. Dance testified without dispute that nowhere along the road he took to the scale house were there signs listing the mine's rules of the road or signs directing equipment operators to stop at the house for instruction. Tr. 156, 163-164, 168. He also testified without dispute that no one showed him a card on which several instructions regarding traffic safety were printed and that no one showed him a card or statement signed by a vehicle operator acknowledging the driver received such instructions. Tr.

---

[29] Redding later agreed that the signs to which he referred were on the landlord's property, not on property over which WRQ had authority. Tr. 310; WRQ Exh. 20. Still, in Redding's opinion, it did not matter because "signs give information" and the signs in question stated "rules governing the property." Tr. 311. However, although the speed limit at the mine was five miles per hour, Redding admitted none of the signs depicted in WRQ's exhibit of purported road signs at the pit showed the limit. Tr. 316; *see* WRQ Exh. 20. Redding, who was not at the property during the inspection, also stated that his understanding of the traffic rules was based on what Hart later told him. Tr. 315. The first time Redding saw the cards about which he testified, one of which is depicted in WRQ Exh.19, was approximately two months before the hearing. *Id.* Finally, Redding admitted he never had seen a statement drivers were supposed to sign, such as the statement depicted in WRQ Exh. 19 at 2. *Id.*

171, *referencing* WRQ Exh. 19.

To defend against a credible allegation of failing to establish rules of the road, an operator must do more than assert it complied. It must present credible testimony and/or physical evidence of compliance. Here, the record contains neither.

In the face of Dance's testimony that on February 24, he heard and saw no evidence – Hart's self-serving assertion aside – of compliance with section 56. 9100(a), WRQ offered no rebuttal. It introduced no testimony from drivers affirming they received instructions in rules of the road. It offered no testimony from employees affirming they gave such instructions. It offered no signed statements. I fully agree with Dance, that to be considered "established" the rules must be communicated to all those who operate self-propelled mobile equipment at the mine, and here the record inevitably leads to the conclusion they were not.[30]

The finding of violation is restricted to subpart (a) of section 56.9100. The Secretary did not establish there were hazardous conditions at the pit requiring the placing of warning signs and/or signals. The kind of "hazard" to which Dance referred, the "heavy equipment [including haulage trucks] running around in the pits," is remedied by the rules of the road established pursuant to section 56.9100(a). Hazards contemplated under section 56.9100(b) are those related to physical features, facilities, and perhaps traffic conditions at the mine and not to the unregulated movement of equipment.

GRAVITY AND NEGLIGENCE

I agree with the inspector that the failure to establish rules of the road at the mine posed a potential hazard to miners. Without drivers knowing the rules governing speed, right of way, use of lights, etc., vehicles might collide or overturn, and drivers could be injured or killed. *See* Tr. 177. However, the record warrants finding that many of the drivers were experienced in operating their equipment both at that pit and at other mines and were knowledgeable about general traffic safety. *See* Tr. 169. In addition, drivers at the pit moved slowly and with care. Tr. 178. The record further warrants finding, as discussed with regard to Citation No. 6350900, *supra*, and as alluded to by Redding (Tr. 309), that there were some rules of the road signs on the landlord's property prior to drivers reaching mine property. Therefore, I agree with the inspector's finding as indicated on the citation that injuries were unlikely to result from the violation, and I find the violation was not serious.

[30] As noted, the record does not support finding the scale house operator was charged with the duty of instructing drivers in rules of the road, but assuming he or she was so charged, I agree with Dance that because drivers could bypass the scale house and proceed to other parts of the mine, the duty would not negate the violation. Tr. 167, 176-177.

The lack of signs and/or oral instruction posted by the operator at its mine or given by the operator on mine property were obvious indications of non-compliance. Had WRQ officials met the standard of care required of them, they would have made sure rules of the road were established at the pit. They did not, and the failure reflects the company's negligent lack of care.

DOCKET NO. WEST 2004-309-M

Citation No.	Date	30 C.F.R. §
6350900	2/24/04	56.9100 [31]

Citation No. 6350900 states:

> There were no signs stating the mine speed limit, direction of travel or hazard warning signs on the mine roads, entrance to the sand pit, at or near the scale, or in the pit stockpile area where there is a large volume of truck and equipment traffic. There is also no sign to tell visitors to stop at the scale for instruction and/or training. The pit is visited several times daily by company trucks, customer trucks, visitor vehicles and by sales and/or vendor personnel.

Gov. Exh. 26.

On February 24, Dance also inspected WRQ's King Creek Pit. Champion Pit is connected to King Creek by a gravel road. Tr. 183. Although Dance noticed "no trespass" signs and speed limit signs along the gravel road, none of the signs were on mine property. *Id*. Moreover, Dance saw no signs on mine property regarding speed limit and direction of travel or signs advising people to stop and obtain rules of the road. Tr. 186.

Dance identified a photograph he took at the pit. Tr. 182, Gov. Exh. 27. Among other things, the photograph depicts the King Creek scale house (Gov. Exh. 27, left [32]), a small storage facility (Gov. Exh. 27, center) and piles of material (Gov. Exh. 27, right). Tr. 183. According to Dance, no signs existed between the entrance to the pit and the scale house, and the only sign on the scale house was a sign identifying the rental company that owned the house. Tr. 185. No signs directed visitors to stop and inquire about the mine's rules of the road. *Id.* In addition, Dance testified there was another entrance to the pit, to the left of the entrance depicted in Gov. Exh. 27. Tr. 184.

---

[31] The standard is set forth in n. 27.

[32] A more detailed view of the house is provided by Gov. Exh. 28. Tr. 185.

For the same reasons as stated with regard to Citation No. 6350897, Dance cited WRQ for a violation of section 56.9100. Dance believed the gravity of the alleged violation and the negligence of WRQ also were the same. Tr. 186. Dance acknowledged that there were no specific hazards requiring placement of warning signs. Tr. 187. He also acknowledged that traffic was moving slowly (in second or third gear) and following normal rules of the road at the pit. *Id.*

Hart countered that WRQ had established traffic rules at both Champion Pit and King Creek, and the same rules applied at both operations. These rules were in writing and were "handed out to . . . anyone that [came] in to the pit". Tr. 245. Hart identified a copy of a card that was "handed out". *Id.;* WRQ Exh. 19. He described the card as "printed on both sides" and "giving some regulations, some rules for driving in the pits." *Id.*; Resp. Exh. 19.[33] According to Hart, these rules were in effect when the inspection took place. Tr. 247. Hart also claimed that drivers were given a written document that addressed issues such as proper speed, right of way, direction of movement, and use of headlights to ensure appropriate visibility. Tr. 247-248.

---

[33] The following safety rules are listed on the back of the card to which Hart referred:

• Equipment operators and scale house on c.b.
channel 3

• Speed limit in pit 5 MPH

• Use approved roads only

• Yield to all equipment
Equipment has right of way
Know traffic patterns
Avoid moving vehicles

• Truck drivers must stay in
truck while being loaded

• If out of vehicle hardhat steel-
toed boots required
Not needed if entering scale
house or honey bucket

WRQ Exh. 19. The rules are followed by lines for a truck driver's signature, the number of the truck, the company owning or leasing the truck, and the date. *Id.*

Hart acknowledged the road to King Creek provides access to the pit at both ends of the road. Tr. 252. At one entrance there is a gate where there are signs reading, "no trespassing," "speed limit 10," "slow down speed limit through gate areas is 10 MPH please adhere to posted speed limit if problems continue a large speed bump will be installed," "attention all drivers maximum speed 30 m.p.h. except all curves 15 m.p.h.," "speed limit 30," "lights on for safety," and "lights on for safety warning non-compliance will result in immediate removal from the premises." Tr. 252-253; WRQ Exh. 20. According to Hart, the same signs appear at the other entrance and at both pits. Tr. 253, 255. However, he agreed that none of the signs were posted by WRQ and none specifically referred to WRQ. Tr. 257. Rather, the company has an understanding with its landowner that those entering the landowner's property have to obey the signs posted at the gates to the property, including those on WRQ Exh.19. Tr. 260-262. Hart testified, the day before Dance conducted his inspection, WRQ required all truckers and vendors who came to the property sign the back of the card depicted in WRQ Exh. 19. Tr. 263.[34] If the rules were not followed, the person violating them was asked to leave. Tr. 261.

THE VIOLATION

I conclude Dance's testimony established the violation. As previously noted, section 56.9100 is divided into parts. Dance agreed there were no specific hazards related to physical features and facilities at King Creek. Tr. 187. Therefore, section 56.9100(b) was not violated. However, it is clear that section 56.9100(a) was infringed. Dance consistently and credibly maintained he saw no rules of the road signs on mine property. Tr. 183-186. Although WRQ offered photographs of some rules of the road signs (WRQ Exh. 20), virtually all of the signs were at the entrance to the landowner's property and not at the entrance to the property for which WRQ was responsible. Tr. 251, 256-257. Close scrutiny of Hart's testimony reveals the only rule of the road sign he identified as being on mine property was a speed sign posted several hundred feet inby the gate where WRQ's responsibility began. The sign was nailed to a tree and was "kind of . . . bent over." Tr. 259. This single, damaged sign is not sufficient to establish rules governing speed, and there is no testimony that other signs were posted on King Creek mine property.

Nor did the card that Hart testified was given to all who entered mine property establish WRQ's compliance. There is no credible basis to find those entering the mine actually received the card. Drivers did not testify, employees who handed out the card did not testify, and signed copies of the card were not offered into evidence.

Moreover, even if, as Hart testified (Tr. 245), WRQ actually gave the card admitted as WRQ 19 to all persons who entered the mine, the card contains nothing regarding the use of headlights, a specific requirement of section 56.9100(a). Further, the other written document

---

[34] Dance testified he did not recall Hart's saying anything about distributing written rules of the road to all such visitors. Dance also denied that Hart told him visitors were required to signs forms to affirm they were advised of such things. Tr. 377.

addressing the requirements of part (a), a document that Hart maintained was given to drivers entering mine property (Tr. 247-248), was not introduced. Nor did drivers who received that supposed document testify. Noncompliance cannot be refuted by an evidentiary vacuum.[35]

In sum, the record fully supports finding that WRQ violated section 56.9100(a) at King Creek.

GRAVITY AND NEGLIGENCE

Given the fact that there were some traffic signs at the entrance to the property owner's land, signs that provided notice of traffic rules just before drivers entered the mine, and given Dance's testimony that, once in the mine, traffic moved slowly and followed normal rules of the road, I conclude the violation was not serious. Tr. 186-187.

I also conclude the violation was due to WRQ's negligence. As Dance's inspection showed, the lack of established rules of the road at the mine was obvious. WRQ either knew or should have known that it was required to establish such rules. In not doing so, it failed to meet its required standard of care.

CIVIL PENALTY ASSESSMENTS

The Act requires that I assess a civil penalty for each violation. It also requires that in doing so, I consider the statutory civil penalty criteria. 30 U.S.C. § 820(i). Several of the civil penalty criteria are equally applicable to all of the violations. In this regard, WRQ's history of previous violations (Gov. Exh. 29) was described by counsel for the Secretary as of a "small to average" number. Tr. 189. WRQ did not take exception to this description. Therefore, when assessing penalties I will not increase them on account of WRQ's prior history. Counsel for the Secretary also stated, based on the number of hours worked at WRQ's operations, that the operations are small. Tr. 189. WRQ did not take exception to this characterization. Therefore, when assessing penalties, I will assess lesser amounts than I would for medium or large operations. The parties have stipulated that assessment of the penalties will not adversely affect the ability of WRQ to stay in business. Stip. 4. Therefore, when assessing penalties, I will neither increase nor decrease them on account of this criterion. Finally, the parties have agreed that WRQ timely abated all of the alleged violations. Tr. 15. Timely abatement is expected and is a neutral factor. Finally, I will consider the criteria of negligence and gravity as they individually pertain to each violation.

---

[35] I also find noteworthy and entirely credible Dance's testimony that he did not see a sign telling those operating vehicles to stop at the scale house, and I find the lack of testimony from equipment operators as to the existence of such a sign to be telling. Tr.185.

DOCKET NO. WEST 2004-352-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Assessment
6350795	1/13/04	56.16006	$60	$60
6350798	1/13/04	56.14112(b)	$60	$60
6350799	1/13/04	56.14107(a)	$60	$60
6355401	1/13/04	56.14107(a)	$60	$60

DOCKET NO. WEST 2004-316-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Assessment
6350797	1/13/04	56.14112(b)	$60	$60
6350897	2/24/04	56.9100	$60	$60

I have found the violations were not serious. I also have found the violations were the result of WRQ's negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of $60 is appropriate for each violation.

DOCKET NO. WEST 2004-309-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Assessment
6355441	3/16/04	56.11002	$60	$50

I have found that the violation was not serious. I also have found that the violation was the result of WRQ's minimal negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of $50 is appropriate.

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Assessment
6355444	3/16/04	56.11003	$60	$0

I have found the Secretary did not prove the alleged violation.

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Assessment
6355447	3/16/04	56.11003	$60	$60
6350900	2/24/04	56.9100	$60	$60

I have found the violations were not serious. I also have found the violations were the result of WRQ's negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of

$60 is appropriate for each violation.

DOCKET NO. WEST 2004-151-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Assessment
6355596	9/14/04	56.14101(a)(2)	$60	$60
6355597	9/14/04	56.14112(b)	$60	$60

I have found the violations were not serious. I also have found the violations were the result of WRQ's negligence. Given these criteria, and given the fact WRQ has a small to average history of previous violations and that WRQ's operations are small, I conclude an assessment of $60 is appropriate for each violation.

SETTLED VIOLATIONS

The parties agreed as follows:

DOCKET NO. WEST 2004-264-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6355403	1/13/04	56.18002(a)	$60	$60

DOCKET NO. WEST 2004-309-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6350901	2/26/04	50.20(a)	$ 60	$60
6355040	3/16/04	56.14107(a)	$124	$60
6355442	3/16/04	56.14207(A	$ 60	$60
6355445	3/16/04	56.12004	$ 60	$60
6355446	3/16/04	56.14107(a)	$ 60	$60
6355448	3/16/04	56.12032	$ 60	$60 [*See* Tr. 11.]
6355449	3/17/04	46.9(a)[*see* Tr. 13]	$ 60	$60

DOCKET NO. WEST 2004-316-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6350800	1/13/04	56.12004	$ 60	$60
6350896	2/26/04	56.9101	$228	$ 0
6350898	2/25/04	46.3(a)	$ 60	$60
6350899	2/26/04	50.20(a)	$ 60	$60
6355402	1/13/04	56.14110	$ 99	$ 0

6355405	1/14/04	62.130(a)	$ 60	$60
6355406	1/14/06	62.120	$ 60	$60

DOCKET NO. WEST 2004-345-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6355409	1/23/06	50.30(a)	$60	$0

DOCKET NO. WEST 2004-352-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6350796	1/13/04	56.14132(a)	$ 60	$ 60
6355404	1/13/04	56.14100(d)	$ 60	$ 60
6355407	1/14/04	56.15005	$165	$165
6355408	1/23/04	50.30(a)	$ 60	$ 60

DOCKET NO. WEST 2004-151-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6355598	9/14/04	56.12006	$60	$60

DOCKET NO. WEST 2004-307-M

Citation No.	Date	30 C.F.R. §	Proposed Assessment	Settlement
6371231	2/16/05	46.11(b)(4)	$131	$60
6371232	2/16/05	14109	$ 60	$60

After reviewing and considering the proposed settlement, I find it is reasonable and in the public interest. Pursuant to 29 C.F.R. §2700.31, the parties' stipulations regarding the proposed settlement are accepted and the settlement **IS APPROVED.**

ORDER

WRQ **IS ORDERED** to pay a total civil penalty of $1955.00 in satisfaction of the violations in question. Payment is to be made to MSHA within 30 days of the date of this decision. Within the same 30 days, the Secretary **IS ORDERED** to modify and vacate all citations referenced in the parties' settlement agreement and stipulations as requiring such actions. Further, in conformance with my findings regarding the contested citations, Citation No. 6350897 (Docket No. WEST 2004-309-M) **IS MODIFIED** to reflect the violation was due to WRQ's low negligence, and Citation No. 6355444 (Docket No. WEST 2004-309-M) **IS VACATED**. Upon

receipt of WRQ's full payment and upon the Secretary's modification and vacation of the appropriate settled citations, these proceedings **ARE DISMISSED**.

David F. Barbour
Administrative Law Judge
(202) 434-9980

Distribution: (Certified Mail)

Bruce L. Brown, Esq., U.S. Department of Labor, Office of the Solicitor, 1111 Third Avenue, Suite 945, Seattle, WA 98101

Paul M. Nordsletten, Esq., Davis Grimm Payne & Marra, 701 Fifth Avenue, Suite 4040, Seattle, WA 98104

/ej