FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 28, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-269-M
Petitioner	:	A.C. No. 05-04209-21545
	:	
	:	Crusher Operation #2
	:	
	:	Docket No. WEST 2004-270-M
	:	A.C. No. 05-04612-21601-01
	:	
v.	:	Docket No. WEST 2004-271-M
	:	A.C. No. 05-04612-21601-02
	:	
	:	Crusher Operation #5
	:	
	:	Docket No. WEST 2005-133-M
	:	A.C. No. 05-04558-43192
	:	
	:	Docket No. WEST 2005-218-M
	:	A.C. No. 05-04558-48439
	:	
CARDER, INC.,	:	Dredge Operation #1
Respondent	:	
	:	Docket No. WEST 2004-326-M
	:	A.C. No. 05-04116-24225
	:	
	:	Docket No. WEST 2005-132-M
	:	A.C. No. 05-04116-43159
	:	
	:	Docket No. WEST 2005-160-M
	:	A.C. No. 05-04116-45725
	:	
	:	Dredge Operation #3
	:	
	:	Docket No. WEST 2004-491-M
	:	A.C. No. 05-04581-35054

:	Docket No. WEST 2005-134-M
:	A.C. No. 05-04581-43233
:	
:	Screening Operation/
:	Dredge Operation

DECISION

Appearances: Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mike Ausmus, Carder, Inc., Lamar, Colorado, for Respondent.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Carder, Inc., ("Carder"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). A hearing was held in Lamar, Colorado.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Carder operates several sand and gravel pits in Prowers County, Colorado. The citations are grouped in this decision by operation rather than by docket number.

A. Crusher Operation No. 2

1. Citation No. 6298298, WEST 2004-269-M

MSHA Inspector Steven Ryan inspected Carder's Crusher Operation No. 2 on May 8, 2003. Inspector Ryan issued Citation No. 6298298 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14105. The body of the citation states, as amended:

> A front end loader operator was observed cleaning out loose material from the return end of the primary hopper discharge conveyor [that was] being turned on and off at the start-stop controls next to the hopper by another employee upon signals from the front end loader operator cleaning the conveyor of material. The power was not off and the conveyor belt was not blocked from motion while the work was being performed. The company has a lockout policy. An oral 107(a) imminent danger order was given to Uraldo Bargus, another front end loader operator at the site.

The inspector determined that it was highly likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was of a significant and substantial nature ("S&S") and that Carder's negligence was moderate. The cited safety standard provides:

> Repairs or maintenance of machinery or equipment shall be performed only after power is off and the machinery is blocked against hazardous motion. Machinery or equipment motion is permitted to the extent that adjustments or testing cannot be performed without motion or activation, provided that persons are effectively protected from hazardous motion.

The Secretary proposes a penalty of $750.00 for this citation.

Inspector Ryan testified that the primary feed hopper is where the raw mined rock is fed into the plant. (Tr. 12). The rock leaves the hopper through a conveyor system under the hopper which delivers the rock to a crusher. (Tr. 13). When Inspector Ryan arrived at the crusher operation, the plant was energized but it was not running. He observed two miners on one side of the feed hopper and another miner on the other side of the hopper, who was standing at the stop/start control panel. (Tr. 16). The loader operator was "reaching in and cleaning material" off the "return end of the belt going back to the self-cleaning tail pulley," which was under the guard. He was using his bare hands to remove loose rock. The other miner was giving signals to the miner at the stop/start switch to jog the start button so that the conveyor would move slightly as the other miner was cleaning. *Id.*

Inspector Ryan told the miners to stop working because there have been serious accidents at other plants when this same procedure was used. He issued the citation in conjunction with an imminent danger order. (Tr.10; Ex. G-1). Ryan testified that he has personally investigated two accidents in which miners were injured while cleaning belts using the same procedure. (Tr. 17). To comply with the standard, equipment should have been turned off and the moving parts should have been blocked against motion while the cleaning was performed. He states that start/stop buttons are not fail-safe and the belt could have started moving without notice. (Tr. 18). In addition, the miner at the start/stop switch could accidently turn the belt on while the loader operator was reaching in to clean the belt. (Tr. 19).

Inspector Ryan believes that the miner could have been seriously injured if the belt had started moving without his knowledge. He determined that the violation was S&S because he has investigated serious accidents under very similar circumstances. Indeed, he testified that he investigated a serious accident in which an employee got "caught up" in a conveyer belt at one of Carder's other operations a few months later. (Tr. 21-22, 25).

Mike Ausmus, Carder's general manager, testified that the stop/start switch consists of two separate buttons, one for on and one for off. (Tr. 33-34). He stated that the switch is

designed so that arcing will not occur between the poles which may accidently energize the circuit. He has never seen a start/stop switch of this type malfunction. (Tr. 35). Ausmus said that cleaning the belt was necessary so that it could be repaired.

I find that the Secretary established a violation. There is no dispute that power was on and the belt was not blocked against motion. Adjustments were not being made and the conveyor was not being tested. I also find that the violation was extremely serious and S&S. The miner cleaning the belt could have been seriously injured if the other miner accidently energized the conveyor with the start/stop switch. The miner operating the switch had been working for Carder for one day and he apparently did not speak English. (Tr. 30-31). As Inspector Ryan stated, "steel has no mercy." (Tr. 20).

A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established all four elements of this test. There was a violation of the safety standard that created a discrete safety hazard. The violation presented a reasonable likelihood that the hazard contributed to by this violation would result in an injury of a reasonably serious nature, assuming continued normal mining operations.

I also find that Carder's negligence was moderate to high. The citation is affirmed and a higher penalty of $1,500.00 is appropriate.

B. Dredge Operation No. 1

1. Citation No. 6311844, WEST 2005-133-M

MSHA Inspector Brad Allen issued Citation No. 6311844 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14112(a)(1). The body of the citation states:

> A guard on the diesel motor driven water pumps located on the rear of the dredge was not being maintained. The guard on the front of the motor fell off and was laying down, fully exposing the moving machine parts. Employees working/traveling near this area were exposed to the possibility of injury from entanglement hazards and/or pinch points. Employees work and travel this area several times daily.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was S&S and that Carder's negligence was moderate. The cited safety standard provides that "[g]uards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation." The Secretary proposes a penalty of $177.00 for this citation.

Inspector Allen testified that he issued the citation because the guard covering the water pump for the motor on the dredge had apparently vibrated loose. (Tr. 41; Ex. G-3). The guard was replaced to abate the citation. The photo that the inspector took before the condition was abated shows that the guard had fallen. Inspector Allen determined that the violation was serious and S&S because a miner travels throughout the dredge and, if his clothing were to become entangled in the moving machine parts, he would likely suffer a permanently disabling injury. (Tr. 42). This employee's duties "required him to travel all the way around the dredge throughout the day." *Id.* He stated that it was three feet "into the pulleys" from the travelway. *Id.* He also stated that the "moving machine parts are frequently accessed by the dredge operator." (Tr. 43). Allen estimated that the cited condition was about 25 feet from the dredge operator's cab. (Tr. 58).

Mr. Ausmus testified that a preshift examination had been performed on the dredge at the start of the shift and the guard was in place. (Tr. 68). He further stated that, contrary to the inspector's testimony, the dredge operator does not walk around the dredge all day. Instead, he remains in the operator's cab which is about 40 feet from the cited condition. *Id.* The dredge operator must monitor gauges constantly and he only leaves the cab for short periods of time. *Id.* Ausmus testified that the dredge operator does not walk near the diesel motor because there is nothing there that he needs to do. (Tr. 69).

I find that the Secretary established a violation of section 56.14112(a)(1). Inspector Allen cited that safety standard because the guard was in the position that it would be if it fell out of place. (Ex. G-3, Photo 1). A miner who needed to remove the guard to perform repairs would not have placed the guard in the position shown in the photograph. Thus, the guard was not being maintained to withstand the vibration, shock, and wear it was subjected to. I find that the Secretary established a *prima facie* case and that Carder did not offer any evidence to contradict the inspector's assumption that the guard fell out of place.

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

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

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982) (footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in determining the amount of the penalty. Thus, if a safety standard is violated, a penalty is assessed even if there was no injury and the chance of an injury was not very great.

I find that the violation was neither serious nor S&S. The moving machine parts which the guard protected were recessed three feet from the walkway. In addition, I credit Ausmus's testimony that the dredge operator does not walk by the diesel motor with any frequency. In addition, there has been no showing that there were any tripping or stumbling hazards in the area. Thus, I find that it was highly unlikely that the dredge operator or his clothing would get caught in moving machine parts. I also find that Carder's negligence was low. Carder established that the cited condition existed for a short period of time and there has been no showing that anyone knew that the guard had fallen out of place. A penalty of $20.00 is appropriate.

2. <u>Citation No. 6311846, WEST 2005-133-M</u>

Inspector Allen issued Citation No. 6311846 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The engine powering the work boat contained exposed moving machine parts that are not guarded. The alternator pulley, main pulley and drive belts are open and exposed on the left side. Employees are exposed to the possibility of injury if they were accidently to contact the moving machine parts. The moving machine parts are placed along a travel way that is regularly used and the work boat is used at least twice daily, making the chance of accidental contact reasonably likely.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was S&S and that Carder's negligence was moderate. The cited safety standard provides that "[m]oving 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." The Secretary proposes a penalty of $177.00 for this citation.

Inspector Allen testified that the alternator pulley, main pulley, and drive belts were open and exposed on the left side of the engine. (Tr. 46; Ex. G-5). The work boat is used for transportation to and from the barge. Anyone who operated the boat or was a passenger in the boat would be exposed to the hazard. Allen believed that the violation was S&S because it was reasonably likely that someone would be injured as a result of the condition and that the injuries would be permanently disabling. The inspector believed that miners could stumble or fall into the moving machine parts. (Tr. 62). The opening in front of the cited moving parts between the guard for the fan and the housing for the engine was about three inches. (Tr. 63; Ex. G-5, photo 1). The inspector believed that the motor had been recently installed and the guard for the left side was inadvertently left off. (Tr. 49).

Carder admits that the cited condition violated the safety standard. (Tr. 60). Mr. Ausmus testified that the exposure to the hazard was minimal. (Tr. 70). He believed that miners would walk by the exposed area to get into the boat before the engine was started and would walk by after the engine was shut off but that miners would not be in the area while the motor was running. Ausmus also believed that the frame of the engine and the guard around the fan provided sufficient protection for the area. He said that there was "maybe an inch of room." *Id.*

I find that the cited condition created a serious safety hazard. Although the opening in front of the moving machine parts was not wide, the parts were nevertheless exposed. Several people travel on the boat at least twice a day. I do not credit Ausmus's testimony that the engine is always off when miners travel near the moving parts. It is reasonably likely that someone would stumble and get his fingers caught in the moving parts. Although the injuries may not be permanently disabling, they would be serious. The Secretary established that the violation was S&S. Carder's negligence is moderate to low because the engine had only been recently installed. A penalty of $100.00 is appropriate.

3. Citation No. 6311848, WEST 2005-218-M

Inspector Allen issued Citation No. 6311848 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The self cleaning tail pulley on the Kolberg stacker conveyor was not adequately guarded. The guarding provided on the south side consisted of a loosely hung piece of conveyor belt, leaving openings of one and a half foot wide, and contact less that one foot away to the moving machine parts as well as a six inch by six inch opening on the rear of the bearing block. The moving machine parts were approximately 28 inches above ground level. This

> condition exposed employees to the possibility of an injury if they were accidently to contact the moving machine parts. The pulley is not placed along a regularly used travel way and no foot prints were observed in the area making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was high. The Secretary proposes a penalty of $500.00 for this citation.

Inspector Allen testified that when the conveyor is operating, a lot of water falls in the area so miners would not usually be in the area. (Tr. 53; Ex. G-6). He designated the negligence as high because Mr. Ausmus admitted that he observed the condition the previous day. (Tr. 54, 65). Allen believes that Ausmus should have recognized that the condition created a hazard.

Mr. Ausmus objected to the $500.00 penalty for the citation because the inspector admitted that the condition was unlikely to cause an injury. Ausmus believes that, because the cited area was in an inaccessible location, a miner would have to intentionally put his arm in the opening in order to injure himself. He also contends that this stacker conveyor had been previously inspected by MSHA in the same condition and no citations were issued. (Tr. 71).

I find that the Secretary established a non-S&S violation. I credit Inspector Allen's testimony that it was unlikely that the guard was in the cited condition during previous MSHA inspections. I find that Carder's negligence was moderate because, although Ausmus may have previously observed the cited condition, he did not believe that a guard was crucial because the tail pulley was in a rather inaccessible location. A penalty of $60.00 is appropriate.

C. Dredge Operation No. 3

1. Citation No. 6311828, WEST 2005-160-M

Inspector Allen issued Citation No. 6311828 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14130(i). The body of the citation states:

> The seat belt on the John Deere front-end loader . . . company number 373 did not meet the requirements of SAE J386. The belt strap was worn frayed, and the right side of the belt contained a tear approximately one and one half inches long, creating a hazard to the operator of the loader by eliminating the ability of the seatbelt to function properly in the event of an accident. The loader is used on a daily basis in a fairly level area and light traffic, making the chance of an accident unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides that "[s]eat belts shall be maintained in functional condition and replaced when necessary to assure proper performance." The Secretary proposes a penalty of $300.00 for this citation.

Inspector Allen testified that the seatbelt, while not completely ineffective, was not being properly maintained. (Tr. 83; Ex. G-9). He determined that the violation was not S&S because the loader is used in a flat area where there is little traffic. He concluded that it was unlikely that the loader would be in an accident. Mr. Ausmus testified that he does not disagree with the citation but that he contests the special assessment of $300.00. (Tr. 125).

I affirm the citation as written. I find that a penalty of $60.00 is appropriate taking into consideration the gravity and negligence designated by the inspector.

2. <u>Citation No. 6299980, WEST 2004-326-M</u>

Inspector Allen issued Citation No. 6299980 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14132(a). The body of the citation states:

> The horn on the John Deere front-end loader, company number 404 . . . was inoperable. The front-end loader was not being operated at the time, but was on the ready line. There was no record or tag to indicate it was taken out of service. The defective horn had been identified on the pre-operation checklist.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was low. The cited standard provides that "[m]anually-operated horns . . . provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." The Secretary proposes a penalty of $91.00 for this citation.

Inspector Allen determined that the condition was S&S because there was foot traffic in the area where the loader would operate. (Tr. 86). The loader was not being operated at the time of his inspection, but it was not tagged out. The pre-operation checklist indicated that the horn had been operable for three days. Allen determined that the negligence was low because the defect had been identified and documented.

Mr. Ausmus testified that the defect had been noted and the loader was not being used. (Tr. 117). Because only three people work at the mine, it is not necessary for the operator to tag out the loader. Only two of these employees would operate the loader and they both knew that

the horn was not working. (Tr. 118). The mechanics had been notified that the horn needed to be repaired, but they had not been able to fix it by the time of the inspection.

I find that the Secretary established a violation. Although the loader apparently had not been used, it was available for use. Because the loader was not tagged out, one of the two employees who use the loader may well forget that the horn was not working and operate the loader in the defective condition. Because there has been no showing that the loader was used with the defective horn, I find that the violation was not S&S. Carder's negligence was low. A penalty of $20.00 is appropriate.

3. Citation No. 6299981, WEST 2004-326-M

Inspector Allen issued Citation No. 6299981 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(b). The body of the citation states:

> The John Deere front-end loader . . . company number 404 . . . contained a defect that affected the safety of persons. The brake lights were defective and not maintained in a functional condition. Vehicular traffic was observed in the area while the loader was in operation. Miners were exposed to the possibility of injury due to the inability of another equipment operator to know when the loader is stopping.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was low. The cited standard provides that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of $91.00 for this citation.

The evidence on this citation was the same as for the previous citation. For the same reasons, I find that the Secretary established a non-S&S violation with low negligence. A penalty of $20.00 is appropriate for this violation.

4. Citation No. 6299982, WEST 2004-326-M

Inspector Allen issued Citation No. 6299982 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11002. The body of the citation states:

> There were no handrails provided on the top of the tank for the diesel fuel trailer company number 537. Employees working on top of the tank were exposed to the possibility of a fall injury of approximately eight feet eight inches to the ground below. A

> miner mounts and dismounts the tank once a week to check tank levels. Failure to provide handrails and the rough walking surface makes the chance of an accident reasonably likely.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was S&S and that Carder's negligence was moderate. The cited standard provides that "[c]rossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of $217.00 for this citation.

Inspector Allen testified that there were no handrails provided on the top of the tank for the diesel fuel trailer. (Tr. 91; Ex. 13). He further testified that employees told him that they "were required to go up there at least once a week to check the levels of the tank." *Id.* They gained access to the top of the trailer by climbing the ladder at the rear of the trailer. (Tr. 107-08). Allen stated that the area was not a smooth walking surface. He determined that the violation was S&S based on the conditions he observed and the fact that miners have fallen to their deaths in similar circumstances. (Tr. 93).

Mr. Ausmus testified that the tank trailer cited by Inspector Allen has been in the same location for four years without handrails and has never been cited by any MSHA inspector. (Tr. 119). He assumes that other inspectors observed the condition. *Id.* He also testified that there is no need for employees to walk on the top of the tank to check fuel levels. (Tr. 119-20).

I find that the Secretary established a violation. I credit the testimony of Inspector Allen that the top of the tank trailer was used as a walkway when employees needed to check fuel levels. As a consequence, I find that the top of the trailer was an elevated walkway.

In some situations a citation should be vacated if the cited condition has been previously inspected by MSHA without any enforcement action being taken. Prior inconsistent enforcement of a safety standard at a mine is a factor that the Commission considers when evaluating whether a mine operator has received fair notice of the Secretary's interpretation of an ambiguous safety standard. *Good Construction*, 23 FMSHRC 995, 1006 (Sept. 2001). In this case, however, it is not clear whether an MSHA inspector has actually inspected the trailer. Mr. Ausmus was not sure if the trailer had been previously inspected but he assumed it had. (Tr. 119). In addition, previous MSHA inspectors may not have known that miners walk on top of the trailer tanks to check fuel levels. Consequently, I find that Carder did not establish this affirmative defense.

I also find that the Secretary established that the violation was S&S. The Secretary met all four elements of the *Mathies* S&S test. Because employees must regularly walk up on the top of the tank trailer, it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. Employees may not have to go up on the tank

on a weekly basis, but they travel there enough to create a hazardous situation. The top of the tank has the potential to be slick if it is wet or if the employee's boots are muddy. (Tr. 109).

Because the condition had existed for four years and the application of the standard to the top of a tank trailer is somewhat ambiguous, I find that Carder's negligence was low. A penalty of $80.00 is appropriate.

5. Citation No. 6299983, WEST 2004-326-M

Inspector Allen issued Citation No. 63299983 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11002. The body of the citation states:

> There were no handrails provided on the top of the tank for the diesel fuel trailer company number 538. Employees working on top of the tank were exposed to the possibility of a fall injury of approximately eight feet ten inches to the ground below. A miner mounts and dismounts the tank once a week to check tank levels. Failure to provide handrails and the rough walking surface makes the chance of an accident reasonably likely.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $217.00 for this citation.

The evidence presented for this citation was identical to the evidence for the previous citation. The two tank trailers were immediately adjacent to one another. (Ex. G-13, G-14). Consequently, I find that the Secretary established a S&S violation with low negligence. A penalty of $80.00 is appropriate.

6. Citation No. 6299985, WEST 2004-326-M

Inspector Allen issued Citation No. 63299985 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11002. The body of the citation states:

> There were no handrails provided on top of the portable generator set, unit number 488. The opening was four feet long and the height from ground level was three feet and eight inches. The opening was located over the right rear fender. Employees working on top of the elevated work deck were exposed to the possibility of a fall injury. A miner mounts and dismounts the trailer once a week to service the motor which is mounted on it.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $135.00 for this citation.

The generator cited by Inspector Allen is mounted on the back of a truck bed. The cited area is the fender above the rear wheels of the truck bed. (Tr. 95, Ex. G-15). The fender is flat in that location so that persons can stand on it and a tread is present. It was almost four feet above the ground. Allen believed that a miner would be in the cited location twice a day to start and stop the generator and to provide any maintenance on the generator. Inspector Allen believed that it was reasonably likely that a miner would fall from the trailer and injure himself because a miner must walk on the trailer on a regular basis. (Tr. 96-97). Serious accidents have occurred in similar circumstances at other mines.

Mr. Ausmus testified that the generator trailer had been at the mine for two years. (Tr. 121). He stated that miners can reach all of the controls for the generator from the ground. The top of the radiator is so high that employees must use a ladder to check the fluid level. He implied that miners do not have to get up on the generator trailer during their work day.

I find that the Secretary established a violation. The photographs show that there were stairs leading up to the cited area. I find that the top of the fender was an elevated walkway as that term is used in the safety standard. Because I credit the uncontroverted testimony of Inspector Allen, I find that the violation was S&S and that Carder's negligence was moderate. A penalty of $120.00 is appropriate.

7. <u>Citation No. 6299987, WEST 2004-326-M</u>

Inspector Allen issued Citation No. 6299987 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12032. The body of the citation states:

> The inspection cover plate was missing for the number seventeen circuit inside the electrical breaker box located on the northwest end of the scale house trailer. Miners could come in contact with the one hundred and ten volt ac current that was exposed.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was low. The cited standard provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that there was one cover plate missing on a breaker box in the scale house. (Tr. 98; Ex. G-16). The breaker box was in a section of the scale house that Carder leased to another company, but the box controlled the power for the entire building. Allen was told that Carder miners flip the switches in the breaker box when there is a power outage. Inspector Allen testified that it was unlikely that anyone would be injured as a result of this violation. (Tr. 99-100).

Mr. Ausmus testified that the citation should be vacated because the breaker box was in an area of the scale house controlled by another company. There is a locked door between the two areas of the scale house so the exposure to Carder employees "would be zero." (Tr. 120).

I find that the Secretary established a violation but the safety hazard created by the violation was de minimis. As the inspector testified, a miner would have to purposefully stick a tool into the small opening to sustain an injury. The violation was not serious and Carder's negligence was quite low. A penalty of $20.00 is appropriate for this violation.

D. Crusher Operation No. 5

1. Citation No. 6299958, WEST 2004-270-M

Inspector Allen issued Citation No. 6299958 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.4230(a)(1). The body of the citation states:

> The John Deere front end loader, company number 384 . . . did not have a fire extinguisher on the equipment. This creates a potential hazard to miners trying to escape in the event of a fire. No other fire extinguishing equipment was provided on this equipment.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides that "[w]henever a fire or its effects could impede escape from the equipment, a fire extinguisher shall be on the equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen was concerned that if the loader were to catch on fire, the loader operator would have a difficult time escaping from the vehicle. (Tr. 128). A diesel fuel tank was under one door and a hydraulic tank near the other door. "Because there was a fire promulgator under both exits, [Carder] needed a fire extinguisher for the miner to be able to escape from that piece of equipment." *Id.* The inspector did not believe that the violation was serious or S&S because a fire was unlikely. (Tr. 129). Not every piece of mobile requires a fire extinguisher, just those in which a fire would impede escape. *Id.* In this case, there was a tank of combustible liquid adjacent to the each door of the loader. (Tr. 154).

Mr. Ausmus testified that, because the loader had two doors, there would always be a way for the loader operator to escape. (Tr. 173). He believes that a fire would most likely start in the engine compartment and it would be highly unlikely that both doors would be engulfed with flames. (Tr. 154-55). Ausmus noted that subsection (a)(2) of the safety standard provides that "[w]henever a fire or its effects would not impede escape from the equipment but could affect the escape of other persons in the area, a fire extinguisher shall be on the equipment or within 100 feet of the equipment."

I find that the Secretary established a violation. I agree with Mr. Ausmus that in most instances a fire would not impede the loader operator from exiting the loader. Nevertheless, if a fire were to break out quickly both tanks could catch fire and the miner would need to be able to use the extinguisher to help him escape. The inspector admitted that it was not likely that the extinguisher would ever have to be used.

I find that Carder's negligence is quite low. MSHA inspectors have inspected Carder's facilities on a regular basis. No inspector has ever advised Carder that some of its self-propelled equipment may require a fire extinguisher even if the equipment has two doors. I find that a penalty of $20.00 is appropriate.

2. <u>Citation No. 6299959, WEST 2004-270-M</u>

Inspector Allen issued Citation No. 6299959 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.4201(a)(2). The body of the citation states:

> The fire extinguisher located on the Caterpillar 96F front end loader, company number 532 . . . had not received a maintenance check in the last twelve months (since October 1999), creating a potential hazard to employees trying to use it to extinguish a fire.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides that "[a]t least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of the extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that the "last proof" of any inspection of the fire extinguisher was in October 1999. (Tr. 131). He did not believe that the violation was serious because the loader was in good repair. Mr. Ausmus testified that, because a fire extinguisher was not required to be on the loader, there could be no violation of section 56.421(a)(2). (Tr. 156-57, 174-75).

I find that the Secretary established the violation. If a mine operator places a fire extinguisher on a piece of equipment, it must meet MSHA's testing and maintenance requirements. A miner will assume that an extinguisher will function when fighting a fire. There was no showing that his extinguisher was not working properly. The violation was not serious or of an S&S nature. Carder's negligence was moderate. A penalty of $60.00 is appropriate.

3. <u>Citation No. 6299961, WEST 2004-270-M</u>

Inspector Allen issued Citation No. 6299961 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The hopper feed conveyor contains two idlers that are not guarded. The open and exposed idlers are eighteen inches and forty-eight inches above the mine floor, respectively. This condition exposed employees to the possibility of injury if they were accidently to contact the moving machine parts. The idlers are not . . . along a regularly used travelway, making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that the idler rollers were not guarded but that the rollers were not close to a travelway. (Tr. 132; Ex. G-20). A miner or his clothing could become entangled in the rollers. (Tr. 134). He admitted that MSHA has determined that conveyor belt rollers are not considered to be moving machine parts for purposes of the standard. (Tr. 158). The inspector testified, however, that this policy applies to "material-carrying rollers," not return or idler rollers. (Tr. 160). The plant was not operating while the inspector was at the plant.

Mr. Ausmus testified that two miners work at the plant, one in a loader and the other in the operator's station. (Tr. 159). As a consequence, miners are not walking around the plant while it is operating. Ausmus also testified that, during previous inspections, some MSHA inspectors have told him that return rollers do not have to be guarded and others have told him that guards are required. (Tr. 175). Ausmus stated that one inspector told him that "there's not a pinch point on the return roller." *Id.* Ausmus believes that when one inspector gives Carder "a clean bill of health" for a certain condition, it is unfair for another inspector to issue a citation for the same condition. (Tr. 176). If a condition is inspected and "accepted by an inspector," does it mean that the inspector did "not do his job?" (Tr. 177).

As stated above, the Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 56.14107(a) is "simple and brief in order to be

broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application' " *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990) (citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The Commission addressed this issue with respect to the Secretary's guarding standard in *Good Construction*. In that case, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Good Construction* 23 FMSHRC at 1002. The moving machine parts were guarded, but the MSHA inspector determined that the guarding was insufficient. The Commission remanded the case to the administrative law judge for consideration of the notice issue.

In the present case, Carder believes that it has been led astray by MSHA's policy statements and prior inconsistent enforcement. MSHA's program policy manual provides that conveyor belt rollers are not to be construed as moving machine parts that must be guarded under the standard "where skirt boards exist along the belt." The Secretary takes the position that the statement in the policy manual applies only to "material-carrying rollers, not return rollers – return idlers." (Tr. 160). In addition, the cited idlers were not protected by a skirt board.

I find that the standard applied to the cited idlers and that Carder had fair notice of the requirements of the standard. Although the statement in the program policy manual is subject to differing interpretations, it is clear that the statement does not apply to the idlers cited by MSHA in this case. These return rollers were exposed moving machine parts that are similar to those specifically mentioned in the standards. The Secretary has often applied this standard to return rollers. *See e.g. Heritage Resources Inc.,* 21 FMSHRC 626, 632 (June 1999) (ALJ); and *Asphalt Paving Co.*, 27 FMSHRC 123, 124 (Feb. 2005) (ALJ). In *Heritage Resources* a miner was killed when he became entangled in a return roller and in *Asphalt Paving* a miner was injured when his arm was pulled into a return roller. Unguarded return rollers are a known hazard in the mining industry. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of section 56.14107(a) would have recognized the cited return rollers were required to be guarded. Mr. Ausmus's testimony with respect to prior MSHA inspections is too vague for me to find that Carder was a victim of prior inconsistent enforcement. The cited idler was near the tail pulley in an area where cleaning would be required.

It was not reasonably likely that anyone would be injured by the violation. The return rollers were in a rather remote area. In addition, with only two employees, the risk of injury was reduced. The condition did create some measure of danger to employees.

I find that Carder's negligence was low. It is clear the Carder believed that these rollers were not required to be guarded. A penalty of $20.00 is appropriate.

4. <u>Citation No. 6299962, WEST 2004-270-M</u>

Inspector Allen issued Citation No. 6299962 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The cone feed conveyor contains a return idler that is not adequately guarded in that the guard contained several openings and the idler was readily accessible. The idler is sixty-eight inches above the mine floor. This condition exposed employees to the possibility of injury if they were accidently to contact the moving machine parts. The idler is not . . . along a regularly used travelway, making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The evidence presented with respect to this citation is essentially the same as the evidence for the previous citation. (Tr. 135-37, 160-61, 175-77; Ex. G-21). Carder raised a general issue with respect to this and other citations concerning the need to protect against intentional

misconduct by an employee. Carder believes than the only way for a miner to be injured by the cited condition is for him to intentionally put himself in harm's way. Carder's position fails to consider human error. The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. There is a history of such injuries at crushing plants throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

For the reasons set forth above, I find that the Secretary established a non-S&S violation and that Carder's negligence was low. A penalty of $20.00 is appropriate.

5. <u>Citation No. 6299963, WEST 2004-270-M</u>

Inspector Allen issued Citation No. 6299963 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

> The screen feed conveyor contains a return idler that is not guarded. The idler is fifty-four inches above the mine floor. This condition exposed employees to the possibility of injury if they were accidently to contact the moving machine parts. The idler is not . . . along a regularly used travelway, making the chance of accidental contact unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The evidence presented with respect to this citation is essentially the same as the evidence for the previous two citations. (Tr. 137-39, 162-63, 175-77; Ex. G-22). For the reasons stated above, I find that the Secretary established a non-S&S violation and that Carder's negligence was low. A penalty of $20.00 is appropriate.

6. Citation No. 6299964, WEST 2004-270-M

Inspector Allen issued Citation No. 6299964 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.9300(a). The body of the citation states:

> No berms or guardrails were provided on the banks of the elevated scale roadway adjacent to the scale house, where a thirty-two to thirty-six inch drop off exists. This condition creates a vehicular overturn hazard. The scales are used daily to weigh over the road haul trucks.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was low. The safety standard provides that "[b]erms 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 overturn or endanger persons in equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that Carder's customers use the scale roadway. (Tr. 140; Ex. G-23). Several trucks entered and exited the property during his inspection. He determined that an accident was unlikely because trucks move very slowly over the scale. (Tr. 141). He determined that Carder's negligence was low because its managers were not aware that the standard would apply to the scale. (Tr. 142).

Mr. Ausmus testified that the scale has been in its present position for several years through many MSHA inspections without guardrails or berms. (Tr. 176-77). The condition had not been previously cited by MSHA nor had an MSHA inspector suggested the guardrails be installed. Anyone entering or leaving the property would see the scale, as shown on the photographs taken by Inspector Allen. (Ex. G-23).

I find that the citation should be vacated because Carder was not provided with adequate notice that guardrails were required on the scale. The scale has been present for many years and perhaps as long as 15 years. (Tr. 164). The scale would be quite obvious to anyone entering the property. A reasonably prudent person familiar with the mining industry and the protective purposes of section 56.9300(a) would not have recognized that the cited scale was covered by the standard given the lack of enforcement at the mine and the fact that truck drivers drive over the scale at a very low rate of speed. I further find that, putting aside the notice issue, the scale fits within the scope of the safety standard. The scale is a roadway where a drop-off exists of sufficient grade or depth that could cause a truck to overturn or endanger persons in the truck. By issuing the citation, MSHA put Carder on notice that guardrails are required. The citation is vacated.

7. Citation Nos. 6299965 through 6299976, WEST 2004-270-M

Inspector Allen issued Citation Nos. 6299965 through 6299976 under section 104(a) of the Mine Act alleging violations of 30 C.F. R. § 50.30(a). The body of Citation No. 6299965 states:

> The MSHA #7000-2 (Quarterly Employment Report) for the 1st Quarter 2001 (January, February and March) was not completed properly in that the employment and employee hours for the mine were not reported correctly.

The inspector determined that there was no likelihood that someone would be injured as a result of this condition. He determined that the violation was not S&S and that Carder's negligence was moderate. The regulation provides, in part, that "[e]ach operator of a mine in which an individual worked during any calendar quarter shall complete a MSHA form 7000-2 in accordance with the instructions and criteria in § 50.30-1. . . ." The Secretary proposes a penalty of $60.00 for each citation. Each of the 12 citations charging a violation of section 50.30(a) are identical, except that they cite a different calendar quarter. (Exs. G-24 through G-36).

Inspector Allen stated that he issued the citations following an audit of Carder's record-keeping compliance. (Tr. 143). The audit revealed that Carder made the same mistake on the 7000-2 form in 12 consecutive quarters. A separate citation was issued for each quarter. (Tr. 144). Inspector Allen described the mistake as follows:

> We identified during the course of the audit that the mine operator was not reporting hours for the scale-house person. [Carder has] a roving scale-house person that would bounce around for the different mines, and they were not tracking the hours to associate with each mine ID.

(Tr. 145). The same mistake was made with respect to Mike Ausmus, the general manager. Inspector Allen testified that Carder has a unique situation because it has "people that travel to [four] different mine Ids and it's a little difficult to track it." (Tr. 16).

Mr. Ausmus testified that he was surprised that he received these citations because Carder has been reporting hours worked the same way for a long time. Carder was never advised by MSHA that it was not correctly reporting hours worked. Ausmus testified that the scale-house employee works about 40 hours a week in the summer, but does not usually work at all during the winter months. (Tr. 178-89). Ausmus testified that he is at the No. 5 crusher about 10 hours a week. (Tr. 178). When Mr. Ausmus asked Inspector Allen why the alleged reporting violation was not included in one citation, he replied that it is MSHA's policy to issue a separate citation for each quarter. (Tr. 166).

The Secretary is authorized to assess proposed penalties for violations of Part 50. *Consolidation Coal Co.*, 14 FMSHRC 956, 963-65 (June 1992). Inspector Allen did not refer to a specific provision of section 50.30-1 that was violated. Nevertheless, section 50.30-1(g)(3) requires mine operators to "[s]how the total hours worked by *all* employees during the quarter covered." (Emphasis added). "Hours worked" includes work performed by employees who only work part of their time at the No. 5 crusher. It does not appear that Carder's employment records had been previously audited. In *Consolidation Coal*, the Commission recognized the Secretary's authority to issue a separate citation for each calendar quarter.

I find that the citations should be affirmed as non-serious citations. I find that Carder's negligence was very low because it believed that the hours were being correctly reported. Carder relied on an administrative assistant to calculate and report the employment and hours worked. (Tr. 146). A penalty of $10.00 for each citation is appropriate.

8. <u>Citation No. 6299957, WEST 2004-271-M</u>

Inspector Allen issued Citation No. 6299957 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(b). The body of the citation states:

> The John Deere front end loader, company number 384 . . . contained defects that affected the safety of persons. The horn and the lights were defective and not maintained in a functional condition. Miners and other vehicular traffic were observed in the area while the loader was in operation. Miners were exposed to the possibility of injury due to the inability of the loader operator to warn others in the event of an emergency. The mine operator was not aware of the defects on the loader.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be permanently disabling. He determined that the violation was S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen testified that the operator of the cited loader was loading a truck when he arrived for the inspection. (Tr. 149). Use of the loader with an inoperable horn and lights presented a serious safety risk to employees. When Mr. Ausmus attempted to turn on the lights during the inspection, sparks were created under the dashboard. (Tr. 150). No defects were noted in the pre-operational checklist. Inspector Allen could not determine how long the loader had been in this condition because the loader operator did not speak English. (Tr. 151).

Mr. Ausmus testified that there was sparking when he turned the key for the loader. (Tr. 179). He believes that the problem developed at that moment. Ausmus contends that the sparking indicated a short in the electrical system that caused the horn and lights to malfunction.

(Tr. 180). The citation is not fair because MSHA did not give Carder an opportunity to fix the problem.

Carder argues that the standard requires that safety defects be corrected in a timely manner. Because it was not given the opportunity to correct the problem that developed at the time of the inspection, the citation should be vacated. Inspector Allen believes that the loader operator knew that there was a problem with his equipment because he parked the loader and started using another loader as soon as the inspector arrived at the mine. (Tr. 150-51, 167-68).

I find that the Secretary did not meet its burden of proof with respect to this citation. The pre-operational checklist for the cited loader did not indicate that the horn and lights were not working. If there was sparking under the dash when Ausmus and Allen inspected the loader, it is possible that the lights and horn had been working that shift. *See Lopke Quarries, Inc.*, 23 FMSHRC 705, 714-15 (July 2001). Consequently, I vacate this citation.

9. <u>Citation No. 6299960, WEST 2004-271-M</u>

Inspector Allen issued Citation No. 6299960 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(b). The body of the citation states:

> The Caterpillar 966F front end loader, company number 532 . . . contained defects that affected the safety of persons. The brake lights were defective and not maintained in a functional condition. Vehicular traffic was observed in the area while the loader was in operation. Miners were exposed to the possibility of injury due to the inability of another equipment operator to know when the loader is stopping. The mine operator was not aware of the defects on the loader.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $114.00 for this citation.

Inspector Allen testified that there was a possibility of a collision between vehicles at the mine as a result of this violation. (Tr. 152). The defect was not noted on the pre-operational checklist. He admitted that it was possible that the brake lights stopped working during the shift. (Tr. 172). Mr. Ausmus testified that the citation was unfair because the defect was not noted on the pre-operational checklist. (Tr. 181). He stated that the brake lights must have malfunctioned during the shift. Ausmus believes that everything was working at the start of the shift. He admitted that when he spoke to the loader operator after the citation was issued, he merely asked him whether he did a preshift exam and whether everything checked out. (Tr. 182). The loader operator spoke broken English.

I find that the Secretary established a non-S&S violation of the standard. Carder did not effectively rebut the Secretary's evidence of a violation. It is not at all clear that the loader operator checked the brake lights at the start of the shift. Although there was a possibility that the hazard contributed to by the violation would result in an injury, such an injury was not reasonably likely. Carder's negligence was moderate. A penalty of $60.00 is appropriate.

E. Screening Operation/Dredge Operation

1. Citation No. 6311741, WEST 2004-491-M

Inspector Allen issued Citation No. 6311741 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.16006. The body of the citation states:

> The oxygen and acetylene tanks being transported on the company number 170 maintenance truck were observed in the upright position with no protective covers provided over the valve stems. Employees working in this area were exposed to the possibility of injury, should the cylinders tip over or receive an impact on the valve body causing fire and/or projectile hazards.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it could be fatal. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides, in part, that "[v]alves on compressed gas cylinders shall be protected by covers when being transported or stored . . . ." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified that the valves for the compressed gas cylinders were not protected as required by the standard. (Tr. 186; Ex. G-40). He observed the cylinders being transported in the cited condition while on the truck. (Tr. 189). The cylinders were secured to the truck. (Tr. 213). He stated if the valves were "impacted and knocked off, those compressed gas cylinders [had] the potential to become a rocket." (Tr. 187, 214). The violation could also propagate a fire. (Tr. 188). There were covers available at the mine.

Mr. Ausmus testified that Inspector Allen admitted that the cylinders could not tip over and there was nothing overhead that could fall onto the valves. (Tr. II. 8). Ausmus believes that there was no safety hazard connected with the cited condition.

As stated above, the Secretary is not required to prove that an alleged violation created a safety hazard. I find that the Secretary established a non-S&S violation. It was highly unlikely that the violation would result in an injury. The gravity was quite low and Carder's negligence was moderate. A penalty of $40.00 is appropriate.

2. Citation No. 6311743, WEST 2004-491-M

Inspector Allen issued Citation No. 6311743 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12004. The body of the citation states:

> The power conductors feeding power from the 12 volt DC battery to the engine on the work boat were not insulated and/or provided [with] adequate protection. The conductors had mechanical damage near both electrical connections at the battery. A diesel fuel tank is located in the near vicinity to the damaged conductors. Employees working in and around this area were exposed to the possibility of shock and/or fire.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was moderate. The safety standard provides, in part, that "[e]lectrical conductors exposed to mechanical damage shall be protected." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen testified the conductors were damaged near where they were attached with lugs to the 12 volt battery. (Tr. 190; Ex. G-42). He stated that having broken wires in the conductors can create arcing and sparking if the battery is moved. The battery was on the bottom of the boat and was not secured. (Tr. 224). He also stated that the conductors could overheat since their current-carrying capacity was reduced. One of the conductors was "almost broken clear off where it entered into the lug that mounts to the battery." (Tr. 218). The work boat is used on a daily basis. A fuel tank was near the battery. (Tr. 191). Inspector Allen determined that the violation was S&S because of the proximity of the fuel tank. (Tr. 192). On cross-examination, Inspector Allen admitted that one of the cited conductors was the ground conductor and that he did not know what would happen if that conductor failed. (Tr. 221). Allen stated that he issued the citation because the conductors were damaged. (Tr. 222-23).

Mr. Ausmus testified that the conductor that concerned Mr. Allen was the ground conductor. (Tr. II 9). The conductor on the ground can be a bare wire because the ground goes to the frame of the equipment. There is no possibility of sparking from the ground conductor. Mr. Ausmus introduced the ground cable (negative cable) as Exhibit R-1 and the positive cable as Exhibit R-2. (Tr. II 11).

I find that the Secretary established a violation. Both conductors were badly damaged at the point where they entered the lugs. Although this condition created a potential hazard, Inspector Allen's testimony as to the likelihood that someone would be injured by the violation, assuming continued normal mining operations, was not very convincing. The Secretary did not show that it was reasonably likely that sparking would occur, that sparking would cause a fire, or

that a miner would be shocked by the condition. I find that the violation was not S&S and that Carder's negligence was moderate. A penalty of $60.00 is appropriate.

3. Citation No. 6311745, WEST 2004-491-M

Inspector Allen issued Citation No. 6311745 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14100(a). The body of the citation states:

> The work boat used daily during the shift has not received an inspection by the equipment operator before being placed in operation on that shift. Several safety defects were found and cited . . . on the work boat that should have been identified if a proper pre-operational check had been made.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was moderate. The safety standard provides that "[s]elf propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen determined that the preshift examination had not been performed after talking with Leonard Smart, the lead man on the shift. (Tr. 193). Smart told him that no pre-operational check had been performed.

Mr. Ausmus testified that the work boat cannot be classified as self-propelled mobile equipment under section 56.14100 because section 56.14000 defines "mobile equipment" as "[w]heeled, skid-mounted, track-mounted, or rail-mounted equipment capable of moving or being moved." (Tr. 225; Tr. II 12). A boat does not fit within this definition.

I agree with Mr. Ausmus that a boat is not mobile equipment as that term has been defined by the Secretary. The safety standard applies to self-propelled mobile equipment. Consequently, the citation is vacated.

4. Citation No. 6311746, WEST 2005-134-M

Inspector Allen issued Citation No. 6311746 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14103(b). The body of the citation states:

> The broken window on the Collidge dredge impaired the operator's visibility for safe operation and/or created a hazard to the equipment operator. Numerous cracks running both vertically and

> horizontally existed, creating a spider web effect. There [are] other windows that are intact, making the chance of an accident unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The cited standard provides, in part, that "[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed." The Secretary proposes a penalty of $425.00 for this citation.

Inspector Allen testified that he issued this citation because a window on the dredge was cracked. He stated that it looked like an object had struck the window. (Tr. 196; Ex. G-44). Mr. Ausmus testified that a dredge is not mobile equipment as that term is defined by the Secretary and that the citation should be vacated. (Tr. 226-28; Tr. II 12).

Section 56.14103 is entitled "Operators Stations." Subsection (a) states that "[i]f windows are provided on operators' stations of self-propelled mobile equipment, the windows shall . . . ." Subsection (c) also limits its applicability to self-propelled mobile equipment. Subsection (b) cited by Inspector Allen does not make any direct reference to self-propelled mobile equipment. Nevertheless, the entire standard clearly applies only to windows on operators' stations of self-propelled mobile equipment. This subsection requires the replacement of damaged windows on such equipment but does not require the replacement of windows at other locations at a mine. The preamble to section 56.14103 states "[t]his final standard sets forth several safety requirements relating to the operator's station on self-propelled mobile equipment." 53 Fed. Reg. 32507 (August 25, 1988). I find that the dredge did not fit within the Secretary's definition of mobile equipment. Consequently, this citation must be vacated.

5. <u>Citation No. 6311747, WEST 2004-491-M</u>

Inspector Allen issued Citation No. 6311747 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states, in part:

> The drive shaft between the engine and the main pump located on the Coolidge dredge contained exposed moving machine parts that were not adequately guarded. The existing drive shaft guarding contains a twenty one inch by fifty nine inch opening and is open and exposed on the bottom side. There are also two seven inch by nine inch lids on the top side that are not secured and were easily opened. . . . The moving machine parts are along a travel way that is not regularly used. . . .

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined

that the violation was not S&S and that Carder's negligence was moderate. The Secretary proposes a penalty of $425.00 for this citation.

Inspector Allen testified that the rotating drive shaft was exposed to accidental contact. (Tr. 198; Ex. G-45). There were also lids on the top side of the shaft which could be opened. He testified that the drive shaft was about 30 inches above the walking surface. (Tr. 200). He took the photograph of the alleged violation while he was on his knees with the camera pointing up. (Tr. 201, 230-32).

Mr. Ausmus testified that the cited area was about 40 feet from the operator's station and that there is no reason for him to be anywhere near this area while the dredge is running. (Tr. II 13). He testified that the bottom of the existing guard protecting the drive shaft was about 18 inches above the deck of the dredge. (Tr. II 14). He states that any greasing of the drive shaft is performed while the dredge is shut down. The lids on the top side were closed and are only opened for greasing operations.

I find that the Secretary established a technical violation of the safety standard. Moving machine parts, that were within seven feet of an infrequently used walkway, were exposed. To become entangled in the parts, a miner would have to be down on the deck kneeling or on his hands and knees. I find that the existing guard would protect miners walking by the shaft. The lids above the shaft were designed so that they could not flip open. I find that the gravity was very low. Because this technical violation was not obvious, Carder's negligence was extremely low. A penalty of $10.00 is appropriate.

6. <u>Citation No. 6311748, WEST 2004-491-M</u>

Inspector Allen issued Citation No. 6311748 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 47.41(a). The body of the citation states, in part:

> The [mine] operator failed to ensure that a five gallon container of a hazardous chemical has a label that was located in the fuel area.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was not S&S and that Carder's negligence was moderate. The standard provides, in part, that the "operator must ensure that each container of a hazardous chemical has a label." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen stated that the cited container contained gasoline. (Tr. 202; Ex. G-46). The container was a red five gallon metal can. (Tr. 233). Mr. Ausmus testified that MSHA has a safety standard which provides that a gasoline container that is emptied every night is not required to be labeled. (Tr. II 15-16).

The Secretary established a technical violation. Mr. Ausmus raised a defense, but he did not present any credible evidence that the can was emptied every night. The violation was not serious. The container in the photograph is a typical metal gasoline can. (Ex. G-46). It is highly unlikely that a miner would mistake the container for anything other than a gasoline can. For the same reasons, Carder's negligence is very low. A penalty of $10.00 is appropriate.

7. <u>Citation No. 6311749, WEST 2004-491-M</u>

Inspector Allen issued Citation No. 6311749 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.4102. The body of the citation states, in part:

> Excessive amounts of engine oil had been allowed to accumulate under the engine (a pool approximately three feet long by four feet wide) and the dirt around the genset was oil soaked for a distance of approximately six feet wide by twelve feet long, on and around the plant's Caterpillar generator that supplies the plant [with] power.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would result in lost workdays or restricted duty. He determined that the violation was S&S and that Carder's negligence was moderate. The safety standard provides that "[f]lammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard." The Secretary proposes a penalty of $154.00 for this citation.

Inspector Allen testified that the accumulation created a serious fire hazard. (Tr. 203-04; Ex G-47). He testified that miners were exposed to the hazard on a daily basis. He admitted that it was possible that the oil line at the generator had broken the day before. (Tr. 235). Fuel was stored in the area and, since he did not issue a citation for failure to post a No Smoking sign, it is safe to assume that the area was posted. (Tr. 236). The inspector believes that a spillage of flammable liquid must be cleaned up as soon as it is discovered. (Tr. 237).

Mr. Ausmus testified that the night before the MSHA inspection, a hose broke on the generator which caused excessive amounts of oil to spill on the ground. (Tr. II 16). He believes that the generator was not being used at the time of the inspection. Ausmus contends that a mine operator must be given a reasonable amount of time to clean up a spill of flammable liquid. In addition, there were "No Smoking" and "No Open Flames" signs posted in the area. (Tr. II 17).

I agree with Mr. Ausmus that, under the safety standard, a mine operator must be given a reasonable amount of time to clean up the spill before a violation is established. A mine operator must take steps to ensure that the danger is immediately mitigated, however. There is no dispute that the oil spill described by Inspector Allen existed. Inspector Allen stated that it was possible that the spill could have occurred the previous day, but Carder employees did not advise him of

that fact at the time of his inspection. He could not recall if the generator was operating at the time of his inspection. (Tr. 235). On the other hand, Mr. Ausmus only "believed" that miners were not using the generator at that time. (Tr. II 16). Although Carder generally outlined a defense at the hearing, it did not present sufficient evidence to rebut the Secretary's *prima facie* case. There were no warning signs or instructions given to keep away from the generator. I find that the Secretary established an S&S violation and that Carder's negligence was moderate. A penalty of $100.00 is appropriate.

8. Citation No. 6311750, WEST 2004-491-M

Inspector Allen issued Citation No. 6311750 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). At the hearing, Mr. Ausmus stated that he did not have any objections to the citation and he admitted that the guarding on the generator set was not adequate. (Tr. II 17). Consequently, the citation is affirmed as written. The Secretary's proposed penalty of $203.00 is appropriate.

9. Order No. 6311751, WEST 2005-134-M

Inspector Allen issued Order No. 6311751 under section 104(g)(1) of the Mine Act alleging a violation of 30 C.F. R. § 46.11(b)(4). The body of the citation states, in part:

> Three commercial over-the-road truck drivers at the mine have not received site-specific hazard awareness training. The mine operator was aware of the training requirements.

The inspector determined that it was reasonably likely someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was S&S and that Carder's negligence was high. The regulation provides that mine operators must provide site-specific hazard awareness training to "[c]ustomers, including commercial over-the-road truck drivers." The Secretary proposes a penalty of $1,700.00 for this citation.

Inspector Allen testified that he observed three over-the-road truck drivers lined up at the pit getting ready to have their trucks loaded with product. (Tr. 208; Ex. G-51). When he talked to the drivers, none of them had been given the required safety training. He considered the violation to be S&S because an untrained person at a mine site is a hazard to himself and others. He believed that this mine presented unusual hazards because it is a dredge site. He felt that entrapment in a sand pile was a real possibility if the pile were to fail. (Tr. 209). Inspector Allen believed that Carder's negligence was high because the lead man was not paying attention to new truckers. Carder has been in operation for about ten years and it had knowledge of this training requirement.

Allen admitted that there were no Carder employees at the scale house and that there was a sign posted at the entrance to the mine. (Tr. II 5). The scale house was on the opposite side of the dredge pond from the area where the trucks were lined up. The drivers did not adhere to the signs at the entrance of the mine.

Mr. Ausmus testified that Carder has posted a sign at the entrance of the mine which reads: "Customers & Visitors Must Report to Scale Office Before Entering Property." (Tr. II 17-18; Ex. R-3). Ausmus contends that, because no miners were manning the scale house, drivers who were new to the property just drove around to where they saw activity. (Tr. II 18). In doing so, these drivers disregarded the sign posted at the entrance to the mine. Ausmus contends that if these drivers had remained at the scale house, someone would have driven around the pond to greet them and given them the required hazard training. Carder had four employees at the mine that day. Ausmus further testified that, as soon as the lead man noticed the trucks, he would have asked them if they had the required training. If they said no, he would have escorted them back to the scale house to provide the training. (Tr. II 19).

I credit the testimony of Inspector Allen. He testified that the lead man told him that he thought the truckers had already been trained and that he was not paying any attention to new truckers. (Tr. 209). Inspector Allen's notes corroborate this testimony. (Ex. G-51). I find that the Secretary established an S&S violation of the training regulation. I also find that Carder's negligence was high because Carder's employees were not paying attention to this requirement. Carder should have expected new truckers would travel to the area of the mine where people were located rather than sit at the scale house. The lead man should have asked each unfamiliar driver whether he had received any hazard training. The Secretary proposed the penalty under her special assessment regulations. I am reducing the penalty to $1,000.00 taking into consideration the civil penalty criteria. This mine has no history of previous violations.

10. <u>Citation No. 6311753, WEST 2004-491-M</u>

Inspector Allen issued Citation No. 6311753 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.11003. The body of the citation states, in part:

> The twelve foot ladder located on the #1 oversized conveyor was not maintained in good condition. The ladder had two of the rungs bent and a crack was observed in the right side frame that penetrated approximately one third of the way through. . . . Employees seldom use this ladder, making the chance of an accident unlikely.

The inspector determined that it was unlikely someone would be injured as a result of this condition but that, if an injury were to occur, it would be fatal. He determined that the violation was not S&S and that Carder's negligence was moderate. The standard provides that "[l]adders

shall be of substantial construction and maintained in good condition" The Secretary proposes a penalty of $60.00 for this citation.

Inspector Allen testified at to the condition of the ladder. (Tr. 210-12; Ex. G-50). He believed that the ladder could easily fail with a miner on it. The ladder was not in use and he was not sure if there were other ladders available in the area. (Tr. II 6).

Mr. Ausmus testified that there was another ladder in perfect condition in the area that miners could use. (Tr. II 20). In addition, the ladder was used to access a platform. If the ladder were properly placed, the bent rungs would be above the level of the platform and no miners would be required to step on them.

I find that the Secretary established a violation. Although the hazard was not very great, it was possible that the violation could contribute to an injury. The violation was not serious. Carder's negligence was moderate. A penalty of $60.00 is appropriate.

F. Citation Nos. 6311742, 6311830, and 6311847

Carder agreed to withdraw its contest of the above citations at the start of the hearing. As a consequence, these citations are affirmed as written.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The individual operations have the following history of previous paid violations during the 24 months preceding these inspections: Crusher No. 2 - no reported history; Dredge Operation No. 1 - three; Dredge Operation No. 3 - six; Crusher Operation No. 5 - four; Screening Operation/Dredge Operation - no reported violations. Carder is a small operator and its mines are small. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Carder's ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

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

Citation No.	30 C.F.R. §	Penalty
WEST 2004-269-M		
6298298	56.14105	$1,500.00

Citation No.	30 C.F.R. §	Penalty
WEST 2004-270-M		
6299958	56.4230(a)(1)	$20.00
6299959	56.4201(a)(2)	60.00
6299961	56.14107(a)	20.00
6299962	56.14107(a)	20.00
6299963	56.14107(a)	20.00
6299964	56.9300(a)	Vacated
6299965	50.30(a)	10.00
6299966	50.30(a)	10.00
6299967	50.30(a)	10.00
6299968	50.30(a)	10.00
6299969	50.30(a)	10.00
6299970	50.30(a)	10.00
6299971	50.30(a)	10.00
6299972	50.30(a)	10.00
6299973	50.30(a)	10.00
6299974	50.30(a)	10.00
6299975	50.30(a)	10.00
6299976	50.30(a)	10.00
WEST 2004-271-M		
6299957	56.14100(b)	Vacated
6299960	56.14100(b)	60.00
WEST 2004-326-M		
6299980	56.14132(a)	20.00
6299981	56.14100(b)	20.00
6299982	56.11002	80.00
6299983	56.11002	80.00
6299985	56.11002	120.00
6299987	56.12032	20.00
WEST 2004-491-M		
6311741	56.16006	40.00
6311742	56.14112(b)	203.00
6311743	56.12004	60.00
6311745	56.14100(a)	Vacated

Citation No.	30 C.F.R. §	Penalty
6311747	56.14107(a)	10.00
6311748	47.41(a)	10.00
6311749	56.4102	100.00
6311750	56.14107(a)	203.00
6311753	56.11003	60.00
WEST 2005-132-M		
6311830	56.14100(b)	60.00
WEST 2005-133-M		
6311844	56.14112(a)(1)	20.00
6311846	56.14107(a)	100.00
6311847	56.14112(a)(1)	60.00
WEST 2005-134-M		
6311746	56.14103(b)	Vacated
Order No. 6311751	46.11(b)(4)	1,000.00
WEST 2005-160-M		
6311828	56.14130(i)	60.00
WEST 2005-218-M		
6311848	56.14107(a)	60.00
	TOTAL PENALTY	$4,206.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Carder, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $4,206.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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