FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

June 23, 2006

SUBURBAN SAND & GRAVEL, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2004-464-RM
	:	Citation No. 6311794; 07/15/2004
	:	
	:	Docket No. WEST 2004-465-RM
v.	:	Citation No. 6311795; 07/15/2004
	:	
	:	Docket No. WEST 2004-466-RM
	:	Citation No. 6311796; 07/15/2004
	:	
	:	Docket No. WEST 2004-467-RM
SECRETARY OF LABOR	:	Order No. 6311797; 07/15/2004
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), Respondent	:	Suburban Sand & Gravel Mine ID 05-04428
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 2005-142-M A.C. No. 05-04428-44707
	:	
v.	:	
	:	
SUBURBAN SAND & GRAVEL, Respondent	:	Suburban Sand & Gravel
	:	
	:	
SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 2005-223-M A.C. No. 05-04428-49161A
	:	
v.	:	
	:	
RUSSELL BARTZ, employed by SUBURBAN SAND & GRAVEL Respondent	:	Suburban Sand & Gravel

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2005-224-M
Petitioner	:	A.C. No. 05-04428-49160A
	:	
v.	:	
	:	
ROBERT K. HORN, employed by	:	Suburban Sand & Gravel
SUBURBAN SAND & GRAVEL	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Secretary of Labor; James J. Gonzales, Esq., Holland & Hart, Denver, Colorado, for Suburban Sand & Gravel, Russell Bartz, and Robert K. Horn.

Before: Judge Manning

These cases are before me on four notices of contest brought by Suburban Sand and Gravel ("Suburban") and three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Suburban, Russell Bartz, and Robert K. Horn 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"). The cases involve citations and orders issued by MSHA following its investigation of an accident at Suburban's pit. An evidentiary hearing was held in the Commission's courtroom in Denver, Colorado. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

I. BACKGROUND, SUMMARY OF THE EVIDENCE, AND FINDINGS OF FACT

At the time of the accident, Suburban operated a sand and gravel pit (the "pit") in Adams County, Colorado. The pit includes an area where material is excavated as well as crushing, screening, and material storage areas. Suburban became the owner of the pit in January 2004. On July 15, 2004, Jose Adame, a laborer with Suburban, was at the top of a sand stacker conveyor ("sand conveyor" or "conveyor") to grease the bearings on the head pulley when another employee started the conveyor. As the belt moved, Mr. Adame's foot became caught in the metal scraper that removes any sand that has stuck to the belt. He received serious injuries to his ankle and foot before the belt was turned off. MSHA Inspector Brad Allen, who was scheduled to conduct a regular inspection of the mine that day, arrived shortly after the accident and conducted MSHA's accident investigation. Inspector Allen issued a number of citations and

orders following his investigation. The parties settled all of these items except the four which are the subject of this litigation.

Adame testified through a Spanish/English interpreter that his primary job at the time of the accident was to remove mud, dirt, and debris from the sand conveyor. (Tr. 17). He also greased the bearings on the sand conveyor and other conveyors at the pit. Grease fittings were located at the head pulley and tail pulley. Adame has worked at the pit since January 2004, but he also worked there for a few months in 2003. In 2003, the pit was owned by Aggregates, Inc., which was not affiliated with Suburban. Many of the supervisors and hourly employees with Aggregates, Inc., started working for Suburban when it bought the pit. Adame helped grease bearings in conveyors in 2003. The bearings were greased about every other week in 2003. (Tr. 23). Adame testified that in 2003 he walked up the belts at the pit to grease the head pulley because that was how everyone else performed that task. (Tr. 24-25). Adame started greasing the head pulleys in this manner after "watching everyone else do it." (Tr. 25). Handrails were not provided on the conveyor and Adame did not use fall protection once he arrived at the top. In addition, he did not lock out the electrical switches to prevent anyone from starting the conveyer. Adame testified that he never observed anyone else using fall protection or locking out the circuit when greasing head pulleys in 2003. (Tr. 26).

Adame testified that when he returned to the pit in 2004, after it was purchased by Suburban, he greased the head pulley on the sand conveyor in the same manner "because everything was the same as it had been before." *Id.* He watched how others greased the pulleys and he did the same thing. (Tr. 50). He never walked up the pile of sand under the conveyor to reach the bearings on the head pulley. (Tr. 32). He could not recall anyone locking out the conveyor or using fall protection when greasing high conveyors. Adame testified that his supervisor at the pit in 2004 was Robert "Kenny" Horn, who had worked at the pit with Adame in 2003. In 2004, the bearings were greased about once a month. (Tr. 27). Horn spent most of his time loading trucks with product from the stockpiles under the stacker conveyors. (Tr. 29). Adame would make sure the sand conveyor was turned off, but he did not take any steps to lock out the conveyor or the generator that supplies power to the pit. Adame usually did his greasing on Saturdays, when the pit was not operating, or at the end of the shift after the generator was turned off. (Tr. 30, 51, 61). Adame testified that neither Horn nor Russell Bartz, the aggregate division manager for Suburban, told him that he should walk up the belt to grease the head pulley. (Tr. 47). Adame never discussed the procedure for greasing the pulleys with either of them. (Tr. 54).

When Adame arrived at the mine on July 15, 2004, Vincent Wallett told him to grease the sand conveyor. (Tr. 33-34). Wallett was not a management employee. Wallett operated the conveyors. Between 6:00 a.m. and 7:00 a.m., Adame walked up the belt to grease the bearings at the head pulley. Wallett was shoveling material from around the tail pulley on the sand conveyor when Adame walked up the belt. (Tr. 55-56). As Adame was greasing the bearings at the head pulley, the conveyor started. He subsequently learned that it was Wallett who turned on the sand conveyor. There was no warning or alarm to signal that the belt was going to start. (Tr. 42).

Adame thought he was going to fall off the end of the conveyor, but his foot got caught in the metal bar that scrapes sand off the conveyor. He screamed for help. Someone turned off the belt and Wallett ran up the conveyor to lift the sand scraper with a metal bar to free Adame's foot. Mr. Horn was loading trucks from a materials pile when the accident occurred. (Tr. 39). An ambulance took Adame to the hospital. Adame's ankle was pulled out of place and he had to undergo surgery. He was off work as a result of the injury for about six months. (Tr. 41).

Adame knew that the generator which supplied power for the pit had been turned on that morning. (Tr. 56). He testified that normally the sand conveyor was started from inside the control trailer at the pit. (Tr. 57-58). When that occurs, an alarm is sounded before the belt actually starts moving to warn everyone. In this instance, Wallett started the belt at a switch on the structure of the sand conveyor and no alarm sounded. None of the other belts had been turned on at the time of the accident. (Tr. 62). Adame assumed that the belt would not be started because Wallett had told him to grease the bearings on the conveyor and Adame walked right past Wallett as he stepped onto the belt. (Tr. 58).

The configuration of the sand conveyor is shown in photographs taken by MSHA Inspector Brad Allen. (Ex. P-1). The top of the sand conveyor was about 25 feet above the ground and the pile of sand under the conveyor was about five or six feet below the top of the conveyor. (Tr. 311, 314). The belt itself was 80 feet long and about 30 inches wide. There are two sets of controls for the sand conveyor: one set is in the control trailer and the other set is attached to the frame of the conveyor. (Tr. 42; Ex. P-1, pp. 7 - 9). Although a warning alarm can be activated from the trailer, there is no way to set off this alarm from the switch on the frame of the conveyor.

Steve Ludwig was a truck driver for Suburban Ready-Mix, a related company. He hauls sand and gravel from the pit to various cement plants. (Tr. 78). He was at the pit at the time of the subject accident. Mr. Horn is the individual who usually loads material into Ludwig's truck. On the morning of July 15, 2004, Ludwig drove into the pit to pick up a load of sand. He saw Adame walking up the belt on the sand conveyor. As Horn was loading his truck, Ludwig noticed that the sand conveyor started moving. He looked out his window and saw Adame with his foot caught in the sand scraper. (Tr. 82). He jumped out of his truck, yelled at Horn, and pointed to the top of the conveyor. When Horn saw what was happening, he yelled at Wallett to shut down the conveyor. (Tr. 82). Nothing in Horn's behavior at that time indicated to Ludwig that he knew that Adame was at the top of the conveyor. (Tr. 99). He helped in the recovery effort by getting a pry-bar and handing it to Wallett. (Tr. 104; Ex. R-1).

Inspector Brad Allen testified that he conducted the accident investigation for MSHA. Allen testified that, soon after he arrived at the pit, Mr. Horn told him it was common for a miner to walk up a conveyor belt to grease the head pulley. (Tr. 118-19). Inspector Allen testified that Russell Bartz told him that miners either walk up the stockpile or up the conveyor belt to reach the head pulley. (Tr. 120-121). Bartz stated that employees only walk up the belt if the stockpile is not high enough to reach the area of the head pulley.

Inspector Allen interviewed Vincent Wallett at the motel where he was living. (Tr. 125). Wallett told Allen that he turned on the conveyor because he needed to move the belt to remove sand that was packed around the roller of the tail pulley. (Tr. 127; Ex. P-2). Wallett apparently believed that Adame had gone to get another grease gun. Wallett stated that he "didn't see him return to go up [the] belt to grease [the] top and wasn't told." (Ex. P-2). Wallett told Inspector Allen that the head pulley was about 12 to 15 feet above the sand pile. (Tr. 128). Allen also testified that Wallett told him that employees commonly walked up the belt to grease the head pulleys. Wallett told both the company and Inspector Allen that an alarm did not sound when he started the sand conveyor. (Tr. 129; Ex. P-2).

Inspector Allen testified that Russell Bartz filed a mine accident report with MSHA. (Tr. 129; Ex. P-3). Bartz's office is in the scale house near the entrance of the mine. Allen testified that one can see most of the crushing, screening, and conveying portions of the plant from the window in his office. (Tr. 131).

Following his investigation of the accident, Inspector Allen issued a number of citations and orders. Three citations and one order of withdrawal are at issue in these cases.

A. Citation No. 6311794

Inspector Allen issued Citation No. 6311794 under section 104(a) of the Mine Act alleging a violation of section 56.14105 as follows:

> Maintenance of 80 feet long Kolberg sand stacker conveyor was being performed with the power on and the machinery was not blocked against hazardous motion. A serious accident occurred when the conveyor was started while a miner was performing maintenance and became entangled between the headroller and the belt scraper mechanism. The miner received crushing injuries to his left lower leg.

Inspector Allen determined that an injury had occurred and that the injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was of a significant and substantial nature ("S&S") and that Suburban's negligence was moderate. The safety standard provides, in part, that "[r]epairs or maintenance shall be performed only after the power is off, and the machinery or equipment [is] blocked against hazardous motion." The Secretary proposes a penalty of $2,500.00 for this citation.

On March 25, 2005, I granted the Secretary's motion to allege, in the alternative, that Suburban violated 30 C.F.R. § 56.12016. That section provides, in part:

> Electrically powered equipment shall be deenergized before mechanical work is done on such equipment. Power switches shall

> be locked out or other measures taken which shall prevent the equipment from being energized without the knowledge of the individuals working on it.

Inspector Allen testified that he issued the citation because the conveyor was not blocked against motion before Mr. Adame attempted to perform maintenance on the head pulley. (Tr. 134). He stated that the requirements of section 56.14105 would have been met if the conveyor or the generator had been locked out. (Tr. 216). He determined that the violation was S&S because it was highly likely that an injury could occur and that such an injury would be quite serious. (Tr. 137). A miner could become entangled in the sand scraper bar, as Adame did. He also believed that a miner could fall off the conveyer onto the ground below.

Suburban contends that undisputed evidence shows that the mine had implemented a lockout-tagout program and provided employees with locks and tags to use. Both Wallett and Adame were trained on these lockout-tagout procedures. Inspector Allen admitted that Adame could have locked out the conveyor before he climbed up the belt. (Tr. 187). The evidence also establishes that Mr. Adame usually greased pulleys on Saturday mornings when the plant was not operating or at the end of the day after the plant had been shut down. Thus, the Secretary failed to establish that it was a common practice for Suburban to grease the pulleys in a manner that violated either safety standard. Mr. Adame simply assumed that the conveyor would not be started because Wallett was working right there at the tail pulley on the base of the conveyor.

I find that the Secretary did not establish a violation of section 56.12016. Referencing *Phelps Dodge Corp. v. FMSHRC,* 681 F.2d 1189, 1192-93 (9th Cir. 1982), the Commission held that the Secretary's lockout-tagout standards are directed to the hazard of electric shock. *Island Creek Coal Co.*, 22 FMSHRC 823, 826-28, 830-32 (July 2000).[1] As drafted by the Secretary, the lockout standards were put in place to prevent the accidental electrocution of miners while mechanical work was being performed on electrically powered equipment. Both the Ninth Circuit and the Commission held that the Secretary's lockout standards simply do not address the hazards arising from the accidental movement of electrically powered equipment while mechanical work is being performed. *See also Arkhola Sand & Gravel, Inc.*, 17 FMSHRC 593, 596-98 (April 1995) (ALJ). In this instance, there was no risk that anyone would be exposed to an electrical hazard while greasing the head pulley on the conveyor.

I find that the Secretary established a violation of section 56.14105. The safety standard requires that the machinery or equipment undergoing maintenance or repair must be (1) de-

---

[1] In *Island Creek*, the Secretary alleged that the mine operator violated section 75.1725, which is substantially similar to section 56.14105, because conveyor belts were not locked out or tagged out. The Secretary argued that the term "blocked against motion" means locked out and tagged out. Two of the Commissioners rejected this interpretation of the standard because it is inconsistent with its language and also because the lockout-tagout requirements are directed to electrical hazards. The remaining two Commissioners did not agree with this analysis.

energized and (2) blocked against motion. Greasing a head pulley qualifies as maintenance. The first question is whether the equipment was deenergized. Mr. Wallett used the control box attached to the conveyor structure to turn on the belt. Power enters the control box, travels through a breaker and then to the start button. The Secretary argues that the conveyor was not "off" because the evidence shows that Wallett simply pushed the start button to activate the belt. Because the start button was "hot," power to the conveyor was not off. The breaker at the control box would have to be in the off position in order to deenergize the conveyor. Since the breaker was in an on position, the equipment was not off. Although I tend to agree with the Secretary's interpretation, there is no evidence to establish that the breaker was in the on position before Wallett went to turn on the conveyor. It is possible that the circuit breaker was off and Wallett turned it on immediately before he pushed the start button. There is no credible evidence on this issue.

It is clear, however, that the belt was not blocked against motion. Suburban did not present any evidence to rebut the Secretary's evidence that the belt was not blocked against motion. As a practical matter, the most common means of blocking a belt against motion is to lock out the power source. A belt that is 80 feet long is not going to move on its own because someone is standing or walking on it and it will not move as a result of the maintenance that was being performed. The Secretary is not contending that the only means to block the belt against motion is to lock out the power source. Locking out and tagging out the circuit was simply a method that Inspector Allen would have accepted to block the belt against motion to comply with section 56.14105. (*Compare, Island Creek*, 22 FMSHRC at 833). Suburban did not argue that MSHA does not have the authority to require that conveyors be locked out and tagged out under section 56.14105. The fact that Suburban had a lockout-tagout policy and that locks were available for use does not eliminate the violation but is relevant to the negligence criterion.

I also find that the violation was serious and S&S. 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).

A serious accident occurred in this instance which would have been prevented had Suburban complied with the requirements of 56.14105. I find that there was a reasonable

likelihood that the hazard contributed to by the violation would result in an injury of a reasonably serious nature.

I find that Suburban's negligence was quite low. Wallett was an hourly employee. Although he occasionally asked Adame to perform tasks, I find that he was not Suburban's agent. He did not supervise any employees, he was not a leadman, and he did not direct Adame's work schedule. Adame and Wallett worked together and would share tasks. In this case, Wallett asked Adame to grease the pulleys while he cleaned up the area around the tail pulley. In may well be that, because his principal language is Spanish, Adame granted Wallett a great deal of deference. Nevertheless, Wallett was not Adame's supervisor. I find that the negligence of Wallett should not be attributed to Suburban.

In addition, Wallett's decision to start the conveyor was totally unexpected. Suburban could not have anticipated that Wallett would start the conveyor that morning. The plant was not running at the time and it was Wallett who started the generator. Apparently, he started the generator because he believed that power was needed in the mechanical shop. The undisputed evidence reveals that the work being done in the shop did not require electricity and that the shop receives its power from the local electric utility, not from the generator. In addition, I find that it was highly unusual for Adame or anyone else to grease the bearings on the head pulley at the start of a shift while the generator was on. Although Adame testified that he never locked out the generator or the conveyor breaker when greasing the head pulley, it is important to note that he always greased while the plant was shut down. There is no evidence as to whether the generator was locked out by someone other than Adame when miners greased pulleys on conveyors, so I cannot enter a finding that Suburban had knowledge that conveyors were not blocked against motion while greasing was performed in this manner on other occasions. For these reasons, Suburban's negligence was very low with respect to this violation. A penalty of $250.00 is appropriate.

B. Citation No. 6311795

Inspector Allen issued Citation No. 6311795 under section 104(a) of the Mine Act alleging a violation of section 56.14201(b) because the "80 feet long Kolberg sand stacker conveyor was started without providing a visible or audible warning prior to startup." The citation also describes the accident as set forth in the previous citation.

Inspector Allen determined that an injury had occurred and that an injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was S&S and that Suburban's negligence was moderate. The safety standard, entitled "Conveyor start-up warnings," provides, in part:

> (a) When the entire length of a conveyor is visible from the starting switch, the conveyor operator shall visually check to make certain that all persons are in the clear before starting the conveyor.

> (b) When the entire length of a conveyor is not visible from the starting switch, a system which provides visible or audible warning shall be installed and operated to warn persons that the conveyor will be started. . . .

The Secretary proposes a penalty of $2,500.00 for this citation.

Allen testified that he issued this citation because there was no visible or audible warning given before the conveyor started up. (Tr. 139). If a warning had been given, it is less likely that the accident would have occurred. The inspector also testified that someone standing at the start switch used by Mr. Wallett could not see the top of the entire conveyor. (Tr. 139-40). The start switch used by Wallet is mounted on the frame of the sand conveyor under the belt. Allen testified that when he stood at the start switch he could not see the top of the belt on the sand conveyor. (Tr. 141). The inspector determined that the violation was S&S because a serious accident occurred. The standard is designed to warn miners to move away from equipment that is about to start. (Tr. 142).

Suburban maintains that it is undisputed that when the cited conveyor is started from the control trailer, the audible warning system is activated. It contends that the evidence shows that it is Suburban's practice and policy to sound this alarm whenever a belt is started. Suburban also argues that since the entire length of the conveyor is visible from the conveyor control switch that Wallett used, the citation must be vacated. The Secretary conceded that a mine operator is not required to use an audible warning when the entire length of the belt is visible from the start switch.

I find that the Secretary established a violation. It is quite clear that the intent of section 56.14201 is to ensure that a belt is not started if someone is in harm's way. In this instance, Inspector Allen stood at the control panel used by Wallett to start the conveyor to determine if he could see the entire length of the conveyor. Although he could see the framework of the conveyor and the bottom of the belt for the entire length, he could not see the top of the belt where Adame had been standing. Bartz admitted that a person standing at the start switch on the frame of the conveyor "probably . . . couldn't see the very top of the conveyor belt." (Tr. 386). I find that a person standing at the control panel attached to the frame of the conveyor system would not be able to see if someone were standing on or crouched at the top of the belt near the head pulley. Suburban's argument in this regard is simply playing with the semantics of the safety standard. Clearly, if Wallett were in a position to see the entire length of the belt, Suburban would have been in violation of subsection (a) of the standard because Wallett did not visually check to make certain that all persons were in the clear before he started the conveyor.

I find that the Secretary established that the violation was S&S for the same reasons as set forth with respect to Citation No. 6311794. Suburban's negligence was very low, for the reasons set forth for the previous citation. The evidence establishes that the policy and practice of Suburban is for employees to sound the alarm from the trailer before starting the conveyor.

Wallett's high degree of negligence in starting the conveyor cannot be attributed to Suburban. A penalty of $250.00 is appropriate.

C. Citation No. 6311796

Inspector Allen issued Citation No. 6311796 under section 104(d)(1) of the Mine Act alleging a violation of section 56.11001 as follows:

> There was no means of safe access provided on the elevated 80 feet long Kolberg sand stacker conveyor. No system was developed or used such as safety belts with lanyards or any other type of restraining device or two-sided railing to prevent or stop a fall of approximately thirty feet below to the hard, compacted sand floor. Employees enter the area once per week to perform maintenance, making the chance of an accident reasonably likely. Manager Russell Bartz stated that grease hoses on the head pulleys running to the ground were hard to maintain and that it was easier to have the miners go up the conveyors. Manager Russell Bartz engaged in aggravated conduct constituting more that ordinary negligence in that he was aware of, and condoned, the common practice of walking up the conveyers to perform maintenance.

Inspector Allen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S, that Suburban's negligence was high, and that the alleged violation was a result of Suburban's unwarrantable failure to comply with the standard. The safety standard provides that "[s]afe means of access shall be provided and maintained to all working places." The Secretary proposes a penalty of $8,300.00 for this citation.

Inspector Allen testified that he issued the citation because Suburban did not provide a safe means of access to the head pulley on the sand conveyor. (Tr. 142-43). The employees typically walked up the conveyor belt to reach the head pulley. Because there may be sand on the belt, there is a risk that a miner may slip and fall while walking up the belt. There are no handrails along the belt. He determined that the violation was S&S because it was reasonably likely that a miner would slip or trip and fall while walking up the conveyor. Allen believed that if a miner fell, it was reasonably likely that he would suffer a serious injury. (Tr. 144). The inspector determined that Suburban's negligence was high and that its conduct was unwarrantable "due to the fact that manager Russell Bartz was aware of and condoned the unsafe practice of walking up and down those elevated conveyors at heights up to 30 feet above ground level." (Tr. 144). He also believed that Mr. Horn was also aware of this practice. Allen admitted that using a safety belt and lanyard would not be a feasible means of providing safe access to the head pulley via the belt. (Tr. 154-55). Handrails are the most common means of

providing safe access along an elevated belt. Suburban did not have any usable safety belts with lanyards on the property.

Suburban argues that Adame's decision to walk up the belt was an aberration that was not condoned by the company. The belt was not used to access the head pulley. Safety belts with lanyards could not be used by a miner walking up a conveyor belt because there was no structure to which to secure the lanyard. In addition, the conveyor was not designed to have handrails along the side. Suburban maintains that it was company policy and practice for miners to walk up the pile of sand to reach the head pulley. Consequently, Suburban provided a safe means of access. In addition, a miner could lower the top of the conveyor. Horn operated a loader and was the leadman on the crew. He testified that he has worked at the pit for 16 years, first for Aggregates, Inc., and now for Suburban. He stated that he never saw miners walking up a belt to grease a head pulley. A few months before the accident he observed Wallett walking up a belt. Horn testified that he told Wallett to get down and to never walk up a belt again. (Tr. 287, 320-21). Bartz testified that miners were not authorized to walk up the belts of conveyors and that he did not know that any miners, including Adame, had ever walked up a belt. (Tr. 353-54). He also testified that he did not know that Horn caught Wallet walking up a belt. The bearings were sealed so greasing could be delayed without damaging the equipment. (Tr. 332). The top of the conveyor was not a working place because miners were not allowed up there.

Arturo Lopez was a front-end loader operator for Suburban in 2004. He operated the loader to fill the hopper with raw material, so he normally worked in the pit rather than in the area where Adame worked. He assisted in training miners and acted as a translator during the safety training, as necessary. (Tr. 250-51). Jose Adame is Lopez's cousin. Lopez testified that miners were not trained or told to walk up conveyors. He said that miners were not supposed to do that. (Tr. 257). He further testified that he never observed Adame walking up a conveyor. After the accident, he asked Adame what he was doing on the conveyor. Adame told him that Wallett told him to grease the head pulley. (Tr. 252-53). He also testified that greasing is normally done on Saturdays or after the plant is shut down during weekdays. Lopez stated that it was not a practice to grease at the beginning of the shift.

I find that the Secretary established a violation of the safety standard. It is not disputed that Adame walked up the stacker conveyor to reach the head pulley. I find that the top of the conveyor belt was a working place because Adame traveled there to grease the head pulley. For the reasons described by Inspector Allen, it was not safe to walk up the conveyor to access the head pulley because there was a serious slip and fall hazard.

I find that it was a common practice for miners to walk up the belts at the mine to grease the head pulley. It was highly unlikely that a miner would bring down a stacker conveyor simply to grease a head pulley. To bring down a conveyor, the miner would first have to move the structure of the conveyor to the side so it would not be above the sand pile. Next, he would have to brace the structure with the bucket of a loader and remove pins that hold the structure up. Finally, he would have to use the hydraulics of the loader to gradually lower the bucket holding

the structure until the conveyor was at its lowest position. Although I do not doubt that miners walked up the sand piles to access the head pulley, the evidence established that they also frequently walked up the belts, as discussed above. Walking up a sand pile that is 19 to 20 feet high which is stacked at the angle of repose would not be an easy task. In addition, the miner would have to stand near the top of the pile and reach up to grease the bearings.

Inspector Allen testified that on July 15, 2004, both Horn and Bartz told him the miners sometimes walked up belts to grease head pulleys. (Tr. 118-21, 218-220, 227-28). After the accident occurred, Robert Horn prepared a report on Suburban's investigation of the accident, as required by 30 C.F.R. § 50.11(b). (Ex. R-2). The report was prepared on July 15-16, 2004. (Tr. 336-38). In the report, Horn states that Suburban took several actions in response to the Adame's accident. The report states that Suburban (1) "Terminated Vincent Wallett," (2) "Reviewed lockout tagout procedure," and (3) Re-trained all miners again on lockout tagout procedures." *Id.* The report was drafted before Inspector Allen issued the citations and order of withdrawal. (Tr. 318, 337-40). The citations and order were faxed to Bartz on or about July 21, 2004. Inspector Allen testified that he held a telephone close-out conference with Bartz sometime after the citations and order had been faxed. During the conference, Bartz adamantly denied that miners were allowed to walk up belts or that he told Allen that miners did so.[2]

At the time Horn wrote the report, he knew that Adame had walked up the belt to grease the head pulley. (Tr. 318). Yet Horn did not mention in the report that Adame walked up the belt or that he violated company policy in doing so. If such an action was against company practice or policy, Horn would have stressed that fact in the report and stated that miners were retrained on this policy. In the section in the report entitled "Action Taken," there is no mention that miners were retrained to not walk up belts. Horn could not provide any explanation for this omission and he did not testify that such instructions were given following the accident. (Tr. 318). Bartz testified that miners signed a company memo prohibiting them from walking up belts after the citations and order were issued as part of the abatement required by Inspector Allen. (Tr. 377-78). Based on the evidence in the record, I credit the testimony of Inspector Allen and Jose Adame on this issue. I find that Suburban did not have a policy that prohibited miners from walking up the stacker conveyors. The belt was used regularly to get to the head pulley and it was not a safe means of access.

I also find that the violation was S&S. It was reasonably likely that someone walking up the belt would have slipped and fallen, assuming continued mining operations. If a miner were to fall he would likely sustain serious injuries, such as a broken ankle or head injuries. The citation was abated when Suburban installed a grease line from the ground to the fitting on the head pulley. Miners can now grease the bearings on the head pulley from the ground level.

---

[2] Horn and Bartz testified that this conversation took place on July 15 or 16 before the citations and order was issued and that they never told Allen that miners walk up the belts at the pit. (Tr. 305-08, 370-72).

The Secretary contends that the violation was the result of Suburban's unwarrantable failure to comply with the safety standard. She argues that Suburban knew that miners were walking up the conveyors to grease head pulleys. Suburban knew that this practice had existed since it purchased the pit and did not stop it. The Secretary relies on the testimony of Adame that employees frequently gained access to the head pulley by walking up the belt. Adame felt no hesitation in walking up the belt in plain view of supervisors because that was the method employees often used. Inspector Allen testified that Messrs Horn, Bartz, and Wallett told him that walking up the belt was a practice at the mine. An operator's failure to take action to abate a known hazard is an aggravated circumstance which supports an unwarrantable failure finding. The Secretary argues that the hearing testimony of Bartz and Horn that they were surprised that employees frequently walked up belts should not be credited. She contends that they "backpedaled" from their previous statements only after they received the unwarrantable failure citation and order. (S. Br. at 9). The Secretary also notes that, after the accident, Suburban did not warn or remind employees not to walk up the belt.

As stated above, Suburban contends that its employees were not authorized to walk up the stacker conveyor to grease the head pulley. At the hearing, Bartz emphatically denied that miners were permitted to walk up conveyors or that it was a practice at the mine. Suburban further maintains that a safe means of access was provided in that employees were permitted to walk up the material pile to gain access to the head pulley and were also allowed to lower the conveyor. Suburban argues that Adame chose to ignore company policy and walk up the belt on the day of the accident. Suburban maintains that its actions did not constitute aggravated conduct.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

I find that the Secretary established that this violation was the result of Suburban's aggravated conduct. There is no question that Adame was not wearing a lanyard when he walked up the belt and the conveyor was not equipped with handrails. As stated above, I credit the testimony of Mr. Adame that he always walked up the belts, that nobody ever told him not to do so, and that he observed other employees walking up the belts to grease the head pulley. I find that it was a common practice at the mine and that management was aware of this practice. I also

credit the testimony of Inspector Allen that both Bartz and Horn told him that miners walk up conveyors to grease the head pulleys. Miners had been walking up the belt for a long time. Lopez worked in the pit and admitted that he was not around the conveyors when they were greased so he had little knowledge of the actual greasing practices. Although Lopez never trained miners to walk up belts, that practice was not prohibited.

I believe that it is quite significant that, after the accident, Suburban's management did not warn or counsel employees not to walk up belts. As stated above, if Horn or Bartz were so surprised that Adame had walked up the belt to grease the head pulley, one would expect this key fact to be included in Horn's accident investigation report and that miners would have been retrained not to walk up belts. In addition, the accident report prepared by Bartz and submitted to MSHA on an official MSHA form also does not indicate that Suburban was concerned about Adame's presence on the belt. (Ex. P-3). Miners were told not to walk up the belts only after Inspector Allen required training on that issue to terminate his order of withdrawal. Wallett's statements to Inspector Allen are consistent with Adame's testimony on this issue.

I find that Suburban knew that miners walked up the belts at the mine. These miners were not specifically trained to walk up belts, but it was a common practice. Although Suburban's managers did not know that Adame would be walking up the belt early in the morning on July 15, they knew that when the bearings on the head pulley needed to be greased, it was reasonably likely that Adame or another miner would walk up the belt to perform the task. This practice had been ongoing. Given the significant slipping hazard, this method of getting to the head pulley did not provide safe access to a working place. Although, some miners may have walked up the sand pile, the Secretary did not charge Suburban with a violation of the safety standard for that method of access so it is not at issue in these proceedings.

Because of my unwarrantable failure holding, I find that Suburban's negligence was high. A penalty of $6,000.00 is appropriate. I have reduced the penalty from the proposed penalty of $8,300.00 because, although Order No. 6311797 discussed below does not duplicate this violation, the two violations are related with the result that there is "some overlap between the two." (S. Br. 16).

D. Order No. 6311797

Inspector Allen issued Order No. 6311797 under section 104(d)(1) of the Mine Act alleging a violation of section 56.15005 as follows:

> A miner who had been performing maintenance on the 80 feet long Kolberg sand stacker conveyor had not been wearing a safety belt with a lanyard or any type of restraining device and/or railing to prevent or stop a fall of approximately thirty feet to the ground below. Falls of this nature can be serious and the chance of an accident, with greased components and the lack of proper hand and

> foot holds, is reasonably likely. Manager Russell Bartz stated that grease hoses on the head pulleys running to the ground level were hard to maintain and that it was easier to have the miners go up the conveyors. Manager Russell Bartz engaged in aggravated conduct constituting more that ordinary negligence in that he was aware of the common practice of working on the elevated conveyors to perform maintenance without fall protection.

Inspector Allen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S, that Suburban's negligence was high, and that the alleged violation was a result of Suburban's unwarrantable failure to comply with the standard. The safety standard provides, in part, that "[s]afety belts and lines shall be worn when persons work where there is a danger of falling." The Secretary proposes a penalty of $8,300.00 for this order.

Inspector Allen testified that the safety standard requires that miners working in elevated work areas be protected with safety belts and lanyards. Mr. Adame was not wearing any fall protection gear and he faced a danger of falling as he crouched at the top of the belt to grease the head pulley. (Tr. 144-45). Miners have been killed as a result of falling from heights less than 25 feet. He determined that the violation was the result of Suburban's unwarrantable failure based on the conversations he had with Horn and Bartz. (Tr. 148). Inspector Allen testified that when he asked to see Suburban's fall protection equipment, all that could be found was an old safety belt without a lanyard.

Suburban makes the same arguments with respect to this order as it did with respect to the previous citation. It maintains that it was Suburban's practice and procedure for miners to grease the bearings on the head pulley for stacker conveyors by walking up the pile of material directly under the conveyor. As a consequence, the top of the conveyor was not a working place and miners were not authorized to be up there.

For the reasons set forth with respect to the previous citation, I find that the Secretary established a violation. There can be no dispute that Adame was at the top of the conveyor without any fall protection on July 15, 2004. In addition, I find that the evidence establishes that miners were often at the top of the conveyor when greasing a head pulley. The company had no safety lines or lanyards to protect miners from falling. In addition, no handrails were at the top to eliminate or reduce the risk of falling. This violation does not duplicate the previous violation because the two standards impose separate and distinct duties upon the mine operator. *See Cyprus Tonopah Mining Corp.*, 15 FMSHRC 367, 378 (March 1993). One deals with safe access to a working place and the other with working conditions at the work place. A mine operator could, for example, violate the safe access standard without violating section 56.15005 if the miner used fall protection at the top of the conveyor and handrails were not present along the side of the conveyor.

For the same reasons stated with the previous citation, I find that the Secretary established that the violation was S&S. It was reasonably likely that someone at the top of the conveyor greasing the head pulley would lose his balance and fall, assuming continued mining operations. If a miner were to fall, he would likely sustain a serious injury. As stated above, the violation was abated when Suburban installed a grease line to the fitting on the head pulley.

Finally, I find that this violation was the result of Suburban's unwarrantable failure to comply with the safety standard. The parties presented the same arguments with respect to this issue as in the previous citation. The reasoning for my unwarrantable failure finding for the previous violation is also the same for this violation. Mine management knew that miners stand on the top of the conveyor without fall protection to grease the head pulley.

Suburban's negligence is high. A penalty of $6,000.00 is appropriate. I have reduced the penalty from the proposed penalty of $8,300.00 because, although Citation No. 6311796 discussed above does not duplicate this violation, the two violations are related with the result that there is "some overlap between the two." (S. Br. 16).

E. Penalties Brought Against Russell Bartz (WEST 2005-223-M).

Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, any agent of such corporate operator who "knowingly authorized, ordered, or carried out such violation" shall be subject to a civil penalty. 30 U.S.C. § 820(c). The Commission held that "knowingly" means "knowing or having reason to know." *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan 1981); *aff'd* 689 F.2d 623 (6th Cir. 1982). "A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence." *Richardson*, 3 FMSHRC at 16. "If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute." *Id.* "In order to establish section 110(c) liability, the Secretary must prove only that the individual knowingly acted not that [he] knowingly violated the law." *BethEnergy Mines*, Inc., 14 FMSHRC 1232, 1245 (August 1992).

The Secretary proposed penalties against Mr. Bartz for the violations described in Citation No. 6311796 and Order No. 6311797. The Secretary argues that Bartz had actual knowledge that miners walked up the belt to grease the head pulley and he did nothing to stop them. In the alternative, she argues that he failed to act on the basis of information within his knowledge that gave him reason to know that miners walked up the belts. The Secretary relies heavily on the testimony of Adame and Inspector Allen. Allen testified that Bartz told him that employees usually walk up the stockpile to grease the head pulley but that they may walk up the belt if the stockpile is not high enough for a miner to reach the grease fitting.

Suburban contends that it was against company policy for employees to walk up conveyor belts, that it was not a practice for employees to walk up belts, and that Bartz had never observed anyone walking up a belt. Adame was not directed by Bartz to walk up the belt on July 15. In addition, Adame had not been trained or instructed by Bartz or anyone in management to walk up conveyor belts to grease the head pulley. Finally, Wallett did not have the authority to tell Adame to grease the pulley because Wallett did not have supervisory responsibility over him. Adame admitted that Wallett did not specifically ask him to walk up the conveyor to gain access to the head pulley; he just went that way because that was his practice. Because head pulleys must only be greased about once per month, Adame should not have been on the conveyor that morning and Bartz could not have anticipated that he would be on the belt. Bartz expected that any necessary greasing would be done on Saturday when the plant is shut down or after the plant is shut down at the end of the shift during a weekday.

The parties do not dispute that, as the aggregate division manager for Suburban, Bartz was an agent of Suburban. Suburban is a corporation. (Ex. P-5). There is no question that it was unusual for anyone to grease a head pulley after the generator had been turned on at the beginning of a shift. I find that Bartz could not have anticipated that Adame would walk up the conveyor at the start of the shift on July 15, 2004, and crouch down to grease the head pulley. Nevertheless, I find that Bartz knew that miners often walked up the belts to grease the pulley. Although miners also may have walked up the stockpiles from time to time, Bartz knew that miners also accessed the area by walking up the belts. I credit the testimony of Inspector Allen that, before he wrote any citations or orders, Bartz told him that miners sometimes walked up belts to grease head pulleys. (Tr. 120-21, 144). I also credit the testimony of Adame that it was a common practice at the mine. I find that Bartz, who had worked at almost every job at the facility, knew that employees walked up belts. This practice existed before Suburban purchased the pit and continued until this accident.

I also find it telling that the accident report required by 30 C.F.R. § 50.20 signed by Bartz and sent to MSHA did not mention that Adame violated company policy by walking up the belt and standing on the belt while greasing the pulley. Both that report and the company accident investigation report prepared by Horn mention that miners were retrained on lockout and tagout procedures but there is nothing about retraining miners on gaining access to head pulleys. (Exs. P-3 & R-2). The only evidence in the record of miners being trained not to walk up belts relates to the training required by Inspector Allen to terminate the order of withdrawal. I find the testimony of Inspector Allen and Mr. Adame to be significantly more credible than the testimony of Horn and Bartz with respect to these two citations. Mr. Lopez worked in a different area of the pit so he was not in a position to know the practices of miners who do the greasing on the conveyors. Finally, I must note that walking up a sand pile that is up to 20 feet high in order to grease a pulley would not be as easy or as trouble free as Bartz and Horn seemed to suggest at the hearing. Both Horn and Bartz testified that it was safe to walk up the pile of sand under a conveyor, reach up, and grease the head pulley.

In *Roy Glenn*, 6 FMSHRC 1583 (July 1984), several miners were instructed by their supervisor, Mr. Glenn, to weld a valve on an oxygen line in a mill building. To perform this welding, it was necessary to stand on an adjacent girder some distance above the floor. Rather than using a ladder to access the area, the miners climbed some stairs and walked along the girders without using safety lines to get to the work site. Glenn went to another area to check other valves and when he returned he saw one of the miners walking across the girder. He waived him down with a flashlight just as an MSHA inspector was entering the area. The Commission held that Glenn did not knowingly violate the safety standard. The Commission determined that the administrative law judge's finding that Glenn had reason to know that miners "might" or "could" walk across the girders was insufficient to establish a knowing violation. *Id*. at 1588. A supervisor always has "reason to know" that miners "might" perform tasks in an unsafe manner. *Id*. This "degree of knowledge is too contingent and hypothetical to be legally sufficient" under the test set out in *Kenny Richardson*. *Id*. The Commission went on to state:

> Before personal liability under section 110(c) can be imposed on an operator's agent for "knowingly" authorizing, ordering, or carrying out a violation, the Secretary's proof must rise above the mere assertion that, at the time of assignment, an assigned task could have been performed by miners in an unsafe manner. Adoption of this rationale could mean that . . . an operator's agent could be held personally liable under section 110(c) for failing to anticipate the miner's unsafe actions and not giving specific instructions to each miner, at the time of the assignment, to avoid all hazardous approaches to a task that could be followed.

Id.

In Roy Glenn, the Commission tailored its *Kenny Richardson* analysis to those situations where a "violation of a mandatory standard does not exist at the time of the corporate agent's failure to act, but occurs subsequent to that failure." *Id*. at 1586. The Commission held as follows:

> [A] corporate agent in a position to protect employee safety and health has acted "knowingly," in violation of section 110(c) when, based on the facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act.

Id.

Although the present case has some similarities with *Roy Glenn*, there are some important differences. Mr. Bartz was not present when Adame walked up the belt. More importantly, Bartz did not assign Adame the task of greasing the head pulley that morning. Nevertheless, Bartz knew that miners periodically greased head pulleys and, as stated above, he knew that miners often walk up the belts in order to perform this task. Citation 6311796 alleges that Bartz "was aware of, and condoned, the common practice of walking up the conveyers to perform maintenance." Order No. 6311797 alleges that Bartz "was aware of the common practice of working on the elevated conveyors to perform maintenance without fall protection." Inspector Allen did not premise the citation and order on the fact that Bartz ordered Adame to walk up the belt or on Bartz's knowledge of Adame's activities that particular day. Rather, the inspector issued the citation and order because mine management was aware of the common practice of walking up belts to grease the head pulleys. The Secretary brought the case against Bartz on the basis of that knowledge.

In *Warren Steen Construction, Inc.*, 14 FMSHRC 1125 (July 1992), the operator was moving a stacker conveyor to another location when it passed close to overhead power lines owned by the local public utility. A miner was electrocuted when the conveyor kept rolling and struck a power line. Mr. Steen argued that he was not liable under section 110(c) of the Mine Act because he was not at the mine at the time of these events. He also maintained that the company had placed conveyors within eight feet of these power lines in the past without receiving citations from MSHA. Mr. Steen also contended that he was not aware of a mandatory safety standard requiring ten feet clearance from the power line and that he did not knowingly or intentionally tell his employees to position the conveyor in such a fashion that it would be in violation of federal law. *Id.* at 1131. The Commission rejected these arguments. It held that "the Secretary must prove only that an individual knowingly acted, not that the individual knowingly violated the law." *Id.* (citation omitted). The Commission also held that the fact that Mr. Steen was not at the mine at the time of the accident is no defense to the finding that he had knowingly authorized the move of the stacker conveyor. Steen gave the order to move the conveyor and knew that it would be close to the power lines.

In the present case, Bartz was not aware that Adame would be climbing up the belt on the morning of July 15, 2004, and he did not see him do so, but he did know that miners walked up the belt and greased the head pulley while standing at the top of the belt. Mr. Bartz was a person in a position to protect employee safety and health and he failed to act on the basis of information that gave him knowledge or reason to know that miners walked up conveyor belts to grease the head pulley for the belt. He never took any action to stop this practice prior to the time Suburban was issued the citation and order. As a consequence, he acted knowingly and in a manner contrary to the remedial nature of the statute. I find that the Secretary established that Bartz knowingly authorized the violations.

The Secretary did not present evidence with respect to the penalty criteria in section 110(i) for Mr. Bartz. According to the special assessment attachment to the Secretary's petition for penalty, the amount of the proposed penalty is based, in part, on Bartz's "position as

manager" at the time of the violations and any information Bartz provided at the safety and health conference concerning his ability to pay a penalty. Because the conference was by telephone and Bartz did not agree with the citation and order, there is no indication that any information was provided. I find that the violations were serious and Bartz's negligence was high. Mr. Bartz has no history of previous violations. Indeed, this operation received two Holmes Safety Awards from MSHA while Bartz was managing the pit for Aggregates, Inc. (Tr. 349-50). Until Adame was injured, there had never been any accident, injury, or illness at this pit that was required to be reported to MSHA under 30 C.F.R. § 50.20(a). (Tr. 389-90). The cited conditions were rapidly abated in good faith when Bartz ordered the installation of a grease hose from the pulley to the ground.

In *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997), the Commission held that "judges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to individuals." The "relevant inquiry with respect to the criterion regarding the effect on the operator's ability to continue in business, as applied to an individual, is whether the penalty will affect the individual's ability to meet his financial obligations . . . [w]ith respect to the 'size' criterion, . . . as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth." *Ambrosia Coal and Construction Co*., 18 FMSHRC 819, 824 (May 1997) (*Ambrosia I*). The Commission further held that, if an individual is married, the judge should consider the individual's share of the household net worth, income, and expenses. *Ambrosia Coal & Construction Co*., 19 FMSHRC 381, 385 (April 1998) (*Ambrosia II*).

The Secretary did not present any evidence on the size criterion and Bartz did not present any evidence on the ability to continue in business criterion. I hold that, under the circumstances of this case, the remedy is not to further delay these cases by requesting additional information, but by entering a finding that Bartz is relatively "small" and that the penalty I assess will not adversely effect the Bartz's "ability to continue in business. *See William A Hooten, Jr.* 21 FMSHRC 1083, 1091 (Oct. 1999) (ALJ). Taking into consideration all of the penalty criteria, I find that a penalty of $200.00 for each violation is appropriate.

F. Penalties Brought Against Robert K. Horn (WEST 2005-224-M).

1. Horn was Suburban's Agent.

Mr. Horn and Suburban argue that Horn was not a "director, officer, or agent" of Suburban as those terms are used in section 110(c) of the Mine Act. They contend that Horn was employed by Suburban as an hourly loader operator. He was not a manager or supervisor at the pit and he did not have authority to hire or fire, promote, discipline, or demote employees. Horn worked four days a week, ten hours a day, operating a front-end loader from 6:00 a.m. until 4:00 p.m. He received overtime pay if he worked more than 40 hours a week. (Tr. 330). He did not work on Saturdays when conveyors and other equipment were serviced and greased. The plant continued to operate when he was not present. Because of his operating experience, he provided

safety training to employees, but he was not Suburban's agent. Suburban states that Bartz was the only supervisor at the pit.

The Secretary argues that, although Horn did not have a management title, he functioned as a manager at the pit. She contends that, because the purpose of the Mine Act is to promote safety, the key question is whether the alleged agent's actions had the ability to affect safety and health. "[I]f a miner has been delegated the responsibility for giving assignments to other miners, and for telling those miners how a particular job is to be performed, and he has the ability to stop those miners if he does not approve of the manner in which they are performing their jobs, then he is an "agent" of the operator within the meaning of section 3(e) [of the Mine Act] regardless whether he [has a management job title]." (S. Supp. Br. at 3). She contends that Horn was an agent because he fits within this definition. In addition, Horn was listed as the "plant manager" on Suburban's legal identity report dated April 2, 2004. (Ex. P-5). Horn testified that he was the lead man. Adame considered Horn to be his boss. In addition, Horn had an office in a trailer at the scale house, he instructed Wallett to write out a statement about the accident, and he told Inspector Allen that he was the person in charge at the mine. (Tr. 343).

Horn testified that he has worked at the pit for 16 years, first with Aggregates, Inc., and now with Suburban. He has held most jobs at the pit from "mud picker" to operating heavy equipment. Since Suburban bought the pit, he had made recommendations to Mr. Bartz as to who should be hired or who should be fired, but Bartz made the final decisions. (Tr. 277). He could recommend that hourly employees should be given a raise in pay, but he could not authorize such a raise. Occasionally, Bartz would give him special assignments, such as calling vendors to come out to the mine. (Tr. 279). Horn was the primary trainer at the pit. He trained most newly hired employees and conducted refresher training courses. Most of the training was conducted using MSHA and OSHA training videos and Horn was available to answer any questions. Horn testified that his primary responsibility was to load sand and gravel into trucks using a front end loader for delivery to customers. He testified that he worked four days a week and he did not have any responsibility for supervising employees. (Tr. 286). Nevertheless, Horn was the senior miner at the pit and the lead man. (Tr. 342). He told Inspector Allen that he was the person in charge. *Id.* If he saw a miner committing an unsafe act, he would usually yell at them. Horn testified that he observed Wallett walking up a conveyor several months before the accident. Horn said that he told Wallett to get down and not walk up there again. When Wallett told him that he was checking a roller, Horn replied "you don't check a roller." (Tr. 287; 320-21). Horn also gave other employees warnings for safety infractions, such as for not wearing a hard hat. Horn gives them an oral warning for the first offense and writes a letter for a second offense. (Tr. 321). He has also delayed starting the crusher if guards were not in place. Horn has ordered that mobile equipment be shut down until the brakes are fixed. (Tr. 323). After the accident, Bartz and management from Suburban's central office discussed the incident with Wallett and decided that he should be terminated from his employment. (Tr. 305, 312). Horn did not participate in that decision.

It is clear that Horn was not a director or officer of Suburban, but the issue is whether he was Suburban's "agent." The term "agent" is defined in section 3(e) of the Mine Act as "any person charged with the responsibility for the operation of all or part of a coal or other mine or the supervision of miners in a coal or other mine." In considering whether a mine employee is an agent of the operator under the Mine Act, the Commission has "relied, not upon the job title or the qualifications of the miner, but upon his function, [and whether it] was crucial to the mine's operation and involved a level of responsibility normally assigned to management personnel." *Ambrosia I*, 18 FMSHRC at 1560 (citation omitted). I find that Horn's work at the pit was crucial to its operation and involved "a level of responsibility normally assigned to management personnel." *Id.* Both Horn and Suburban held him out as someone with management responsibility. Horn told Inspector Allen when he arrived to inspect the facility that he was in charge. (Tr. 342). He describes himself as a "lead man." Bartz testified that, although Horn did not have a title at the time of the accident, he functioned as "either plant manager or plant foreman." (Tr. 390).[3] The legal identity report Suburban filed with MSHA listed Horn as the person in charge of health and safety at the pit and listed his title as "Plant Manager." (Ex. P-5). Horn "kept the paperwork and such for MSHA" in his desk in the scale house trailer. (Tr. 283). He prepared the company's report of its investigation of Adame's accident that is required by 30 C.F.R. § 50.11(b). (Tr. 312; Ex. R-3). Adame considered Horn to be his supervisor.

Although Horn did not have the authority to hire or terminate employees, he provided advice to Bartz on these decisions. Horn did not assign employees their work duties on a daily basis, but employees knew their job assignments. Excluding Horn, Bartz, and the person in the scale house, the pit employed about eight miners. (Tr. 316). In his testimony, Horn stated that he would verbally discipline a miner if he saw him committing an unsafe act. He would also report the problem to Bartz and write a letter if conditions warranted. (Tr. 321-22). Horn provides task and safety training to all new miners and he provides annual safety retraining. He also testified that he delayed the start-up of the plant when he found that guards for pinch-points needed to be replaced. (Tr. 323).

Based on the evidence of record, I find that the evidence establishes that Horn was Suburban's agent for purposes of section 110(c) of the Mine Act. I base this holding on Horn's wide range of responsibilities. Because Horn's responsibilities were not routine, he was required to exercise a great deal of discretion. Suburban relied on Horn to perform these responsibilities with a great deal of independence and little supervision. His responsibilities were not "tightly circumscribed" by Suburban and he was not "closely supervised" by Bartz. *Martin Marietta Aggregates*, 22 FMSHRC 633, 639 (May 2000) (citations omitted). I recognize that he did not have independent authority to hire and fire employees, but he could discipline them and correct their work practices. He had the authority to shut down the plant or a piece of equipment. When Bartz was not present, Horn was responsible for the operation of the pit. Horn represented himself to Inspector Allen as being in charge at the pit and Suburban advised MSHA on its legal

[3] Horn testified that he was given the title "plant manger" by Suburban soon after this accident and a former employee was rehired to operate the loader. (Tr. 324-25).

identity report that he was the plant manager. Suburban delegated virtually total responsibility for safety and health to Horn. He interacted with MSHA inspectors, and he kept all required records. Even though Horn was paid at an hourly rate, I find that he was Suburban's agent.

2. Horn knowingly Authorized the Violations.

I find that Horn knowingly authorized the violations set forth in Citation No. 6311796 and Order No. 6311797 for the same reasons set forth with respect to Mr. Bartz. Horn was not aware that Adame would be climbing up the belt on the morning of July 15, 2004, and he did not see him do so, but he did know that miners at the pit walked up the belt and greased the head pulley while standing on top of the belt. Mr. Horn was a person in a position to protect employee safety and health and he failed to act on the basis of information that gave him knowledge or reason to know that miners walked up conveyor belts to grease the head pulley for the belt. He never took any action to stop this practice prior to the time Suburban was issued the citation and order. As a consequence, he acted knowingly and in a manner contrary to the remedial nature of the statute. I find that the Secretary established that Bartz knowingly authorized the violations.

As with Bartz, the Secretary did not present evidence with respect to the penalty criteria. I enter the same findings. The violations were serious and Horn's negligence was high. There is no history of previous violations for Mr. Horn. Suburban's pit has an excellent history of previous violations. There were no previous accidents, injuries, or illnesses at this pit. The conditions were rapidly abated. I find that Mr. Horn is a small operator and that the penalties I assess will not adversely affect his "ability to continue in business." Taking into consideration all of the penalty criteria, I find that a penalty of $200.00 for each violation is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The parties stipulated that Suburban was issued eleven non-S&S citations and one S&S citation in the 12 months preceding the accident. In 2004, the mine worked about 21,211 hours, making it small mine. This was Suburban's only sand & gravel pit. All of the violations at issue in these cases were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Suburban's ability to continue in business. My gravity and negligence findings are set forth above. My findings with respect to the application of the penalty criteria to Messrs. Bartz and Horn are also 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/Order No.	30 C.F.R. §	Penalty

WEST 2005-142-M (Suburban)

6311794	56.14105	$250.00
6311795	56.14201(b)	250.00
6311796	56.11001	6,000.00
6311797	56.15005	6,000.00

WEST 2005-223-M (Russell Bartz)

6311796	56.11001	200.00
6311797	56.15005	200.00

WEST 2005-224-M (Robert K. Horn)

6311796	56.11001	200.00
6311797	56.15005	200.00

For the reasons set forth above, the citations and order are **AFFIRMED** as written. Suburban Sand & Gravel is **ORDERED TO PAY** the Secretary of Labor the sum of $12,500.00 within 30 days of the date of this decision.

For the reasons set forth above, Russell Bartz violated section 110(c) of the Mine Act and he is **ORDERED TO PAY** the Secretary of Labor the sum of $400.00 within 30 days of the date of this decision. For the reasons set forth above, Robert K. Horn violated section 110(c) of the Mine Act and he is **ORDERED TO PAY** the Secretary of Labor the sum of $400.00 within 30 days of the date of this decision. Upon payment of the penalties, the contest proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Certified Mail)

James J. Gonzales, Esq., Holland & Hart, P.O. Box 8749, Denver, CO 80201-8749 (Certified Mail)

RWM