FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 7, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2006-441-M
Petitioner	:	A.C. No. 10-01777-87696
	:	
v.	:	Docket No. WEST 2006-493-M
	:	A.C. No. 10-01777-90504
	:	
	:	Docket No. WEST 2006-525-M
CLAYTON'S CALCIUM, INC.,	:	A.C. No. 10-01777-92960
Respondent	:	
	:	Mill

DECISION

Appearances: John D. Pereza, Conference & Litigation Representative, Mine Safety and Health Administration, Vacaville, California for Petitioner; Todd Clayton, President, Clayton's Calcium, Inc., Meridian, Idaho, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Clayton's Calcium, Inc., ("Clayton's Calcium"), 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 18 citations issued by MSHA under section 104(a) of the Mine Act at the Mill operated by Clayton's Calcium. The parties presented testimony and documentary evidence at the hearing held in Boise, Idaho.

At all pertinent times, Clayton's Calcium operated a mill in Ada County, Idaho. The mill produces calcium carbonate products for livestock, industry, and medical uses. Clayton's Calcium is a family-run business. Until a few years ago, Glen Clayton was the president and chief operating officer . His son, Todd, was the plant operator. Todd Clayton took over as president in 2002 but Glen is still involved in the corporation. The company received only three citations between 2003 and 2005. Most of the citations at issue in these cases were issued by MSHA Inspector Larry Stevenson. Ron Jacobsen, the supervisor of MSHA's Boise office, accompanied Inspector Stevenson during the inspection. Inspector Stevenson retired from the Department of Labor and did not testify at the hearing. Supervisory Inspector Jacobsen offered testimony with respect to each citation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 6360913

On January 18, 2006, Inspector Stevenson issued Citation No. 6360913 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The bottom portion of the V-belt drive for the screen in the mill building was not guarded to prevent persons from accidentally contacting the moving parts. The open area measured 12 inches wide and 6 feet long. The moving parts measured 4 feet and 6 feet above the walkway.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not of a significant and substantial nature ("S&S") and that the negligence was low. The 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, . . . shafts, . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that the V-belt drive was located along a walkway for the shaker screen. (Tr. 25; Ex. P-7). Miners could become entangled in the pulley. The inspectors determined that the negligence was low because the operator advised him that the condition had existed for 15 years. (Tr. 27).

Glen Clayton, an owner of Clayton's Calcium, testified that when Inspector Stevenson took the photo, the camera must have been about six inches above the walkway. (Tr. 114; Ex. P-7). The walkway is used only occasionally and never when the mill is running. (Tr. 115). If a belt broke, it is highly unlikely that anyone would be struck by the belt.

Mr. Heriberto "Eddie" Sarabia is the plant operator. (Tr. 125). He testified that a miner would have to get on his knees and reach up to come in contact with the cited belts. (Tr. 130). The bottom of the existing guard comes within three feet of the deck. The guards are made of belting material. (Tr. 134).

Todd Clayton, the president of Clayton's Calcium, testified that MSHA has never required guards on the bottom of belts. (Tr. 139). Nobody could come in contact with the belts or pulleys unless he got down on his hands and knees and crawled under the existing guard.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that a 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 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). As a consequence, citations issued under this standard must be "resolved on a case-by-[case] basis." *Thompson Bros.*, 6 FMSHRC at 2097.

The evidence establishes that a guard was present that protected miners from any reasonable possibility of contact and injury. The guard hung down to within three feet of the decking, well below the level of the belts and pulleys. (Ex. P-7). Clayton's Calcium has guarded this belt assembly in this manner for many years. The possibility that anyone would accidently come into contact with any pinch points or other moving parts as a result of stumbling and falling was extremely unlikely. Other Commission administrative law judges have vacated citations where the Secretary did not establish a reasonable possibility of contact with the moving machine parts. *See Hamilton Pipeline, Inc.,* 24 FMSHRC 915, 922-23 (Oct. 2002) (ALJ); *Chrisman Ready-Mix, Inc.,* 22 FMSHRC 1256, 1259-61 (Oct. 2000) (ALJ). Consequently, this citation is hereby vacated.

B. Citation No. 6360915

On January 18, 2006, Inspector Stevenson issued Citation No. 6360915 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The guarding on the feeder conveyor tail pulley did not extend a sufficient distance to prevent persons from accidently contacting the moving parts. The tail pulley [was] three feet above the floor. The opening measured 14 inches long and 12 inches wide. The chain drive guard had an opening through which a person could accidently contact the moving parts. There was an exposed keyed shaft that measured 1 inch in diameter and protruded out 2 inches. These moving parts all traveled at a slow rate of speed and were mostly protected by the existing guards.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that there were three moving parts that were exposed, a tail pulley, a chain drive, and the keyed shaft. (Tr. 29; Exs. P- 11, P-12 & P-13). Contact with any of these moving machine parts could create permanently disabling injuries. Such contact was not likely because partial guards were in place.

Glen Clayton testified that the hole in the chain guard is there so that a grease gun can be inserted. This guard has been present since the mid 1980s. (Tr. 110-11). The guard was installed after a citation was issued by an MSHA inspector. The chain moves very slowly. Glen Clayton testified that a person would have to purposefully put his fingers in the hole to get caught in any moving parts.

Glen Clayton further testified that the exposed keyed shaft is down at the bottom of the dump hopper. The area is accessed only once every three months and the speed of the shaft is about 12 RPM. (Tr. 111-12). He admitted that the guarding on the feeder conveyor tail pulley was insufficient. Todd Clayton agreed that the guarding on the feeder conveyor tail pulley was not sufficient. (Tr. 141; Ex. P-11). He testified that the chain guard had been present for many years and had never been cited. He did not believe that it presented a safety hazard.

I find that the Secretary established a violation. All witnesses agreed that the guarding on the feed conveyor tail pulley was insufficient to protect miners. (Ex. P–11). The question whether the chain drive guard met the requirements of the standard is more problematic. (Ex. P-12). The small opening is present so that miners can oil the chain. The chain moves very slowly. More importantly, this guard has been present for many years and has been inspected during previous MSHA inspections. I credit the testimony of Glen Clayton that the guard was installed after MSHA issued a citation during a previous inspection and that the hole has been present since that time. Thus, MSHA has, up until this inspection, accepted the chain guard as being in compliance with the safety standard.

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).

With respect to the chain guard, Clayton's Calcium believes that it was led astray by MSHA's prior inconsistent enforcement actions. I agree. I vacate that part of the citation that concerns the chain guard. Clayton's Calcium must understand, however, that it is now on notice that, in order to comply with the safety standard, it cannot have a hole in the chain guard.

The third part of this citation concerns the lack of a guard over the exposed keyed shaft that measured 1 inch in diameter and protruded out 2 inches. The evidence establishes that the area is accessed only once every few months and the speed of the shaft is about 12 RPM. I find that the Secretary established a violation because there is a risk, even if it is very slight, that

someone's fingers or clothing could become entangled in the moving shaft. The safety standard specifically provides that shafts must be guarded.

I find that this violation was not serious and that the company's negligence was moderate. The lack of complete guarding for the feeder conveyor tail pulley was obvious. A penalty of $60.00 is appropriate for this violation.

C. Citation No. 6360918

On January 18, 2006, Inspector Stevenson issued Citation No. 6360918 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The motor/pump coupling on the 100 H.P. greaser was not guarded to prevent persons from accidentally contacting the moving parts. The coupling [was] 10 inches above the floor. The coupling rotated slowly. Maintenance was done while the unit was de-energized. Persons were not in the area on a routine basis.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was low. The Secretary proposes a penalty of $60.00 for this citation.

The coupler was exposed at the time of the inspection. (Tr. 31; Ex. P-15). The coupler moved very slowly so the likelihood of an injury was not great. (Tr. 32). The inspectors believed that people walked in the area and, if they slipped and fell, they could get their hand caught in the coupler.

Glen Clayton testified that this coupling rotated at about 34 RPMs. (Tr. 112). He does not believe that anyone could get caught in the cited area because it is "sitting down between the housing and the gear pump assembly." (Tr. 113). He believes that it is highly unlikely that a person would be injured by the condition if he fell in the area. Todd Clayton testified that he specifically asked another MSHA inspector whether the cited area needed to be guarded. The inspector told him "no" because of the speed and "there's no way to catch onto it." (Tr. 141).

I credit Todd Clayton's testimony that another inspector observed the condition and advised the company that a guard was not required. In addition, the mill has been subject to MSHA inspection for many years. The citation itself notes that the coupling was at floor level, it rotated slowly, any maintenance was performed while the unit was shut down, and persons were not in the area on a regular basis. Clayton's Calcium did not receive fair notice that the Secretary interpreted the safety standard to require that the coupling be guarded. It was led to believe by the actions of MSHA inspectors that no guard was required. Clayton's Calcium is now on

notice, through the issuance of this citation, that it now must guard the cited coupler in order to comply with the safety standard. The citation is hereby vacated.

D. Citation No. 6360919

On January 18, 2006, Inspector Stevenson issued Citation No. 6360919 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows, in part:

> The guarding on the secondary rolls crusher was not sufficient in preventing persons from contacting the moving parts. The moving parts measured 4 feet above the floor and had an opening that measured 12" X 15." There was smooth shaft on the end bell side of the drive motor that was not guarded to prevent persons from accidently contacting the moving shaft. It measured 52 inches above the floor and measured 4 inches in diameter and protruded 5 inches. Clean-up and maintenance was done while the unit was de-energized.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was low. The Secretary proposes a penalty of $60.00 for this citation.

The inspectors believed that two areas needed additional guarding. (Tr. 33-34; Exs. P-17 & P-18). Because the area was partially guarded and the area was not generally used as a walkway or working place, Inspector Jacobsen testified that an injury was unlikely.

Glen Clayton testified that the guard was sufficient because it extended to the bottom of the axle of the tire that was part of the assembly and the tire rotated away from the walkway. (Tr. 117; Ex. P-17). He also testified that the exposed shaft was smooth. (Tr. 117; Ex. P-18). There is nothing on the rotating shaft that could catch clothing or fingers in a pinch point. Todd Clayton testified the secondary roll crusher was shut down at the time of the inspection. When it is operating, there is a "bulk can" in front of the area that the inspector cited. (Tr. 142). As a consequence, the moving machine parts are not accessible. In addition, the guarding that was present had been there since 1984. No inspector has ever cited the area for insufficient guarding. In addition, the cited shaft was smooth, so no guarding was required.

A guard was present at the crusher but it did not cover the entire area. (Ex. P-17). In addition, when the secondary crusher is operating, there is a large bin present that makes the area largely inaccessible. It is not at all clear from the record that anyone could come in contact with the moving parts. I find that the Secretary failed to carry her burden of proving that additional guarding was necessary to comply with the safety standard. With respect to the shaft, I find that the Secretary established a violation. Shafts are specifically covered by the safety standard. The

inspector recognized that an injury was unlikely. I find that this violation was not serious and that the company's negligence was low because the condition had never been cited by MSHA. A penalty of $50.00 is appropriate for this violation.

E. Citation No. 6360910

On January 18, 2006, MSHA Inspector Stevenson issued Citation No. 6360910 under section 104(a) of the Mine Act alleging a violation of section 56.9300(a) as follows, in part:

> A berm or guardrail was not provided at the parking area on the south side of the canal that runs through the site and the guardrail on the east side of the bridge over the canal was not being maintained. At this area, a drop-off existed that could cause a vehicle to overturn and endanger persons that park and truck drivers that use the roadway two to three times per day.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. 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 or equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that mine vehicles travel along the cited area and that over-the-road trucks also sometimes travel through the area. (Tr. 14). A log had been placed along the side of the bridge to act as a berm, but it had fallen down. (Ex. P-3). As a consequence, a vehicle could over-travel and go into the ditch, which was about four feet deep. (Tr. 15). The inspector testified that such an accident was unlikely because the roadway was quite wide and the road was straight through the area. He testified that the operator advised him that the area in question had only just been reopened to vehicle traffic. Inspector Stevenson took a photograph of the bridge but not the parking lot. Inspector Jacobsen had little memory of the conditions at the parking lot.

Glen Clayton testified that the cited bridge carries little or no traffic. (Tr. 105). He stated that the cited bridge is used primarily to park a loader. Todd Clayton testified that MSHA inspectors have given him conflicting advice as to how to eliminate any hazard. One inspector wanted him to put up bicycle flags along the edge of the bridge. (Tr. 138). The next inspector told him to take the flags down and improve the berm. He complains that MSHA's requirements have changed over time.

I find that the Secretary established that the guardrail on the east side of the bridge over the canal was not being maintained. A vehicle could overturn if it went over the edge. (Ex. P-3).

The evidence establishes that a log had been used as a guard, but had fallen or rolled down so that it was no longer axle height. Thus, the Secretary established a violation. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard required a berm or guardrail over the bridge. The Secretary introduced insufficient evidence to establish that a guardrail or a berm were required on the parking lot. As a consequence, I do not affirm that part of the citation. I find that this violation was not serious and that the company's negligence was moderate because the condition was obvious. A penalty of $60.00 is appropriate for this violation.

F. Citation No. 6360912

On January 18, 2006, Inspector Stevenson issued Citation No. 6360912 under section 104(a) of the Mine Act alleging a violation of section 56.11001 as follows, in part:

> Safe access was not provided along the bridge work over the plant feed bin located at the drive-over ramp. The area was being used as a walkway on a regular basis. A person could fall through an opening in the middle of the structure that measured 28 inches wide and depth of 8 feet into the bin.

Inspector Stevenson determined that an injury was reasonably likely and that any injury could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. 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 $114.00 for this citation.

Inspector Jacobsen observed a miner on the cited structure using a shovel or bar to knock loose rock into the bins below. (Tr. 17). A miner could fall through the opening in the structure while performing this task. (Ex. P-5). Because bottom-dumping trucks travel over the structure to dump rock from their trailers through the opening, the area needed to be cleaned on a regular basis. As a consequence, the inspector determined that the violation was serious and S&S.

Glen Clayton agreed that truck drivers position their vehicles over the bridge structure and dump rock out of the bottom of the trailers into the crusher bin below. (Tr. 108). The only reason miners walk over the structure is to clean up rock from the bridge structure. He further testified that the cited structure was constructed in the early 1960s and it has not been changed since that time. (Tr. 106). In addition, the company has not changed the way it uses the structure. He testified that he has escorted MSHA inspectors through the cited area on several occasions. These inspectors discussed the purpose of the structure with him but, in every instance, the inspector was satisfied that it did not violate any safety standards. (Tr. 107). Mr. Sarabia testified that he escorted an MSHA inspector around the plant about four years earlier and they walked over the cited structure at the inspector's direction. (Tr. 126, 129). The

inspector did not indicate that walking through the area was a safety hazard and he did not issue any citations. Miners do not normally walk across the structure. (Tr. 127).

Todd Clayton testified that the structure has been in place since before MSHA started inspecting the mill. At least a dozen inspectors have observed the condition and have not written a citation. (Tr. 138). He said that the company is in the process of building a new bridge structure in the area.

Clayton Calcium does not dispute that there is a large opening in the middle of this bridge structure. It argues that several MSHA inspectors have observed the opening while walking across the bridge. Nevertheless, there is no evidence that any inspectors observed miners out on the bridge using a shovel or bar to push loose rock down the hole. It is not clear the MSHA inspectors were aware that miners routinely perform this work in close proximity to the opening. The photo shows that there are numerous tripping and stumbling hazards on the bridge structure. (Ex. P-5). As a consequence, the company's argument that MSHA's enforcement has been inconsistent is not convincing. I find that Clayton's Calcium did not provide and maintain a safe means of access to this working place. I reduce the negligence from medium to low, however, because the company genuinely believed that it was complying with MSHA regulations.

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 that the violation was serious and S&S. A discrete safety hazard was created by the violation. It was reasonably likely, assuming continued mining operations, that a miner working in the area would be injured. He could trip and fall into the opening, for example. He could also twist his ankle on the bridgework. It is reasonably likely that any injuries would be serious. As a consequence, I find that it was reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. A penalty of $100.00 is appropriate.

G. <u>Citation No. 6360914</u>

On January 18, 2006, Inspector Stevenson issued Citation No. 6360914 under section 104(a) of the Mine Act alleging a violation of section 56.20003(a) as follows, in part:

> The walkway on the east side of the screen in the mill building had accumulations of spilled material. The material accumulation measured 14 inches high. The walkway measured 3 feet wide for a visual distance of eight feet. A handrail and toeboard were in place. The area was accessed periodically for maintenance duties. Visible footprints were observed on the spilled material.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that the walkway could be used to check or change the screens of the shaker to the left of the walkway. (Tr. 46; Ex. P-9). It appeared to the inspectors that the material had accumulated over a significant period of time and that the material was unconsolidated. (Tr. 48, 59). Because the walkway was used infrequently, the likelihood of an accident was low. The accumulations presented a tripping hazard.

Todd Clayton testified that the accumulations form a ramp over the I-beam that crosses the walkway, which eliminates any tripping hazard. (Tr. 140). The accumulation was firm and tight. Nobody enters the area except to change screens.

I find that the Secretary established a violation. The accumulations were significant in size and the fact that they were firm and tight helps establish that they had accumulated over time. I reject the company's argument that the accumulations improved safety by providing a ramp for employees to use when crossing the I-beam. The violation was not serious and the negligence was low. Miners were in the area only when screens needed to be changed. A penalty of $50.00 is appropriate.

H. Citation No. 6360923

On January 18, 2006, Inspector Stevenson issued Citation No. 6360923 under section 104(a) of the Mine Act alleging a violation of section 56.15002 as follows:

> Suitable hard hats were not being worn at the plant where falling objects may create a hazard to persons. A vibrating screen, conveyor, and objects on overhead walkways were present that could cause head injuries to persons in the area. The walkways had

toeboards. Large fallen objects were not visible on the floor areas. 1" diameter rocks were observed on the screen walkway.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides that "[a]ll persons shall wear suitable hard hats when in or around a mine or plant where falling objects may create a hazard." The Secretary proposes a penalty of $60.00 for this citation.

The inspectors observed that Clayton's Calcium employees were not wearing hard hats in the mill building. (Tr. 49). Loose rock was observed on the elevated walkways. In addition, hand tools may be placed on the walkways when maintenance is being performed. They also observed a loose guard in a elevated position that could have fallen, but Inspector Jacobsen could not state that this guard presented a falling hazard to employees. (Tr. 50, 64-65; Ex. P-20). Inspector Jacobsen also believes that he observed a bucket of bolts on an elevated walkway. He testified that each MSHA inspector determines whether a hazard is present and that there is no written list of hazards that inspectors rely on. (Tr. 63). The fact that the walkways were equipped with toeboards reduced the likelihood of an injury but they did not eliminate the hazard.

Glen Clayton testified that, during a previous inspection, an MSHA inspector told him that miners did not need to wear hard hats inside the mill building. (Tr. 119). The inspector told him that hard hats were not required because there was no danger that anything would fall. No employees have ever been injured by objects falling in the mill building.

Mr. Sarabia testified that he discussed hard hats with an MSHA inspector about nine years ago. (Tr. 130). The inspector told him that hard hats were not required in the mill because it is not a dangerous place. Todd Clayton testified that he has worked in the mill since he was a teenager and more than one MSHA inspector told company management that hard hats are not required in the mill building. (Tr. 143). During an early MSHA inspection, an inspector issued a citation for the lack of hard hats. (Tr. 146). All employees wore company-issued hard hats after that inspection. Then another MSHA inspector came to the mill and asked "why are you wearing those silly things." *Id*. Employees stopped wearing hard hats after this inspection.

The evidence establishes that there was a danger that objects could fall and hit miners on the head while working in the mill. I credit the testimony of Inspector Jacobsen that, at the time of the inspection, there were loose rock, a bucket of bolts, and other material on the upper decks in the mill building. These objects could fall and strike an employee working on a lower level. There was also a vibrating screen on the upper deck. The toeboards on the decking reduced the risk, but they did not eliminate it. Thus, I find that employees in the mill building were working in an area "where falling objects may create a hazard." The Secretary established a violation of this standard.

Hard hats have been standard equipment in the mining industry for many years. Most companies require employees to wear hard hats except when they are in vehicles or offices or when they are in areas where there is clearly no danger of falling objects. Consequently, I reject the company's fair notice arguments with respect to this citation. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard required the wearing of hard hats in the mill. *See, Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990) (citation omitted); *see also, Weirich Brothers, Inc.*, 28 FMSHRC 66, 68-69 (Feb. 2006) (ALJ). I question whether an MSHA inspector would say that hard hats are "silly," but assuming that he did, this statement should have raised red flags in the minds of company management, especially since another inspector issued a citation that required the wearing of hard hats. A call to the MSHA field office would have clarified the issue. Given that there were raised decks in the mill, there was a danger that objects would fall to the floor and injure someone standing below.

I affirm the Secretary's negligence and gravity determinations. I have taken into consideration the fact that another MSHA inspector stated that hard hats are not required in my low negligence finding. A penalty of $60.00 is appropriate for this violation.

I. Citation No. 6360924

On January 20, 2006, Inspector Stevenson issued Citation No. 6360924 under section 104(a) of the Mine Act alleging a violation of section 56.15003 as follows:

> Suitable protective footwear was not being worn at the plant. Hazards were present at the plant that could cause injury to feet. Employees handle pallets, tools, and heavy machinery parts in the mill.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides that "[a]ll persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which could cause an injury to the feet." The Secretary proposes a penalty of $60.00 for this citation.

The inspectors observed that employees were not wearing protective footwear. The shoes being worn did not have hard toes. (Tr. 52). Maintenance tasks, such as changing screens, expose employees to potential foot injuries. It is MSHA policy, as set forth in its Program Policy Manual ("PPM"), that "substantial hard-toed shoes or boots" are the "minimum protection acceptable for most mining applications." (Ex. P-22). Inspector Jacobsen testified that the only miners who might not be required to wear hard-toes shoes would be equipment operators or control booth operators. (Tr. 54). He admitted that there is no written list of conditions that must be present to trigger the requirement for hard-toed boots or shoes. (Tr. 66-67).

Glen Clayton testified that the same MSHA inspector who advised him that hard hats were not required in the mill also told him that hard-toed shoes were not required because a miner's feet were only exposed to being struck by hand tools. (Tr. 119). No employee has ever sustained a foot injury at the mill. Mr. Sarabia testified that he also discussed hard-toed shoes with the MSHA inspector. (Tr. 130). The inspector told him that hard-toed shoes were not required. Todd Clayton testified that more than one MSHA inspector has told the company that hard-toed shoes are not required in the mill building.

My findings with respect to this citation are the same as with the previous citation. The Secretary established that there was a danger that heavy objects could fall and hit a miner's foot. Employees change shaker screens, for example. The record establishes that hazards existed in the mill that could injure a person's foot.

Hard-toed boots or shoes have been standard equipment in the mining industry for many years. Equipment operators and control booth operators are not regularly exposed to the danger of potential foot injuries. Thus, the PPM provides that there may be "some instances where heavy leather shoes or boots will provide adequate safety for the feet." (Ex. P-22). But it is clear that MSHA requires hard-toed shoes in most situations. Consequently, I reject the company's fair notice arguments with respect to this citation. I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized that the safety standard required the wearing of hard-toed footwear in the mill. I have taken into consideration the fact that another MSHA inspector stated that hard-toed shoes are not required in my low negligence finding. The gravity is also low. A penalty of $60.00 is appropriate.

J. Citation No. 6360925

On January 20, 2006, Inspector Stevenson issued Citation No. 6360925 under section 104(a) of the Mine Act alleging a violation of section 56.18002(a) as follows:

> Work place examinations for each working place at least once each shift for conditions that may adversely affect safety or health of persons at the mill were not effective. There were 16 total citations issued on this inspection.

Inspector Stevenson determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The standard also states that "[t]he operator shall promptly initiate appropriate action to correct such conditions." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Jacobsen testified that the safety standard requires operators to make workplace examinations and then to correct any problems found. (Tr. 55). He testified that, given the number of obvious violations found during the MSHA inspection, he did not believe that the examinations were being done. It was not the number of citations issued that led the inspectors to issue this citation, but the fact that several of the violations were obvious and the conditions were not corrected. (Tr. 55, 68-69).

As evidence of this violation, Inspector Jacobsen pointed to a number of obvious violations that were cited but not contested by Clayton's Calcium. (Tr. 56-58; Ex. P-24). Although the operator had examination records, the inspectors did not believe that the examinations fulfilled the requirements of the standard.

Clayton's Calcium argues that the mill has been in the same basic condition for many years and has been frequently inspected by MSHA. It has only received three citations since January 2003. Consequently, it argues that the citation should be vacated.

In order to determine whether a violation occurred, the language of the standard must be examined. The Commission has identified three requirements of section 56.18002 as follows: (1) daily workplace examinations are mandated for the purpose of identifying workplace safety or health hazards; (2) the examinations must be made by a competent person; and (3) a record of the examinations must be kept by the operator." *FMC Wyoming Corp*., 11 FMSHRC 1622, 1628 (September 1988). The record-keeping requirement is set forth in subsection (b) of the standard. The Secretary defined a competent person as "a person having the abilities and experience that fully qualify him to perform the duty to which he is assigned." 30 C.F.R. § 56.2.

The Commission held that the term "competent person" within the meaning of the standard "must contemplate a person capable of recognizing hazards that are known by the operator to be present in the work area or the presence of which is predictable in view of a reasonably prudent person familiar with the mining industry." *FMC Wyoming* 1629. There is no evidence that the person conducting the examinations was not familiar with or could not recognize safety hazards that are typically present in a mill environment.

Inspector Jacobsen testified that Clayton's Calcium kept a record of its workplace examinations. (Tr. 58). He stated that the citation was issued because the examinations were not meeting the requirements of the standard as evidenced by the number of obvious violations. The Secretary's Program Policy Manual on section 56.18002 provides, in part:

> Evidence that a previous shift examination was not conducted or that prompt corrective action was not taken will result in a citation for violation of §§ 56/57.18002(a) or (c). This evidence may include information which demonstrates that safety or health hazards existed prior to the working shift in which they were found. Although the presence of hazards covered by other

> standards may indicate a failure to comply with this standard, MSHA does not intend to cite §§ 56/57.18002 automatically when the Agency finds . . . a violation of another standard.

(Program Policy Manual, Volume IV, Subpart Q).

I have vacated citations issued under this standard when the Secretary based the citations solely on the obvious nature of the violations found during the inspection. *See, for example, Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1134-36 (Oct. 1999). Other administrative law judges have also vacated citations under similar circumstances. *See, Lopke Quarries, Inc.*, 22 FMSHRC 899, 911-12 (July 2000); *Alan Lee Good*, 22 FMSHRC 1081, 1088-89 (Sept. 2000). In this instance, however, I find that many of the violations found during the January 2006 inspection were so obvious that I can only conclude that the workplace examinations were rather cursory and superficial. Many of the violations found by the inspectors would have been caught by the type of examination required by section 56.18002. (Tr. 56-58 ; Ex. P-24). It is highly likely that many of these conditions developed since the previous MSHA inspection. For example, Inspector Stevenson discovered that guards around moving machine parts were missing or loose, exposing miners to a serious hazard. A reasonably prudent person familiar with the mining industry and the protective purposes of the standards would have recognized that these conditions created hazards that violated safety standards, that these conditions should be recorded, and they needed to be corrected. Consequently, the citation is affirmed. I affirm the inspector's negligence and gravity determinations. A penalty of $60.00 is appropriate.

K. Citation No. 6374779

On April 5, 2006, MSHA Inspector Kenneth Poulson issued Citation No. 6374779 under section 104(a) of the Mine Act alleging a violation of section 56.5001(a)/.5005 as follows, in part:

> The plant operator was exposed to a shift-weighted average of 89.979 mg/m^3 of nuisance dust on 01/20/2006. This exceeded the threshold limit value (TLV) of 10.00 mg/m^3 times the error factor (1.11 for total dust sampling and analysis). Respiratory protection was not being used and a respiratory protection program . . . was not in place. All feasible engineering controls were not in use to control employee's dust exposure.

Inspector Poulson determined that an illness was reasonably likely and that any illness could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that "exposure to airborne contaminates shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists. . . ." Section 56.5005 provides, in part, that when "engineering control measures have not been

developed or when necessary by the nature of the work involved . . . , employees may work for reasonable periods of time in concentrations of airborne contaminates exceeding permissible levels if they are protected by appropriate respiratory protective equipment." The Secretary proposes a penalty of $114.00 for this citation.

Sampling for total dust, sometimes called nuisance dust, was performed on the suggestion of Inspector Jacobsen because he thought that the mill looked very dusty. (Tr. 72). When a "total dust sample" is taken on a miner, the results are analyzed for all respirable dusts in his breathing zone, not just silica dust. Inspector Stevenson directly supervised the sampling performed but Jacobsen testified that he reviewed all of the sampling notes and inspection reports. He stated that he discovered no discrepancies or abnormalities in the testing procedure used by Stevenson. (Tr. 73-75).

Inspector Jacobsen admitted that dust sampling is usually performed at metal and nonmetal quarries and mills for the purpose of measuring respirable silica dust. (Tr. 77). He also admitted that silica dust is the primary airborne hazard at the mill. In an MSHA booklet on respirable dust that is given to mine operators, sampling for total dust is only mentioned in an appendix. (Tr. 78). MSHA has sampled the company's mill on a yearly basis, but this was the first time that MSHA has sampled for total dust.

Inspector Poulson testified that he has been trained to conduct dust surveys. (Tr. 85). The dust sample taken by Inspector Stevenson was analyzed by MSHA's laboratory in Pittsburgh, Pennsylvania. (Ex. P-27). The report shows that "the exposure limit on total dust for calcium carbonate is 10 milligrams per cubic meter." (Tr. 86). The concentration "on the sample was 89.9 milligrams per cubic meter." *Id.* Inspector Poulson also testified that mine operators are expected to know that they must comply with the TLVs set forth in the 1973 publication of the American Conference of Governmental Industrial Hygienists ("ACGIH TLV Booklet") adopted by the Secretary in section 56.5001(a). MSHA's PPM provides that "the only nuisance particulates for which a citation can be issued [under section 56.5001(a)] are those listed specifically as nuisance particulates in Appendix E of the [ACGIH TLV Booklet]." (Tr. 89; Ex. P-29). Appendix E of the ACGIH TLV Booklet lists the nuisance particulates that are covered, including calcium carbonate. (Tr. 87-88; Ex. P-28). Sampling at the mill revealed that the dust contained calcium carbonate and it was eight times that permitted by the TLV for nuisance dust.

Inspector Poulson testified that when he reviewed the field notes taken by Inspector Stevenson, he did not find any abnormalities in the manner that Stevenson took the sample. (Tr. 90). Inspector Poulson determined that the violation contributed to a serious health hazard because the miners were not wearing respiratory protection. Poulson testified that the operator came into compliance with the standard by covering all of its augers in the mill. (Tr. 95-96). These augers are used to move material around in the mill. Inspector Poulson admitted that MSHA rarely samples for nuisance dust in Idaho because the primary concern is silica dust, so "we mostly concentrate on that." (Tr. 98).

Glen Clayton testified that MSHA has sampled for respirable silica dust at the mill many times and the results have always demonstrated that miners were not being overexposed to dust. (Tr. 120). He stated that he worked in and around the mill all of his adult life until he retired in 2002 and he has not had any respiratory problems. (Tr. 124).

Mr. Sarabia is the employee who wore the dust pump on the day of the inspection by Mr. Stevenson. He also wore the dust pump when the mill was retested for abatement purposes on May 2, 2006. He testified that he performed the same work on both days. (Tr. 132). He could not offer any explanation as to why the results of the testing performed on January 20 were so different from results of the testing performed on May 2. He testified that no changes were made at the mill between January 20 and May 2. (Tr. 133). He stated that the company always covers the augers when the rock is real dry, but the rock is wet in the winter so dust is not a problem.

Todd Clayton testified that he talked to Inspector Stevenson at the time the dust sample was taken. Stevenson told him that in the 18 years he had worked for MSHA, he had never been asked to sample for total dust. (Tr. 144). The company has never been out of compliance for respirable silica dust.

I find that the Secretary established a violation. I credit the testimony of Inspector Jacobsen and Poulson that the sample was taken using correct sampling procedures for total dust and that the sample was correctly analyzed at MSHA's laboratory. Based on this testimony and the exhibits presented, I find that the results of the sampling performed on January 20, 2006, accurately represent the amount of respirable dust that was present in the breathing zone of the mill operator that day. Clayton's Calcium did not present any evidence to contradict the Secretary's evidence on this issue. The mill operator was overexposed to respirable dust and he was not wearing a respirator.

The primary argument of Clayton's Calcium is that it did not know that it had to sample for nuisance dust and MSHA had never tested the mill for nuisance dust. It maintains that MSHA tested for silica dust on a regular basis and the company "received reports back from MSHA that we were in complete compliance." (Tr. 144, 160). The results of the total dust testing "really shocked" company management, especially since the operating procedures in the mill had not changed. *Id.* Clayton's Calcium believes that it should not be fined for this citation because the company had always been in compliance.

The Mine Act imposes strict liability on mine operators. The Commission and courts have uniformly held that mine operators are strictly liable for violations of safety and health standards at their facilities. *See*, *Asarco Inc. v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety [or health] standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* At 1197. As a consequence, the Secretary is not required to establish that the mine operator was negligent in order to establish a violation or to assess a penalty.

In this instance, it is clear that the Secretary's health standards require mine operators to control all airborne contaminants listed in the ACGIH TLV Booklet, not just silica dust. The test results show that calcium carbonate was present in the respirable dust at the mill and that the TLV for nuisance dust was exceeded by a factor of eight. Thus, a violation was established.

I reject the company's fair notice argument. MSHA is not required to provide personal notice of all of its safety and health standards to mine operators. Instead, the Secretary must publish the requirements in the Code of Federal Regulations. In this instance, the requirement is both rather specific and clear. The fact that MSHA has only tested for respirable silica dust at the mill does not negate this requirement. I have taken the company's arguments into account in my analysis of the negligence criterion.

I also find that the violation was S&S. The Commission has held that there is a presumption that the violation of the respirable coal dust standard is S&S. *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd sub nom*. *Consolidation Coal Co. v. FMSHRC*, 824 F.2d 1071 (D.C. Cir. 1987); *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274 (September 1986); *Twentymile Coal Co.*, 15 FMSHRC 941 (June 1993). In those cases, the mine operator violated 30 C.F.R. § 70.100 or §70.101, which apply only to coal mines. The Commission reached this conclusion because an analysis of the four elements of the S&S test would be essentially the same in each instance in which the Secretary proves a violation of the health standard. This presumption was based, in large part, on the legislative history of the Mine Act. The Commission noted that "prevention of pneumoconiosis and other occupational illnesses is a fundamental purpose underlying the Mine Act." 8 FMSHRC at 895. The Commission has not directly applied this presumption to other dust violations. Consequently, I have not relied on the presumption in reaching my S&S findings.

I find that the violation contributed to a discrete health hazard. I also find that the evidence establishes that there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature, assuming continued mining operations. Although the respirable dust detected at the mill may not be as pernicious as silica dust, significant exposures to any type of respirable dust is likely to lead to a serious illness. As stated above, the mill operator was exposed to more than eight times the level of total dust permitted under the TLV. Although it is not entirely clear what must be done to keep the dust at acceptable levels, it is appears that simple housekeeping measures may be sufficient. Clayton's Calcium did not have in place a program for monitoring the mill operator's exposure to total dust so it had no way of knowing whether he was being overexposed. Taking into consideration continuing mining operations, I find that the violation was S&S and serious.

Given the factors discussed above, I find that the company's negligence was very low. A penalty of $100.00 is appropriate.

L. <u>Citation No. 6374780</u>

On April 5, 2006, MSHA Inspector Kenneth Poulson issued Citation No. 6374780 under section 104(a) of the Mine Act alleging a violation of section 56.5002 as follows:

> The mine operator has not performed the required dust sampling to determine the adequacy of control measures. The plant operator was exposed to a shift-weighted average of 89.979 mg/m^3 of nuisance dust on 01/20/2006. This exceeded the threshold limit value (TLV) of 10.00 mg/m^3 times the error factor (1.11 for total dust sampling and analysis).

Inspector Poulson determined that an illness was reasonably likely and that any illness could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that "[d]ust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." The Secretary proposes a penalty of $114.00 for this citation.

Inspector Poulson testified that he issued this citation because of the significant overexposure, the fact that the operator had never sampled for nuisance dust, and his belief that the miners had been exposed to large amounts of calcium carbonate. (Tr. 93). He determined that the violation was serious based on the fact that the exposure was eight times the TLV. Respirable dust tends to accumulate in the lungs over time. (Tr. 95). The testimony and argument offered by the parties on this citation are identical to the testimony and argument offered with respect to the previous citation.

I find that the Secretary established a violation because Clayton's Calcium had not conducted any nuisance dust surveys prior to the issuance of this citation. If an operator does not conduct respirable dust surveys, it cannot determine whether its employees are being overexposed to silica dust or any other types of dust. Although MSHA regularly conducts health surveys at mines, the standard also requires mine operators to monitor airborne contaminants. The operator cannot rely on MSHA's testing alone. I note that Clayton's Calcium contested the dust citations in this case primarily because it felt that MSHA had not provided any notification or advice with respect to testing for total dust. I encourage Clayton's Calcium to contact and work with MSHA's Boise office in developing a plan to solve any respirable dust problems at its mill. The company's own testing performed by a consultant after the citations were issued indicated that the mill operator was not being overexposed. As stated above, a few simple housekeeping measures may eliminate any dust problems.

For the reasons discussed with respect to the previous citation, I find that the violation was serious and S&S and that the company's negligence was very low. A penalty of $90.00 is appropriate.

M. <u>Settled Citations</u>

Clayton's Calcium agreed to withdraw its contest of Citation Nos. 6360911, 6360916, 6360917, 6360920, 6360921, and 6360922. As a consequence, these citations and the associated penalties are affirmed.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the mill was issued three citations between January 1, 2003 and December 31, 2005. Clayton's Calcium is a small operator. 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 Clayton's Calcium'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 2006-441-M		
6360910	56.9300(a)	$60.00
6360911	56.9300(a)	60.00
6360912	56.11001	100.00
6360913	56.14107(a)	Vacated
6360914	56.20003(a)	50.00
6360915	56.14107(a)	60.00
6360916	56.14107(a)	60.00
6360917	56.14107(a)	60.00
6360918	56.14107(a)	Vacated
6360919	56.14107(a)	50.00
6360920	56.11002	60.00
6360921	56.14112(b)	60.00
6360922	56.14112(b)	60.00
6360923	56.15002	60.00
6360924	56.15003	60.00
6360925	56.18002(a)	60.00
WEST 2006-493-M		
6374780	56.50002	90.00
WEST 2006-525-M		
6374779	56.5001(a)/.5005	100.00
	TOTAL PENALTY	$1,050.00

For the reasons set forth above, the citations and orders are **AFFIRMED**, **MODIFIED,** or **VACATED**, as set forth above. Clayton's Calcium. Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,050.00 within 30 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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RWM