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

May 20, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 97-242-M
Petitioner	:	A.C. No. 45-00020-05524
	:	
v.	:	Docket No. WEST 97-257-M
	:	A.C. No. 45-00020-05525
NORTHWEST AGGREGATES,	:	
Respondent	:	Mats Mats Quarry

DECISION

Appearances: Cathy L. Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
Charles R. Bush, Esq., Vandeberg, Johnson, and Gandara, Seattle, Washington, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (AMSHA@), against Northwest Aggregates, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. '' 815 and 820. The petitions allege ten violations of the Secretary=s safety standards. A hearing was held in Seattle, Washington. The Secretary filed a post-hearing brief.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Mats Mats Quarry is an aggregate mine adjacent to the Hood Canal in Jefferson County, Washington. Material is drilled and blasted at the site, sized and crushed, and shipped out on barges. MSHA Inspector Arnold Pederson inspected the quarry on Monday, March 31, 1997, and Tuesday, April 1, 1997. At the time he started his inspection, the quarry was without electricity because a thunderstorm disrupted the power in the region at about 8 p.m. on Sunday, March 30. Power was not restored to the quarry until about 8 p.m. on Monday, March 31.

It is important to keep in mind that the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

Allied Products Co., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. ' 820(i).

A. Docket No. WEST 97-242-M

1. Citation No. 7950096

On March 31, 1997, MSHA Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.20003(a). In the citation, the inspector alleged that the passageway under the roll crushers was not kept clean and orderly. The citation states that a large accumulation of dust and gear lubrication was just below the ladder. It states that the accumulation was two feet deep and that it would be difficult for an employee to enter the area to work on the discharge conveyor or to service the tail-pulley bearings. Inspector Pederson determined that the violation was not of a significant and substantial (AS&S@) nature and that Northwest Aggregates= negligence was moderate. The Secretary proposes a penalty of $50 for the alleged violation. The safety standard requires that Aworkplaces, passageways, storerooms, and service rooms@ be kept Aclean and orderly.@

Inspector Pederson testified that the passageway under the roll crushers was not clean or orderly. He stated that there was a large accumulation of dust and gear lubrication just below the ladder. (Tr. 11) The crushers were at ground level and a ladder led to an area below ground where the alleged violation occurred. Inspector Pederson testified that the cited area provided access to the tail pulley and to the part of the discharge conveyor that is under the roll crusher. (Tr. 13). He stated that an employee would need to enter the area if the crusher broke down or if the rollers needed to be serviced. He further stated that the accumulated material was two to three feet deep, very slippery, and presented a falling hazard. (Tr. 14, 70). The ladder provided the only access to the area. (Tr. 116).

Kenneth Johnston, the quarry superintendent, described the cited area as a pit under the roll crushers. (Tr. 158). Dust and soap grease from the crusher accumulates in the pit. The crusher is designed so that the grease flows through the bearings and out the other side. The grease accumulates in the area under the crushers. He testified that about twice a year, an

employee will descend the ladder, clean out the pit area, and service the crusher. (Tr. 160-61). He testified that no employees enter the area without first cleaning out the accumulated dust and grease.

I find that the cited area is not a workplace, passageway, or storeroom and that the Secretary did not establish a violation. I credit Mr. Johnston=s description of the area as a grease pit under the crusher. Although an employee can gain access to the area by descending a ladder, it is not a passageway. Both parties agree that the cited area is very messy. It is highly unlikely that anyone would enter the area unless he were required to. Anyone entering the area would, by necessity, have to clean up the area before attempting to service or repair any equipment. I credit Mr. Johnston=s testimony as to the quarry=s procedures for cleaning the area when servicing the crusher. Finally, I believe that a greater hazard would be created if employees were required to enter the pit on a regular basis for the sole purpose of cleaning it out. The company=s policy of cleaning the pit whenever an employee is required to enter the area to repair or service equipment creates a safer environment. Accordingly, this citation is VACATED.

2. Citation No. 7950100

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.20003(a). In the citation, the inspector alleged that an accumulation of spilled 4" minus rock was present in the surge tunnel creating a tripping hazard to a person needing to enter the tunnel to work on the conveyor or on the electrical circuits. He determined that the violation was S&S and that Northwest Aggregates= negligence was moderate. The Secretary proposes a penalty of $102 for the alleged violation.

The surge tunnel, which is under a surge pile, contains a conveyor system that is part of the quarry=s portable crusher. Inspector Pederson testified that a walkway is present along the side of the discharge conveyor in the surge tunnel. (Tr. 17). He testified that anyone could walk into the area and stumble on the loose rock. He stated that 4" minus rock, which is rock that is 4 inches in diameter or less, was present along the width of the walkway for a distance of about 20 feet. (Tr. 19). The accumulation was two to three inches deep. (Tr. 129). He saw no evidence that anyone had started cleaning up the accumulation and believes that the rock accumulated in the area over a period of time. (Tr. 19, 77, 133). He believes that the conveyor system had been operating while the accumulation was present. (Tr. 77, 133). Inspector Pederson determined that the violation was S&S because it was reasonably likely that someone would trip and fall on the accumulation and sustain a serious injury. (Tr. 38).

Mr. Kerry Gauthier, the operator of the portable crusher, testified that he was responsible for operating, maintaining, and cleaning up around the portable crusher, including the conveyor system in the surge tunnel. (Tr. 177). He stated that he was the only person who worked on the portable crusher. He testified that, at about noon on Saturday, March 29, the portable crusher broke down. Mr. Gauthier stated that the belt in the surge tunnel started splitting and the rock cited by Inspector Pederson spilled into the surrounding area. (Tr. 181). He testified that the rock accumulated in about a half hour. (Tr. 185). Upon discovering the problem, Mr. Gauthier

shut down and locked out the portable crusher. (Tr.180, 183, 186). He then developed an informal plan to fix the crusher, to clean up accumulations, and to return the portable crusher to production. (Tr.183). He testified that he had not completed these tasks when Inspector Pederson inspected the portable crusher.

I find that the Secretary established a violation. There is no dispute that the accumulation described by the inspector was present in the walkway beside the conveyor in the surge tunnel. I find that this walkway was a Apassageway,@ as that term is used in the safety standard. The spill occurred on Saturday at about noon. The mine did not operate on Sunday. Mr. Gauthier testified that he drove a truck on Monday. (Tr. 180). He further stated that the accumulations had to be removed by shovel. There is no indication as to why the accumulation remained along the walkway, except that Mr. Gauthier planned to take care of all the problems with the portable crusher after he was able to complete some welding on the crusher. (Tr. 190). He apparently drove a truck on Monday because the welder was in use elsewhere at the quarry on that day. The hazard presented by the accumulation was present on Saturday afternoon and on Monday. Mr. Gauthier or another employee could have tripped on the accumulation and sustained an injury. It appears that Mr. Gauthier may have walked through the accumulation on one occasion to evaluate the problems with the conveyor system.

I find that the violation was not S&S. I reach this conclusion because I find that it was not reasonably likely that the hazard contributed to by the violation would result in an injury. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). I credit the testimony of Northwest Aggregates = witnesses that the portable crusher was locked out and tagged out on the afternoon of March 29. The portable crusher did not operate between that time and the inspection and the accumulation would have been cleaned up before the crusher was started. Thus, there was little exposure to the accumulation. In addition, it is unlikely that any injury would have been of a reasonably serious nature. I find that the gravity of the violation was moderate and that Northwest Aggregates = negligence was also moderate. A penalty of $75 is appropriate for this violation.

3. Citation No. 7950101

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.14107(a). In the citation, the inspector alleged that two accessible conveyor idler rollers in the 4" minus surge tunnel were not guarded to prevent a person from contacting the pinch point between the roller and the belt. The citation states that the openings were about 36 inches wide and between 4 and 5 feet above the ground. He determined that the violation was S&S and that Northwest Aggregates = negligence was moderate. The Secretary proposes a penalty of $102 for the alleged violation. The safety standard states, in part, that moving machine parts shall be guarded to protect persons from contacting drive, head, tail, and takeup pulleys and similar moving parts that can cause injury.

Inspector Pederson testified that two idler rollers on the 4" minus surge tunnel conveyor were readily accessible because no guards were present. (Tr. 21). He was not sure whether the

guards had been removed or if guards had never been present at that location. (Tr. 82, 120). Guards were in place along the sides, but the front area was not guarded. (Tr. 118).

As stated above, Mr. Gauthier locked out and tagged out the portable crusher, including this conveyor system, when the belt began splitting on Saturday afternoon. He testified that, as part of the process of repairing and cleaning the crusher, he removed all of the guards on Saturday afternoon. (Tr.189-90). He stated that he needed to remove the guards to repair the equipment and remove any accumulations. (Tr. 184, 188). He further stated that all of the guards had been in place prior to this breakdown, including the guards cited by Inspector Pederson in this citation. (Tr. 180, 188). Mr. Gauthier further testified that he placed all of the guards outside of the tunnel so that they would not be in his way when he repaired the equipment and cleaned the accumulation. (Tr. 184). I credit the testimony of Mr. Gauthier.

I find that the Secretary did not establish a violation because there was no showing that the portable crusher was operated without the cited guards in place. The crusher was locked out on Saturday and remained locked out at the time of the MSHA inspection. Indeed, because of the thunderstorm, the leads to the primary transformer had been unhooked thereby cutting off power to the entire quarry. (Tr. 186). Mr. Gauthier had the only key to lock and unlock the power for the portable crusher. (Tr. 183-84). The guards were not removed until the portable crusher was locked out and tagged out and I credit Northwest Aggregates = evidence that the guards would have been replaced before the crusher was unlocked. The Secretary must show that the equipment was operated without guards in place to establish a violation. In this case, the mine operator established that it removed the guards to perform maintenance and to clean up accumulations while the equipment was locked out. Accordingly, this citation is VACATED.

4. Citation No. 7950102

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.14112(b). In the citation, the inspector alleged that the guards for the self-cleaning pulley on the discharge conveyor under the horizontal crusher were not properly secured to prevent anyone from pushing them out of the way. The citation states that the guards were also bent. He determined that the violation was not S&S and that Northwest Aggregates = negligence was low. The Secretary proposes a penalty of $50 for the alleged violation. The safety standard provides that guards shall be securely in place while machinery is being operated.

Inspector Pederson testified that the guards were between one and two feet off the ground and he surmised that the guards were pushed out by a bobcat during cleaning operations. (Tr. 26). He stated that the guards were very loose. *Id.* He was concerned that someone could push the guard out of the way while cleaning up with a shovel and become entangled in the pulley. He believed that the portable crusher had been operated while the guards were in this unsecured condition. (Tr. 85).

As discussed above, Mr. Gauthier testified that the portable crusher was locked out on Saturday, March 29, due to mechanical problems. Mr. Gauthier also testified that the guards

were not fastened at the bottom at the time of the MSHA inspection. (Tr. 186). He stated that he removed the guards when he inspected the crusher after he locked it out on Saturday. *Id.* He did not refasten the guards at that time because he had to perform some maintenance with a welder under that area. He testified that these guards were securely fastened when the crusher was operating and that he would have made sure that they were secured before unlocking the crusher to begin operations once the repairs and cleanup had been completed.

For the reasons discussed in the previous citation, I find that the Secretary did not establish a violation. There was no showing that the crusher had been operated with loose guards or that the guards would have remained unsecured once the crusher began operating again. Accordingly, this citation is VACATED.

5. Citation No. 7950103

On March 31, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.14107(a). In the citation, the inspector alleged that a guard was not installed on the head pulley adjacent to the elevated walkway on the 4" minus stacker conveyor. The citation noted that few employees would use the walkway because a ladder had to be used to reach the walkway. He determined that the violation was not S&S and was caused by Northwest Aggregates= moderate negligence. The Secretary proposes a penalty of $50 for the alleged violation.

Inspector Pederson testified that because a ladder was not present at the time of his inspection, he did not enter the elevated walkway. (Tr. 29). He stated that he observed the violation from the ground. He believes that employees may need to get onto the walkway to perform routine maintenance.

Mr. Johnston testified that the walkway is about 7 feet above the ground at the tail pulley and 50 feet above the ground at the head pulley. (Tr. 162). He further testified that company procedures require employees to lock out and tag out the equipment before gaining access to the walkway with the ladder. The ladder is kept in a locked storage area to keep trespassers from going up on the walkway when the mine is closed. This conveyor is not part of the portable crusher that was locked out for repairs, as described above.

I find that the Secretary established a violation. The head pulley was not guarded and it was immediately adjacent to a walkway. The fact that the walkway was not frequently used is not controlling. In addition, the fact that the company requires employees to lock out and tag out the conveyor prior to entering the walkway cannot be the basis for vacating the citation. As stated above, the Mine Act is a strict liability statute. Sand and gravel operators frequently require miners to lock out and tag out equipment prior to performing any maintenance. The standard, by its own terms, only applies to Amoving parts that can cause injury.@ The Commission held that the most logical construction of guarding standards Aimports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.@ *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097

(September 1984). The Commission stated that the construction of safety standards involving miners= behavior Acannot ignore the vagaries of human conduct. @ *Id.* (Citations omitted). In this case, it is possible that an employee would travel along the walkway to service the conveyor system without locking out the conveyor, especially if the employee believed that his work could be completed quickly. The employee may not see the need to stop production for such a simple task and may take a shortcut that could lead to a serious injury.

I find that the violation is not serious because the violative condition was in a remote location. The violation was not S&S because the possibility of an injury was slight. I also find that Northwest Aggregates = negligence is moderate to low, due to the location of the violation. A penalty of $50 is appropriate for this violation.

6. Citation No. 7950107

On April 1, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.11012. In the citation, the inspector alleged that the barge access ramp at the loading area had two holes in the planking that forms the surface of the ramp. The citation states that the openings were about six by two feet and four by two feet. He determined that the violation was S&S and that Northwest Aggregates = negligence was moderate. The Secretary proposes a penalty of $102 for the alleged violation. The safety standard provides, as relevant here, that openings above, below, or near travelways through which persons may fall shall be protected by covers.

Inspector Pederson testified that trucks use the ramp to drive onto barges to dump the processed rock. (Tr. 34). He stated that employees also walk onto the barges and that he was concerned that an employee could fall into one of the openings and break a leg, especially if it was dark outside. (Tr. 35; Ex P-1). Employees of Northwest Aggregates showed Inspector Pederson the holes at the time of his inspection and also showed him the repairs that were being made. (Tr. 91). He testified that it was his belief that the condition had existed for at least one day. Finally, he testified that the holes should have been immediately covered, but admitted that repairs could not be made unless a barge was present. (Tr. 139-40).

Mr. Johnston testified that the holes developed in late March and that he immediately ordered planking to repair the holes. (Tr. 164, 166). He stated that as soon as a barge arrived, the holes were repaired. He described the function and design of the ramp. The ramp is hinged from the heel and supported by a head frame and counterweight system so that it can be raised and lowered. (Tr. 165). The ramp is always raised, unless a barge is present. To perform maintenance on the ramp, it must be in a horizontal position. It can only be lowered to that position when a barge is present. He testified that the holes were repaired when a barge arrived on April 1. (Tr. 167-68). The truck drivers= records indicate that a barge had also been present on either March 28 or 29. (Tr. 174, Ex. P-6).

I find that the Secretary did not establish a violation. Except at those times when the ramp was down, the ramp was not a travelway and the holes did not present a hazard. Inspector

Pederson was not concerned that anyone would fall through the holes, but that someone =s leg or foot could get caught in one of the holes. There is no evidence as to when the holes developed. The Secretary did not establish that the ramp was down when holes were present, except perhaps on the day that the holes first developed. The holes were caused by the truck traffic on the barge. The only time anyone walks on the ramp is when a barge first arrives because someone needs to check the depth of the water. The Hood Canal is a natural waterway that is subject to tides. The ramp was down on either March 28 or 29, and again on April 1. The holes may have developed on one of those days. Northwest Aggregates began repairing the holes as soon as the April 1 barge arrived. Indeed, the operator was repairing the holes at the time of Inspector Pederson =s inspection. The evidence does not show whether there was any exposure to the hazard presented by the holes. Northwest Aggregates repaired the holes as soon as possible after they developed. Accordingly, this citation is VACATED.

7. Citation No. 7950109

On April 1, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.11027. In the citation, the inspector alleged that the upper grizzly work deck, where the drive motor and v-belt drive are located, did not have a railing to prevent a person from falling. The citation states that the work deck was about 20 feet high and that it is the company =s policy to require employees to wear a safety belt and line when working at that location. He determined that the violation was S&S and that Northwest Aggregates = negligence was low. The Secretary proposes a penalty of $119 for the alleged violation. The safety standard provides, in part, that scaffolds and working platforms shall be provided with handrails.

Inspector Pederson testified that there was no railing on the upper deck. (Tr. 40; Ex. P-2). He testified that he determined that the violation was S&S because he thought that it was reasonably likely for an accident to occur resulting in serious injuries. (Tr. 48). He stated that he believes that an accident was reasonably likely because there was no place to hook up a safety line when traveling to the work platform. (Tr. 145). He stated that the use of safety lines is not an alternative in the safety standard. (Tr. 123). He admitted that if an employee were tied off when working on the work deck, he would not fall far. (Tr. 95, 145).

Dale Inwards, a foreman for Northwest Aggregates, testified that the mine uses safety belts and lines when doing any work at the cited area. (Tr. 194). He stated that employees need to go to the area when a belt breaks. (Tr. 195).

I find that the Secretary established a violation. Although employees do not need to work on the drive motor or v-belt drive on a regular basis, I find that the deck for the motor and v-belt drive is a Aworking platform,@ as that phrase is used in the safety standard. Exhibits P-2 and P-3 show the cited working platform. I conclude that the use of safety belts and lines is not an alternative means of compliance. Section 56.15005 is an independent safety standard that requires safety belts and lines to be worn Awhen persons work where there is a danger of falling.@ Nothing in the Secretary=s safety standards suggests that safety belts and lines may be used in lieu of rails on scaffolds and working platforms.

I find that the Secretary did not establish that this violation was S&S. Inspector Pederson based his S&S finding on the fact that he was concerned that employees would not have an adequate place to attach their lanyard when traveling to the work platform. There is a place to tie off a safety line at the cited area. (Ex. P-2). Northwest Aggregates contends that the question of safe access to the work area is not an issue in this citation. I agree. The inspector=s concerns about access to the work platform would remain whether or not hand rails are present. (Ex. P-2). There seems to be no dispute that employees used safety belts and lines when working in the cited area. (Tr. 48-49). I find that the Secretary did not establish that it was reasonably likely that the hazard contributed to by the violation would result in an injury, given that safety belts and lines were used in the area. I find that the gravity of the violation was moderate and that Northwest Aggregates= negligence was also moderate. I find that a penalty of $75 is appropriate for this violation.

8. Citation No. 7950111

On April 1, 1997, Inspector Pederson issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 56.12004. In the citation, the inspector alleged that two power cables for the grizzly drive motors had rips and cuts in their outer jackets that could easily lead to a short circuit or ground fault. The citation states that the rips and cuts could allow dirt and moisture to enter the cable and that the condition presented an electric shock hazard. Inspector Pederson determined that the violation was S&S and was caused by Northwest Aggregates= low negligence. The Secretary proposes a penalty of $119 for the alleged violation. The safety standard provides, in part, that electrical conductors exposed to mechanical damage shall be protected.

Inspector Pederson testified that both cables had rips and holes in the outer jacket. (Tr. 51; Ex. P-3). He stated that water and dust could enter the cable and deteriorate the inner insulated conductors. He further stated that rocks and dust fall from the grizzly onto the cables. Inspector Pederson believed that the condition could lead to a fatal injury. (Tr. 52). He testified that even though bare wires were not exposed, the damaged cables presented a serious electric shock hazard. (Tr. 103-04). Mr. Inwards testified that he saw that the outer jacket on at least one of the cables was damaged after Inspector Pederson inspected the grizzly. (Tr. 196). He believes that the jacket was cut from rocks falling off trucks or off the side of the grizzly.

I find that the Secretary established a violation. It is clear that the cables were subject to mechanical damage and that they were not sufficiently protected against such damage. The outer jacket on a power cable is designed to protect it from mechanical damage. The cables were subjected to such a heavy amount of damage from falling rocks that the jackets were insufficient to protect them. Additional protection was required by the standard. The fact that the inner insulation was present is not controlling. The inner insulation provides electrical separation between the phases, not mechanical protection. As Inspector Pederson stated, moisture and dirt could enter the inner insulation and create conditions that could lead to a short circuit or ground fault.

I also find that the Secretary established that the violation was S&S. A citation is properly designated S&S Aif, based on the particular 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). I find that it was reasonably likely that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. The cables were damaged and were subject to continuing damage. The insulated conductors in the cable were also subject to damage from moisture and dirt. I credit the testimony of Inspector Pederson that a short circuit or ground fault was reasonably likely and that a fatal accident could result. I also accept the inspector =s negligence determination. A penalty of $120 is appropriate.

B. <u>Docket No. WEST 97-257-M</u>

1. <u>Citation No. 7950095</u>

On March 31, 1997, Inspector Pederson issued a section 104(d)(1) citation alleging a violation of 30 C.F.R. ' 56.14107(a). In the citation, the inspector alleged that the surge pile discharge conveyor head pulley was not guarded. The citation states that the head pulley was next to an accessible walkway at the crusher and that the guard had been removed and stored under the shaft for the rotary screen. The citation also states that the crusher operator knew that the guard had been removed. It states that the foreman and superintendent visit the crusher occasionally and should have noticed that the plainly visible head pulley was not guarded. Inspector Pederson determined that the violation was S&S and was caused by Northwest Aggregates= high negligence. The Secretary proposes a penalty of $1,000 for the alleged violation.

Inspector Pederson testified that there was a walkway beside the head pulley and Athere might be an occasion for someone@ to be in the area. (Tr. 54; Ex. P-4). The pulley was within a foot of this walkway. The walkway ended a few feet from the head pulley so employees would not pass through the area to go somewhere else. (Tr. 111). Employees would not be near the head pulley very often. (Tr. 127-28). He determined that the violation was serious and S&S because the area was completely exposed. (Tr. 55-56). He based his high negligence and unwarrantable failure determinations on the fact that the crusher operator was aware of the condition and the foreman and superintendent visited the crusher. He stated that the violation was obvious. Inspector Pederson testified that the crusher operator stated that he had been operating the crusher for a few days and the guard was off during that period. (Tr. 56). Inspector Pederson also relied on the fact that the condition had not been entered in the onshift examination books.

Walt Turner, a supervisory MSHA inspector at the time the citation was issued, testified that he discussed this citation with Mr. Johnston. (Tr. 150). Mr. Johnston advised him that the guard had been off for about a week, but that he was not aware that it was off. *Id.* Mr. Johnston testified that only one person is normally at the crusher and he stands at the controls near the office. (Tr. 156; Ex. R-1). He stated that it is company policy for the crusher to be locked out

and tagged out before any maintenance is performed. If any maintenance or service were required at the crusher, the crusher operator would go to the electrical shed to lock out and tag out the crusher. (Tr. 156). He testified that the cited head pulley is in a remote location and there would be no reason for anyone to be there while the crusher was operating. (Tr. 156, 161).

For the reasons stated above with respect to Citation No. 7950103, the Secretary established a violation. The citation was issued at the permanent crusher, not the portable crusher that had been locked out on Saturday for maintenance. The head pulley was not guarded and it was immediately adjacent to a walkway. The citation cannot be vacated simply because the walkway is not frequently used or the company has lock-out and tag-out procedures. The safety standard applies to moving parts that Acan cause injury.@ Given the Avagaries of human conduct@ it is possible that an employee could be at the head pulley while the crusher was operating. Because the unguarded pulley was immediately adjacent to the walkway and was at about waist level, it posed a significant hazard to employees who might be in the area.

Inspector Pederson determined that it was reasonably likely that someone would be injured and that such an injury could be fatal. Based on this testimony, I find that the violation was serious. I also find that the violation was S&S. It is clear that the violation created a discrete safety hazard. I also find that it is reasonably likely that the hazard contributed to by the violation would have resulted in an injury. This element is the third part of the Commission=s S&S test. *Mathies*, 6 FMSHRC at 3-4. Under this test, it is not necessary for the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury was reasonably likely assuming continued mining operations. In concluding that an injury was reasonably likely, I have taken into consideration the fact that the head pulley was in an area where employees do not normally travel. I also recognize that the company requires employees to lock out and tag out equipment before maintenance work is performed. Nevertheless, the pinch point was located at the walkway so that anyone walking in the area was in danger of becoming entangled. In addition, the condition had existed for about a week and, assuming continued operations, the condition presented a hazard to employees at the permanent crusher. It is foreseeable that an employee would be in the area to perform a minor task and not think it was necessary to shut down the crusher. Any injury would be serious.

I also find that the Secretary established that the violation was the result of Northwest Aggregates= unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (December 1987). Unwarrantable failure is characterized by such conduct as Areckless disregard,@ Aintentional misconduct,@ Aindifference,@ or Aa serious lack of reasonable care.@ *Id.* at 2001-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (February 1991).

In analyzing the evidence in the present case using this test, I find that the violation was caused by Northwest Aggregates= aggravated conduct. The violation was not the result of intentional misconduct, indifference, or a reckless disregard of the dangers posed by unguarded pulleys. I find, however, the Northwest Aggregates= failure to meet the requirements of section

56.14107(a) was the result of a serious lack of reasonable care that constituted more than ordinary negligence.

I reach this conclusion for a number of reasons. First, the violation was readily obvious. Section 56.18002 requires each operator to conduct an examination of each working place at least once a shift for conditions that may adversely affect the safety or health of employees. A record of such examination is required to be kept. Inspector Pederson testified that the company =s examination books did not show that the guard was missing. Even a cursory examination of the crusher would have revealed that the guard was not there. The violative condition was quite obvious. *See Faith Coal Co.*, 19 FMSHRC 1357, 1369 (August 1997).

Second, the condition had existed for some time while the crusher was operating. The guard had been removed sometime during the previous week and had not been replaced. The crusher continued to operate and employees were exposed to the hazard. A penalty of $800 is appropriate for this violation.

2. Order No. 7950099

On March 31, 1997, Inspector Pederson issued a section 104(d)(1) order alleging a violation of 30 C.F.R. ' 56.14107(a). In the citation, the inspector alleged that both sides and the back of the self-cleaning tail pulley for the 4" minus conveyor were not guarded. The citation also states that the top guard was bent back exposing part of the pulley. It states that the violation was in plain sight of the crusher foreman and the superintendent. Inspector Pederson determined that the violation was S&S and was caused by Northwest Aggregates = high negligence. The Secretary proposes a penalty of $1,000 for the alleged violation.

This order was issued for a tail pulley on the portable crusher. As discussed above, the portable crusher was locked out on the afternoon of Saturday, March 29 due to mechanical problems. Mr. Gauthier testified that he removed guards after the crusher was locked out, but that all of the guards were present before he shut down the portable crusher. (Tr. 180, 188). He removed guards to clean and perform maintenance. He stated that the top guard was not bent back, but the guard was made of material that was not rigid so that it may have appeared to be bent. (Tr. 189). There has been no showing that the portable crusher was operated with the cited guards missing. I credit Mr. Gauthier=s testimony that once the repairs were made, the guards would have been replaced before the lockout was lifted. Inspector Pederson testified that Mr. Gauthier told him that there had never been any guards at this location. (Tr. 115). I conclude that the inspector misunderstood Mr. Gauthier =s comments. For the reasons discussed with respect to Citation Nos. 7950101 and 7950102, this order of withdrawal is VACATED.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that two citations were issued at the Mats Mats Quarry between July 1995 and March 1997. (Ex. P-8). The Mats Mats Quarry is small. It appears that Northwest Aggregates is owned by Lonestar Northwest, but the Secretary did not present any evidence on this issue. (Tr. 53). Accordingly, I find that Northwest Aggregates is a small operator. The Secretary has not alleged that Northwest Aggregates failed to timely abate the citations and order. The penalties assessed in this decision will not have an effect on Northwest Aggregates= ability to continue in business. The gravity and negligence criteria are discussed separately for each violation. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

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 97-242-M		
7950096	56.20003(a)	Vacated
7950100	56.20003(a)	75.00
7950101	56.14107(a)	Vacated
7950102	56.14112(b)	Vacated
7950103	56.14107(a)	50.00
7950107	56.11012	Vacated
7950109	56.11027	75.00
7950111	56.12004	120.00
WEST 97-257-M		
7950095	56.14107(a)	800.00
7950099	56.14107(a)	Vacated

Accordingly, the citations and order listed above are hereby **VACATED**, **AFFIRMED**, or **MODIFIED** as set forth above, and Northwest Aggregates is **ORDERED TO PAY** the Secretary of Labor the sum of $1,120.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Cathy L. Barnes, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

Charles R. Bush, Esq., Vandeberg, Johnson & Gandara, 600 University Street, Suite 2424, Seattle, WA 98101-1192 (Certified Mail)

RWM