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

September 13, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEST 99-348-M A.C. No. 24-02070-05502
v.	:	Docket No. WEST 2000-168-M A.C. No. 24-02070-05503
JOHN RICHARDS CONSTRUCTION, Respondent	:	Docket No. WEST 2000-470-M A.C. No. 24-02070-05504
	:	Richards Pit

DECISION

Appearances: John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
John Richards, John Richards Construction, Seeley Lake, Montana, 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 John Richards Construction ("Richards Construction"), 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 Secretary's petitions allege 21 violations of the Secretary's safety standards and propose penalties totaling $19,073. A hearing in these cases was held in Missoula, Montana.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Discussion of General Issues Raised by Richards Construction

John Richards owns Richards Construction as a sole proprietor. It operates the Richards Pit in Missoula County, Montana. The pit includes a crushing plant as well as a sand and gravel quarry. All of the citations and orders were issued at the crushing plant. John Richards employs two individuals at the pit. One employee operates the crushing plant and the other operates a loader to feed the hopper for the plant. Mr. Richards frequently works out of state for another employer.

MSHA Inspector Siebert Smith first tried to inspect the pit on February 4, 1999. When he could not find anyone at the pit on that date, he left the pit and did not conduct an inspection. Inspector Smith returned to the pit on August 12, 1999. Mr. Richards was not at the pit on that day because he was working out of state. When Inspector Smith arrived he talked to Mr. Carl Tanner. When Tanner discovered that Smith was an MSHA employee, Tanner told Smith that he was going to shut the plant down. Tanner walked through the plant to the other side, shut it down, and left with the other employee. (Tr. 48-50). As they were leaving, Tanner told Smith that he was not going to participate in the inspection and that he could "[w]rite anything you want - I've seen it all before." (Tr. 49-50). Smith believes that Tanner talked to Lance Richards, John's son, because Lance arrived a short time later.

Mr. Richards raised a number of defenses that are applicable to all of the citations and orders in this case. First, he contends that, because there were only two employees at the pit, each with assigned duties, many of the conditions cited did not pose a hazard. For example, Richards contends that many of the guarding citations, discussed below, should be vacated because employees do not walk around the plant while it is operating. Mr. Tanner operates the loader while the other employee operates the plant. Richards asserts that anytime the plant operator is cleaning up accumulations or performing maintenance on the plant, he shuts it down.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. 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, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. In assessing penalties in this case, I have taken into consideration the fact that Richards Construction is a small business. I cannot vacate citations or reduce penalties to zero simply because the risk of injury was small.

The Commission interprets safety standards, including the guarding standard, to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). The Commission specifically held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. It is conceivable that 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 easily become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded pinch point at this operation is not a defense because there is a history of such injuries at crushing plants throughout the United States and the Richards Pit could be next. Fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ).

Mr. Richards also argues that Mr. Tanner was responsible for the creation of the cited conditions because he left Mr. Tanner in charge while he was out of state. For example, Richards states that many of the guarding citations were issued because Mr. Tanner had allowed large amounts of material to accumulate around the plant contrary to Richards' explicit instructions. The accumulations had the effect of raising the walking surfaces placing them within seven feet of unguarded pulleys. Richards states that if he had been at the plant, he would have made sure that accumulations were cleaned up on a regular basis and the pulleys would have been guarded by location. Richards also raises this defense with respect to the unwarrantable failure citation and orders.

As a general matter, a mine operator can be held liable for the acts of his agents. An agent is defined at section 3(e) of the Mine Act as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of miners in a . . . mine." The Commission has held that the negligence of an agent of a mine operator must be considered when determining the operator's negligence in assessing a civil penalty under section 110(i) of the Mine Act and when evaluating an unwarrantable failure allegation. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991). The issue is whether Mr. Tanner was an agent of Richards Construction.

> When deciding whether a miner is an agent of an operator, the Commission has focused on the miner's function and not his job title. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct.

Martin Marietta Aggregates, 22 FMSHRC 633, 637 (May 2000) (citations omitted). The conduct of a rank-and-file miner, "may *not*, absent agency, be imputed to the operator." *Whayne Supply Co.*, 19 FMSHRC 447, 454 (Mar. 1997) (emphasis in original).

Mr. Richards' testimony is somewhat inconsistent. On the one hand, he stated that he has "been (working) in Arizona since 1987, part years." (Tr. 492). On the other hand, he testified that he is usually around during crushing operations. *Id.* He testified that "this was really the first time that I'd left [Montana] and left [Tanner] in charge." (Tr. 491). Apparently,

Richards had been in Houston for about three weeks at the time of this particular inspection. (Tr. 437).

Ordinarily, Tanner was not an agent of Richards Construction. Mr. Richards put Tanner in charge of the pit while he was in Houston, Texas. The question is whether Tanner was an agent of Richards Construction while Richards was away. Richards argues that he had given his employees, including Tanner, safety training. For example, he told his employees to always wear seat belts when operating equipment. (Tr. 491). As discussed below, Inspector Smith observed Tanner operating a loader without wearing a seat belt. After Mr. Richards returned to Montana, he requested a health and safety conference with MSHA under 30 C.F.R. § 100.6 to discuss the citations that Inspector Smith issued. He requested this conference because he believed that Tanner should have been held responsible for the violations in Richards' absence. The conference was held on October 1, 1999, by telephone. Supervisory MSHA Inspector Wayne Wasson represented the Secretary. Carl Tanner and Lance Richards were also on the telephone conference. Inspector Wasson testified at the hearing that Mr. Richards told him during the telephone conference that Tanner was the "superintendent" at the pit at the time of Inspector Smith's inspection. (Tr. 350). Several of the citations that were issued by Inspector Smith involved violations committed by Carl Tanner, including the seat-belt violation. As a consequence, Inspector Wasson modified these citations to section 104(d)(1) citation and orders. He made these modifications because he believes that a mine superintendent should be held to a higher degree of care than an employee who is not a manager. (Tr. 351-52).

At the hearing, Richards testified that Tanner was a very safety conscious individual who always "followed the directives." *Id.* Richards does not understand why he failed to wear a seat belt. Richards testified that he terminated Tanner from his employment with Richards Construction as a result of his conduct during the inspection. (Tr. 495). Richards believes that Tanner should have been cited for this violation and for other similar violations rather than Richards Construction because Tanner failed to follow the pit's safety rules. Richards believes that Tanner "was not looking out for my best interests. . . ." when Richards was away, especially during the MSHA inspection. (Tr. 519). As a consequence, he argues that Richards Construction should not be held responsible for Tanner's actions during the inspection.

Mr. Richards did not clearly set forth Mr. Tanner's responsibilities at the hearing. Tanner apparently had the authority to supervise the other employee, take orders for product, run the plant, and manage the day-to-day operations. It does not appear that Tanner had the authority to hire or fire employees or to discipline employees. It is clear, however, that Tanner had responsibility for safety at the pit. It was within his power to make sure that safety rules and procedures were followed. Tanner was more than a leadman; he "exercised managerial responsibilities" at the pit in Mr. Richards' absence. For purposes of the Mine Act, I find that Mr. Tanner was an agent of Richards Construction when Mr. Richards was out of state. The fact that Tanner did not follow Mr. Richards' guidelines does not negate the agent-principal relationship, but it may affect the degree of negligence attributable to Richards Construction.

Mr. Richards also asserted that the penalties proposed by MSHA are so high that they will affect his ability to continue in business. At the close of the hearing I advised Mr. Richards that this claim is an affirmative defense for which he bears the burden of proof. (Tr. 551-56). He provided his personal federal tax returns for 1993-1998, which showed business losses for those years. He also submitted W-2 forms for 1999 and 2000. I advised Mr. Richards that I would need more detailed financial information in order to consider this issue. By order dated April 24, 2001, I set forth the specific information that I would need. I enclosed a copy of my decision on remand in *Unique Electric*, 21 FMSHRC 91 (Jan. 1999). Mr. Richards did not file a response to my order by the June 4, 2001, due date.[1] Consequently, I have not reduced the penalties in this case based on the ability to continue in business criterion.

B. Inspection of February 4, 1999

Citation No. **7903871**, the only one issued on February 4, 1999, alleges a violation of 30 C.F.R. § 56.1000, because the "owner, operator, or the person in charge of the Richards Pit did not give notification to the nearest Mine Safety and Health Administration office of the shutdown of the Richards Pit." Inspector Smith determined that the violation was not of a significant and substantial nature ("S&S") and was the result of Richards Construction's moderate negligence. Section 56.1000 provides, in part, that "[W]hen any mine is closed, the person in charge shall notify the nearest [MSHA] subdistrict office . . . and indicate whether the closure is temporary or permanent."

When Inspector Smith traveled to the pit on February 4, he did not see anyone around. He tried two different approaches to the pit without success. Smith testified that the pit is classified as an intermittent operation. Mr. Richards testified that he was out of state on February 4, but that the pit had not been shut down. If a customer wanted to purchase sand, the customer would contact a Richards Construction employee who would direct him to the pit. (Tr. 416-18). If the customer was purchasing only one truckload, he might load the sand himself from the stockpile, otherwise one of the pit employees would load the customer's trucks. Because it was winter, the crusher had not operated since about December 1998. *Id.* Nevertheless, if a customer wanted to purchase a large amount of sand and the weather was not too severe, Richards Construction would operate its crusher to fill the order. The sand was primarily used to sand subdivision roads in inclement weather.

Inspector Smith issued this citation solely because he did not see anyone at the pit on February 4. Intermittent operations do not mine and crush every day. The inspector testified that he did believe that an operator of an intermittent pit and crusher would be required to notify MSHA every week whether it was planning on being open. (Tr. 35). The standard is designed to

[1] On July 18, 2001, Mr. Richards filed a motion for a 90-day extension of time to respond to my order and to file a brief in these cases. The Secretary opposed the motion. By order dated July 30, 2001, I denied Mr. Richards' motion for an extension of time. At Richards' request, I placed his tax records under seal.

cover situations where an operation closes permanently or is closing for some definite period of time, such as November through March. In the case of this pit, it remained open all winter, but it had employees present only when there was a demand for its products. If Richards Construction had notified MSHA that it was closed at the end of December 1998, the standard would have required it to notify MSHA every time a customer called for sand. I do not read section 56.1000 imposing such a requirement on intermittent operations. Consequently, Citation No. 7903871 is vacated.

C. Guarding Citations

Citation No. **7904240** alleges a violation of section 56.14107(a), because no guard was installed on the v-belt drive unit for the discharge conveyor under the kinetic crusher. The citation states that the "v-belt drive unit was located approximately 56 inches from the ground level and could be contacted by employees at the site." Inspector Smith determined that the violation was S&S and was the result of Richards Construction's moderate negligence. Section 56.14107(a) provides, in part, that "[m]oving machine parts shall be guarded to protect persons from contacting . . . drive, head, tail, and takeup pulleys . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of $399 for this alleged violation.

There is no dispute that the cited V-belt drive was not guarded. (Ex. P-3, p.1 bottom photo). Inspector Smith testified that there was no guarding on this v-belt drive and estimated that the pinch point was about 56 inches from the ground level. (Tr. 53, 59). There was an accumulation of spilled material at that location at the time of the inspection. (Tr. 59-61). He determined that Richards Construction's negligence was moderate because it received guarding citations in the past. (Tr. 54-55). He also determined that the violation was S&S because if the drive remained unguarded it was reasonably likely that someone would sustain an injury of a reasonably serious nature. (Tr. 55, 67-70).

Mr. Richards testified that the conveyor was installed in 1993 and had been inspected on at least one previous inspection. (Tr. 426). No guarding citations have ever been issued for this v-belt drive. He further stated that the distance from the ground to the tail pulley is about ten feet. *Id.* Richards testified that the reason Inspector Smith measured a distance of 56 inches was because he was standing on spilled material that had accumulated. (Tr. 431-32). Richards also testified that the violation should not have been designated as S&S because "you have to contort yourself to get anywhere near it." (Tr. 434). Employees would not walk under this conveyor when it was running because large rocks fall from the conveyor, as evidenced by the accumulation of spilled material. *Id.* He stated that "no one with any . . . common sense would get in that area where those rocks are falling." (Tr. 434-35). Richards also testified that he instructed his employees to keep the area under the conveyor clean and to remove spilled material. (Tr. 436). Mr. Richards was not in Montana at the time of this inspection, so he believes that he should not be held negligent for the failure of Tanner to make sure that the area was clean of spilled material.

There can be no dispute that at the time of the inspection, the v-belt drive was not guarded and was a little more than 4.5 feet above the ground level. If accumulations in the area had been cleaned out, the v-belt drive would have been higher off the ground. It may well have been more than seven feet from the ground during previous MSHA inspections. (30 C.F.R. § 56.14107(b)). I find that the area under the v-belt drive was a walking surface. Employees could walk through the area and Inspector Smith observed Mr. Tanner walking under operating conveyors on the date of the inspection. (Tr. 49, 68, 260, 262).

I find that the Secretary established a violation of the safety standard. I also find that the violation was S&S. An S&S violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that 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).

In this instance, the exposed moving parts were about 4.5 feet above the walking surface. A measure of danger to safety was present that was contributed to by the violation. Assuming continued mining operations, it was reasonably likely that someone would come in contact with the moving machine parts that were about 4.5 feet above the walking surface. The exposed moving parts were close to the walking surface because the agent of Richards Construction allowed a significant quantity of rock to accumulate in the area. The fact that Richards would have kept the accumulations cleaned up does not negate the fact that employees were exposed to moving machine parts. A person's clothing can easily get caught in moving machine parts and pull the individual into the moving parts causing an injury. Richards testified that no employee "with common sense" would walk under a moving conveyor because he could get hit by falling rocks, yet Inspector Smith observed Tanner walking under operating conveyors. I find that the Secretary also established that any injury would be of a reasonably serious nature.

The Secretary established that the mine operator's negligence was moderate. The negligence of Mr. Tanner, Richards Construction's agent, is attributable to Richards Construction. A penalty of $200 is appropriate.

Citation No. **7904241** alleges a violation of section 56.14107(a) because the guard on the tail pulley for the return conveyor to the Telesmith plant "did not extend a [sufficient] distance to cover the moving parts of the tail pulley." It further states that the tail pulley was about 24 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposed a penalty of $399 for this alleged violation.

Inspector Smith testified there was a guard present at this location but it did not extend all the way back to protect employees from coming into contact with the self-cleaning tail pulley. (Tr. 76; Ex. P-3, p. 2 top photo). The open area was about 24 inches above the ground. (Tr. 77). Inspector Smith determined that Richards Construction was moderately negligent with respect to this citation. He determined that the violation was S&S because if someone were to trip and fall in the area adjacent to the opening around the guard, he could come in contact with the pinch points. (Tr. 78, 89).

Richards testified that during 1998, a different MSHA inspector issued a citation at the same location and the guard that was installed to abate the previous citation was the guard that Inspector Smith considered to be inadequate. (Tr. 441-42). As a consequence, Richards believes that he was not negligent. (Tr. 445). Richards also testified that, in order to contact a pinch point, an employee's entire arm would have to go through the opening. (Tr. 442). Given that the opening was very narrow, he believes that such an event was highly unlikely. (Tr. 442-44).

I find that the Secretary established a violation but did not establish that it was S&S. The opening that was not covered by the guard was quite small. Inspector Smith did not measure the opening, but the photograph shows a small opening. Although the opening created a discrete safety hazard, it is highly unlikely that anyone would trip and fall next to the opening and then inadvertently have his hand enter the opening. The moving machine parts were well inside the opening. Although such an event could occur, it was not reasonably likely to happen. The gravity is low.

I also find that Richards Construction was not negligent. Mr. Richards testified that another MSHA inspector issued a citation at the same tail pulley a year earlier for a violation of section 56.14107(a). The guard that Inspector Smith found to be inadequate was installed to abate the previous citation. I credit Mr. Richard's testimony on this issue. The pit received seven guarding citations during the MSHA inspection of August 6, 1998. (Ex. P-6). This fact does not negate this violation because equitable estoppel does not apply to the Secretary in Mine Act proceedings. *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981). It is within MSHA's authority to determine that the tail pulley was not adequately guarded on August 12, 1999. Nevertheless, the fact that another MSHA inspector determined that the guard cited by Inspector Smith met the requirements of the safety standard significantly lowers the level of negligence that should be imputed to Richards Construction. It is unfair to cite a mine operator for a violation of a safety standard and then cite it again for a violation of the same standard at the same location with a moderate negligence finding. If the first MSHA inspector had required that

the violation be properly abated, Richards Construction would not have received the second citation. Consequently, I find that a nominal penalty of $10 is appropriate.

Citation No. **7904242** alleges a violation of section 56.14107(a) because the guard on the fin-type tail pulley of the discharge conveyor under the Pioneer crusher "did not extend a [sufficient] distance to cover the moving parts" on the tail pulley. The citation also states that the tail pulley was about 30 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified no guard was provided on the tail pulley. (Tr. 93; Ex. P-3, p. 2 bottom photo). The lower pulley was partially guarded but the top pulley was not. It was 30 inches from the ground. For the reasons set forth with respect to the previous citations, Inspector Smith determined that the violation was S&S and the result of Richards Construction's moderate negligence. (Tr. 94-95). An employee could trip and fall in the immediate area and get his hand caught in the pinch point of the self-cleaning tail pulley. (Tr. 104).

Mr. Richards testified that normally the tail pulley is about four feet above the ground but that material had been allowed to accumulate in the area. (Tr. 448). He also stated that other sides of this tail pulley had been guarded by Richards Construction following a previous MSHA inspection. Richards believes that it was highly unlikely that anyone would walk close to the cited area and even more unlikely that he would trip and fall. (Tr. 448-49). He believes that if there was a violation, it was neither serious nor S&S. The MSHA inspector who conducted the previous inspection did not designate guarding violations as S&S. (Tr. 450; Ex. P-6). In addition, Richards believes that there was no negligence associated with this condition because the guards that were present were installed to abate a citation issued during the previous MSHA inspection. (Tr. 452). He believes that he should not be cited twice for the same condition and then assessed higher penalties for moderate negligence.

I find that the Secretary established a violation. I also find that the violation was S&S. The opening that was not covered by the guard was fairly substantial in size and it is reasonably likely that someone could be seriously injured if this condition were not corrected. The fact that the MSHA inspector who issued a citation at this same location a year earlier considered the violation to be non-S&S is not binding on the Secretary or the Commission.

For the reasons set forth with respect to the previous citation, I find that Richards Construction was not negligent. I credit Richards' testimony that the other guards on this tail pulley were installed to abate another MSHA inspector's citation. If the first MSHA inspector had required that the violation be properly abated, Richards Construction would not have received the second citation. I assess a penalty of $50 for this violation.

Citation No. **7904246** alleges a violation of section 56.14107(a) because a guard was not installed on the head pulley and on the v-belt drive unit on the discharge conveyor under the El Jay screen. The citation states that the head pulley and v-belt drive were about 56 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that the unguarded v-belt drive was under the decking on the El Jay screen. (Tr. 133). There was no guarding at this head pulley and v-belt drive. (Tr. 134; Ex. P-3, p. 4 bottom photo). He determined that the unguarded moving parts were 56 inches above the ground in an area that could be accessed by employees. He determined that the violation was S&S and that Richards Construction's negligence was moderate based on the same factors that he considered with respect to the other guarding violations. (Tr. 135-35).

Mr. Richards testified that the cited head pulley and v-belt drive would normally be ten feet above the walking surface. (Tr. 459, 461). Because his employees had allowed material to accumulate under the pulley and drive, the distance was considerably less. He testified that material can accumulate rather quickly in that area. (Tr. 460-61). Richards further testified that employees never walk under the cited drive pulley because of the falling rock. (Tr. 462-63). He believes that the condition was not S&S. He also contends that he was not negligent. He points to the fact that there has not been a serious injury at his operation in 30 years. (Tr. 464).

The condition cited is similar to the condition in Citation No. 7904240. Because Richards Construction had permitted material to accumulate in the area, the moving machine parts were about 4.5 feet above the walking surface. Normally the moving parts were protected by location. For the same reasons discussed above with respect to Citation No. 7904240, I find that the Secretary established an S&S violation and that Richards Construction's negligence was moderate. A penalty of $200 is appropriate.

Citation No. **7904247** alleges a violation of section 56.14107(a) because a guard was not provided and installed to "extend a [sufficient] distance to cover the moving parts of the fin-type tail pulley" on the number 3061 conveyor. The citation states that the tail pulley was about 33 inches from the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that the existing guard on the conveyor did not cover all of the moving parts. (Tr. 141). He believed that an additional guard had been present but had been removed. Small openings were present as well as a protruding shaft for the pulley. (Tr. 142; Ex. P-3, p. 5 top photo). For the reasons discussed above, the inspector determined that the violation was S&S and that the operator's negligence was moderate. He testified that the openings were large enough to pose a hazard. He was concerned that if someone were to trip and fall while walking by the unguarded conveyor, he could become entangled in the moving parts. (Tr. 160).

Mr. Richards testified that the end of the conveyor was sitting on a block that was six feet long, two feet high, and about two feet deep. (Tr. 465). He stated that, as a consequence, an employee could not get close to the moving parts. If an employee were to trip and fall in that area, he believes that it would be highly unlikely that he would become entangled in the moving parts. (Tr. 466-68). As with some of the other guarding citations, Richards testified that he had been issued a citation for this conveyor in 1998 and the guarding that was present was adequate to abate the previous citation. *Id.* I credit Richards' testimony.

The condition cited in this citation is quite similar to the violation in Citation No. 7904241. For the same reasons, I find that the Secretary established a violation; the violation was not S&S; the gravity was low; and Richards Construction was not negligent. A penalty of $10 is assessed.

Citation No. **7904248** alleges a violation of section 56.14107(a) because a guard was not installed on the back side of the drum-type tail pulley on the number 157 conveyor. The citation states that the tail pulley was about 33 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that a number of moving parts presented a hazard at this location including a scraper bar across the top of the belt and the tail pulley. (Tr. 163). No guard was present on the front and top of the tail pulley. (Tr. 165; Ex. P-3, p. 5 bottom photo). There was a guard on the right side, but the guard on the left side had been pulled back exposing the moving parts. *Id.* As with the previous citations, Inspector Smith believes that someone could become entangled in the moving parts if he were in the area.

Mr. Richards testified that a guard had been present before he left Montana. (Tr. 470). He stated that he became furious when he discovered that the guard had been removed. He believes that the condition should be characterized as non-S&S and he also believes that his negligence was very low. (Tr. 470-71).

I find that the Secretary established an S&S violation. This violation created a very serious safety hazard. I also find that Richards Construction's negligence was moderate. A penalty of $250 is appropriate because of the serious nature of the violation.

Citation No. **7904249** alleges a violation of section 56.14107(a) because a guard was not installed on the fin-type tail pulley on the conveyor under the pro-screen. The citation states that the tail pulley was about 26 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith testified that there was no guard present on the back side of the self-cleaning tail pulley. (Tr. 184). The fins are visible in the photograph. (Ex. P-3, p. 6 top photo). The inspector believes that an employee could be seriously injured if he fell in the area and came in contact with the unguarded moving parts. (Tr. 186). For the reasons stated above, he determined that the violation was S&S and was the result of Richards Construction's moderate negligence. (Tr. 187). There was spilled material in the area. (Tr. 196).

Mr. Richards stated that an employee would "have to crawl" to get close to the tail pulley because the Fab Tec screen is on top of the conveyor. (Tr. 472). He also testified that this tail pulley had been fully guarded but his employees removed part of the guard. (Tr. 473). Richards stated that he is angry because his employees "know better, that's what makes me mad." (Tr. 473). Because the tail pulley was immediately below a screen, Richards believes that it was highly unlikely that anyone would be injured by the condition. He stated that an injury was especially unlikely because he has two employees not hundreds. (Tr. 474). He also believes that the Secretary failed to show that his negligence was moderate. (Tr. 479).

I find that the Secretary established an S&S violation. The fins on the self-cleaning tail pulley were exposed presenting a serious safety hazard. Mr. Richards believes that the hazard was minimal because the exposed moving parts were immediately below a screen. While this may have lessened the likelihood of an injury to some extent, I find that an injury was reasonably likely. If someone were to stumble and fall in the area, his hands or clothing could become entangled in the moving parts. I also find that Richards Construction's negligence was moderate because its employees removed the guards that had previously been installed. A penalty of $200 is appropriate.

Citation No. **79804251** alleges a violation of section 56.14107(a) because a guard was not installed on the fin-type tail pulley on the Fab Tec feed conveyor at the main feed hopper. The citation states that the tail pulley was about 12 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

Inspector Smith stated that this citation was issued because there was no guard on the self-cleaning tail pulley on the feed conveyor under the main feed hopper for the plant. (Tr. 211-12; Ex. P-3, p. 7 top photo). He stated that an employee could walk along the side of this conveyor. (Tr. 214). Smith testified that he designated the condition as S&S and the negligence as moderate for the same reasons discussed above. (Tr. 214-15).

Mr. Richards testified that no employee would walk near the conveyor while the plant was operating because large rocks constantly fall off the sides of the hopper from the grizzly on top of the hopper. (Tr. 215-16, 482-4). Inspector Smith testified that he would not walk through that area while the plant was operating. Richards believes that the conditions did not present a violation, much less an S&S violation.

Citation No. **7904252** alleges a violation of section 56.14107(a) because a guard was not installed on the head pulley and on tail pulleys for the small discharge conveyer under the same feed hopper at the crushing plant. The citation states that the pulleys were about 40 inches above the ground and could be contacted by employees at the site. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $399 for this alleged violation.

The condition cited in this citation is immediately above the condition cited in the previous citation. (Tr. 223; Ex. P-3, p. 7 bottom photo). The small discharge conveyor was under the main feed hopper for the plant. The inspector's testimony is the same for both citations. (Tr. 224-225). Mr. Richards' testimony was also the same.

These two citations present a close issue. Were the moving machine parts within seven feet of a walking or working surface? The cited areas were at the back of the main feed hopper. The land falls away quickly at the back as illustrated in Ex. P-3, p. 7. I credit the testimony of Mr. Richards that employees do not walk behind the feed hopper while it is operating because large rocks fall from the grizzly. Inspector Smith testified that he would not walk in this area. Nevertheless, I find that it is possible that an employee might walk near those moving parts that are pictured on the left side of the photographs. There is a wide flat area there that can be classified as a "walking surface." The rocks in the area create a tripping hazard. Consequently, I find that the Secretary established these violations. I find that the violations are not S&S because it is not reasonably likely that anyone would be exposed to the hazard assuming continued operations. It is not likely that anyone would walk in the area when the hopper was operating. The gravity is low. I also find that Richards Construction's negligence was low. Reasonable people could differ on whether guards were required at these locations under the safety standard. A penalty of $25 for each citation is appropriate.

D. <u>Unwarrantable Citation and Orders</u>

Citation No. **7904235** alleges a violation of section 56.14130(g) because Mr. Tanner was operating a front-end loader on an elevated ramp at the pit without wearing a seat belt. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson determined that citation should be modified to a section 104(d)(1) citation with high negligence. He made this change because the individual operating the loader was the "mine superintendent." The standard provides, in part, that "[s]eat belts shall be worn by the equipment operator." The Secretary proposes a penalty of $1,800 for this alleged violation.

Inspector Smith testified that when he first arrived at the pit, he observed Mr. Tanner operating the loader on the ramp to the hopper for the crusher. When Smith flagged him down, Tanner was not wearing the safety belt that was installed on the loader. (Tr. 240). When the inspector asked Tanner why he was not wearing it, Tanner replied that he was "just not wearing it." *Id.* Smith testified that it took Tanner quite a while to pull it out from under the seat cushion. Inspector Smith determined that the violation was S&S because Tanner was using the loader on

the elevated ramp and the ramp was not equipped with a berm. Smith was concerned about a rollover accident on the ramp which was about six feet off the ground at its highest point. (Tr. 242; Ex. P-3, p.1 top photo). He said that it was reasonably likely that a loader operator would roll his equipment over on the ramp and sustain a serious injury. (Tr. 252-53).

Mr. Richards testified that the loader was equipped with seatbelts. He stated that he instructed all equipment operators to wear seatbelts at all times. (Tr. 491). Richards testified that Tanner followed this rule when Richards was at the property. He admitted that Richards Construction received seatbelt citations in the past. Richards does not believe that the citation should have been designated as S&S or that a serious injury was reasonably likely. (Tr. 494). He also testified that the previous citation was designated as non-S&S. Richards also testified that the ramp was only about 50 to 55 inches high (4.5 feet). (Tr. 510-11). He believes that the inspector included some horizontal distance when he attempted to measure the height. Richards also maintains that his negligence was not high. He testified that Tanner wore his seatbelt when Richards was at the pit. (Tr. 495). Richards stated that he instructed Tanner to wear a seat belt and that his failure to do so should not be attributed to Richards Construction.

I find that the Secretary established a violation and that the violation was S&S. Based on the photograph, I credit Mr. Richards' testimony that the ramp was closer to 4.5 feet high than 6 feet high. Nevertheless, the violation created a serious safety hazard. It is reasonably likely that someone operating a loader without wearing a seat belt will be injured and that the injury will be reasonably serious. *See Lakeview Rock Products*, 17 FMSHRC 83, 87 (Jan. 1995)(ALJ). I reject the inspector's testimony that a fatal injury was reasonably likely, but that does not negate my S&S finding.

The key issue is whether the violation was caused by an unwarrantable failure of Richards Construction to comply with the safety standard. The Commission determined that unwarrantable failure is aggravated conduct constituting more that ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as: the extent of the violative condition; the length of time it has existed; the operator's efforts in abating the violative condition; whether the operator has been placed on notice that greater efforts are necessary for compliance; the operator's knowledge of the existence of the violation; and whether the violation is obvious or poses a high degree of danger. *See Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). These factors need to "be viewed in the context of the factual circumstances of a particular case, and some factors may be irrelevant to a particular factual scenario." *Id.* These factors must be examined to determine if "an actor's conduct is aggravated, or whether the level of the actor's negligence should be mitigated." *Id.*

Because Mr. Richards appointed Mr. Tanner as his agent in his absence, the negligence of Tanner is attributable to Richards Construction. During this inspection, Mr. Tanner stood in Mr. Richards' shoes, so to speak. Although this result may seem harsh, it has the effect of requiring mine operators to take every reasonable step to ensure that it appoints agents that are responsible and competent to manage the operation in a safe manner. In the case of mine operators that are corporations, the operator always depends on the acts of its agents. In this case the operator is a sole proprietor, Mr. Richards. When Mr. Richards is present, he directly manages the pit without any agents. On those occasions when he does rely on agent, Richards Construction is liable for the agent's negligent acts.

I find that this violation was the caused by the unwarrantable failure of the operator to comply with the safety standard. Richards Construction received a citation for a violation of this safety standard on August 6, 1998. (Ex. P-6). Consequently, Mr. Richards was aware that he needed to take further steps to enforce this safety standard at the pit. The operator's agent was well aware of the violation because he was the individual operating the loader. It appears that this was not the first time that Tanner operated the loader without wearing a seat belt because the belt was under the seat cushion between the back and the cushion. The violation was also obvious. Although I recognize that Mr. Richards was not at the pit to enforce his safety rules, his agent violated the safety standard and was aware that he was doing so. A penalty of $500 is appropriate for this violation.

Order No. **7904236** alleges a violation of section 56.15002 because Mr. Tanner was not wearing a protective hat at the pit. The inspector observed him walking through the crushing plant. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, 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 $1,400 for this alleged violation.

Inspector Smith testified that when Tanner told him that he was going to shut the plant down, he walked under two moving conveyors at the pit instead of walking on the roads to reach the other employee. (Tr. 260-61). Tanner was not wearing a hard hat at the time. Inspector Smith does not know what was on these particular conveyors at the time Tanner walked under them. (Tr. 265). He stated that if it was sand, a serious hazard would not be presented. When Tanner left the pit, he had his hard hat in his truck. (Tr. 273).

Mr. Richards testified that the conveyors that Tanner walked under carried three-eighths-inch sand. (Tr. 498). He stated that this material could not have injured Tanner even though he was not wearing his hard hat. Mr. Richards also testified that he cannot understand why Tanner walked through the plant given its configuration and the location of the other employee. (Tr. 499; Ex. R-5). He stated that Tanner would have gone out of way to do so and such action does not

make any sense. Mr. Richards stated that there was no likelihood of an injury in this case. (Tr. 500-01).

I find that the Secretary established a violation. As discussed above with respect to the guarding citations, the Commission interprets safety standards taking into consideration the unpredictable nature of human conduct. There are many areas at the crushing plant where falling objects may create a hazard. Although the conveyors that Smith saw Tanner walk under may have carried only sand, Tanner's actions indicate that he is not hesitant to walk in and around the plant without a hard hat. Given his behavior, the Secretary established a violation. I find, however, that the Secretary did not establish that the violation was S&S. Tanner walked through the plant in a fit of anger. I credit the testimony of Richards that Tanner did not walk under conveyors that carry large rocks. There is insufficient evidence to establish that it was reasonably likely that the hazard contributed to by the violation will result in an injury of a reasonably serious nature. It is impossible to ascertain whether Tanner's actions were unusual or commonplace. Although there is sufficient evidence to establish a violation, I cannot determine that the violation was S&S. The gravity was moderate.

I find that the Secretary established that this violation was caused by the unwarrantable failure of the operator to comply with the safety standard. The violation was obvious and it was committed by the agent that Richards Construction had put in charge of the pit. This violation demonstrated a serious lack of reasonable care on the part of Mr. Tanner. A penalty of $300 is appropriate.

Order No. **7904237** alleges a violation of section 56.15003 because Mr. Tanner was not wearing protective footwear at the pit. The inspector observed him walking through the crushing plant. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, 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 feet." The Secretary proposes a penalty of $2,000 for this alleged violation.

Inspector Smith testified that Tanner was wearing tennis shoes at the pit. (Tr. 291). Smith was concerned that if an object were to fall and hit his foot, he could suffer a serious injury. The inspector was primarily concerned about falling rocks. (Tr. 292). John Richards testified that it was highly unlikely that a large rock would fall on Tanner's foot. (Tr. 500). He also testified that Richards Construction was not negligent. (Tr. 501).

I find that the Secretary established a violation. Tanner was observed walking through the plant wearing tennis shoes. There were hazards present that could have caused injury to his feet. I also find that the violation is S&S. In analyzing the previous violation, I took into consideration the fact that Tanner might have inadvertently left his hard hat in the loader when he walked

through the crushing plant. In this instance I cannot reach such a conclusion. Had Inspector Smith not shown up at the pit, it is foreseeable that Tanner would have worn his tennis shoes all day. Numerous hazards exist at a crushing plant that can cause serious injury to an employee's feet. The evidence establishes that it was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature, assuming continuing operations at the pit.

I also find that the Secretary established that this violation was caused by the unwarrantable failure of the operator to comply with the safety standard. The violation was quite obvious and it was committed by the agent chosen by Mr. Richards to run the pit in his absence. This violation demonstrated more than a serious lack of reasonable care on the part of Tanner. A penalty of $500 is appropriate.

Order No. **7904238** alleges a violation of section 56.14132(a) because the backup alarm on the loader Mr. Tanner was operating was not working. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "audible warning devices provided on self-propelled mobile equipment shall be maintained in functional condition." The Secretary proposes a penalty of $2,500 for this alleged violation.

The inspector testified that he observed the loader back up and upon further inspection discovered that there was a broken wire on the alarm. (Tr. 293). Smith also observed a truck driver standing "in the area where the truck was backing up." (Tr. 294). He believes that it was reasonably likely that someone would be killed or injured as a result of this violation.

Mr. Richards testified that the broken wire was immediately repaired. (Tr. 503). He stated that although the truck drivers do get out of their vehicles to stretch their legs, they do not get in the way of the loader. He further testified that when a person regularly works around back- up alarms, he no longer hears them. He believes that backup alarms do little to prevent accidents. (Tr. 504). He stated that an accident was not reasonably likely. Richards does not know when the wire broke and stated that it could have occurred that morning. The backup alarm functioned properly in the past.

I find that the Secretary established an S&S violation. There is no dispute that the back-up alarm was not working. Although it is possible for people to get used to the sound of backup alarms, there is little dispute that they help prevent accidents. Hearing a backup alarm as back-ground noise is quite different from hearing one right behind you. Assuming continued mining operations, it was reasonably likely that the violation would contribute to an injury of a reasonably serious nature.

Whether this violation was the result of the operator's unwarrantable failure is a closer question. I find that this violation does not meet the unwarrantable failure criteria established by the Commission. The record does not reveal how long the condition existed. It is also not clear that the operator's agent knew about the violation, even though he was operating the loader. He may simply not have noticed, an indication of ordinary negligence. The record reveals that Richards Construction was cited for this safety standard in the past. (Ex. P-6). I find that the Secretary did not establish that Richards Construction was engaged in aggravated conduct constituting more than ordinary negligence. A penalty of $200 is appropriate.

Order No. **7904239** alleges a violation of section 56.9300(a) because a berm was not installed on the outer edge of the elevated ramp at the hopper. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $3,000 for this alleged violation.

Smith testified that there was no berm present on the right side of the ramp to the main feed hopper for the plant. (Tr. 295; Ex. P-3, p. 1 top photo). He measured the height of the ramp to be about 72 inches at the highest point. (Tr. 242, 541). He testified that it was reasonably likely that the loader operator would run the loader off the ramp because no berm was present and would seriously injure himself, especially since he was not wearing a seat belt. (Tr. 297).

Mr. Richards testified that Smith's measurement of the ramp was inaccurate. (Tr. 507-11; Ex. R-6). He believes that the ramp was about 4 to 4.5 feet above the surrounding land at its highest point. *Id.* Richards also testified that the ramp is about 55 feet wide; the loader is 12 feet wide; and the feed hopper is 14 feet wide. (Tr. 512-13). In addition, the ramp is about 25 feet long and the loader is about 35 feet long. *Id.* Richards testified that given these dimensions, it is highly unlikely that the loader operator would go off the edge of the ramp. First, the ramp is more than four times as wide as the loader so it is not likely that the operator would be near the edge. Second, when the loader is up on the ramp dumping material into the hopper, its rear wheels are not on the ramp. Given these facts, Mr. Richards believes that an accident was highly unlikely.

Mr. Richards also testified that MSHA inspected this ramp in the previous August and issued a citation because the berm on the left side of the ramp was not high enough. (Tr. 514; Ex. P-6). Richards states he was not negligent with respect to this citation because an MSHA inspector previously inspected this ramp and did not believe that the area cited in this case required a berm. He testified that the ramp had not changed in the intervening year. *Id.*

I find that the Secretary established a violation. The Secretary established that the drop-off on the right side of the ramp was of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment. As stated above, the fact that another inspector did not write a citation for this condition does not negate the violation. In general, it is reasonably likely that a drop-off on the side of a ramp to a feed hopper would contribute to an injury of a reasonably serious nature. Given the facts that Mr. Richards presented, I find that the Secretary did not establish an S&S violation. I credit the dimensions that Mr. Richards introduced at the hearing. The ramp was very wide relative to the size of the loader. The ramp was quite short relative to the length of the loader. The hopper was near the center of the ramp. The Secretary did not meet the third element of the Commission's *Mathies* test. It was not reasonably likely that the loader operator will accidentally run off the edge of the ramp. Although such an event is possible, it is not reasonably likely. The gravity is moderate.

I also find that Richards Construction did not engage in aggravated conduct constituting more than ordinary negligence. Although the condition had existed for a long period of time, an MSHA inspector observed the condition the previous August and did not issue a citation. The previous inspector issued a non-S&S citation because the berm on the opposite side of the ramp was not high enough. (Ex. P-6). Richards Construction was not put on notice that greater efforts are necessary for compliance. If anything, the previous MSHA inspector lulled Mr. Richards into believing that a berm was not required on the right side of the ramp. I delete the unwarrantable failure designation from this order and hold that the operator's negligence was quite low. A penalty of $50 is appropriate.

Order No. **7904245** alleges a violation of section 56.12005 because an unbridged electrical cord extended across a roadway at the pit. The cord provided power to a radio. Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[m]obile equipment shall not run over power conductors . . . unless the conductors are properly bridged or protected." The Secretary proposes a penalty of $900 for this alleged violation.

Inspector Smith testified that he observed a pickup truck drive across the cited power cord. (Tr. 297; Ex. P-3. P. 4 top photo). Mr. Tanner was in the truck that ran over the cord as he left the pit. Smith testified that driving over the power cord could damage the insulation and create a safety hazard.

Mr. Richards testified that the radio and the cord were the personal property of the crusher operator. (Tr. 515). He took the radio home with him every night and threw the cord back across the road. Tanner drove over it in anger soon after Inspector Smith arrived at the mine. Apparently, Tanner had an argument with another MSHA inspector on a previous occasion. *Id.* Richards testified that he does not want the crusher operator to listen to the radio

because he wants him to be able to hear the crusher. Since this is not his equipment, Richards does not believe that he should be held responsible.

I find that the Secretary established a violation. I find, however, that the violation does not fit the criteria for unwarrantable failure. The violation was not serious; it had not existed for a long period of time; and there was no showing that the operator had been put on notice that greater efforts were necessary to comply with this standard. The violation is not very obvious because there was no showing that vehicles normally traveled through this area while the cord was present. There is no showing that the operator engaged in aggravated conduct constituting more than ordinary negligence other than the fact that Tanner drove over it when leaving the pit. The negligence of Richards Construction was moderate. I find that a penalty of $50 is appropriate.

Order No. **7904256** alleges a violation of section 56.18002(a) because a competent person was not examining each working place at least once each shift for hazardous conditions. Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. After reviewing the facts at the safety and health conference, MSHA Inspector Wasson modified the original citation to a section 104(d)(1) order with high negligence. The standard provides, in part, that "[a] competent person . . . shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The Secretary proposes a penalty of $2,500 for this alleged violation.

The inspector testified that he issued this citation because he issued a large number of citations for obvious safety violations. (Tr. 300). He designated this violation as S&S "because of the large number of [S&S] violations" he had written. (Tr. 301). He believed that serious injuries would likely result from the operator's failure to do on-shift examinations. He felt that at the time of the inspection, the pit was in very poor condition "safety wise." *Id.*

Mr. Richards testified that he thought, based on his prior experience with Mr. Tanner, that the pit would be operated in a competent manner when he was in Houston. (Tr. 519). He has a difficult time understanding why Tanner let him down. He does not believe that this citation was S&S because he makes sure that the pit is safe when he is there.

I find that the Secretary established an S&S violation. The Commission identified three requirements of section 56.18002 as follows: (1) . . . 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 defines 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. Mr. Richards did not present any evidence that the required examinations were being performed or recorded. He testified that his employees quickly repair any conditions that create a safety hazard, at least when he is at the pit. (Tr. 518). Although that

is an excellent practice, if followed, it does not comply with the safety standard. Given the large number of violations discovered during this inspection, it was reasonably likely that the violation would contribute to an injury of a reasonably serious nature, assuming continued mining operations. *See Nelson Bros. Quarries, Inc.*, 21 FMSHRC 1100, 1110 (Oct. 1999) (ALJ); *but cf. Dumbarton Quarry Associates,* 21 FMSHRC 1132, 1136 (Oct. 1999) (ALJ).

I also hold that the violation was created by the operator's aggravated conduct constituting more than ordinary negligence. Tanner was the agent of Richards Construction. Richards testified that another inspector had discussed the need for on-shift examinations with him during a previous inspection. (Tr. 518-19). Consequently, he was put on notice that greater efforts were necessary. Smith asked Lance Richards about examination records, but the inspector was not shown any such records. The violation was extensive because no records were kept. Mr. Richards knew of the specific requirements of this safety standard. I find that the operator unwarrantably failed to comply with the standard. A penalty of $500 is appropriate.

E. Other Citations

Citation No. **7904243** alleges a violation of section 56.4101 because signs were not posted at the portable fuel storage tank at the crushing plant prohibiting smoking and open flames. Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. Section 56.4101 provides, in part, that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The Secretary proposes a penalty of $224 for this alleged violation.

Inspector Smith testified that there were no signs prohibiting open flames or smoking near the fuel storage tank. (Tr. 120; Ex. P-3, p. 3). The tank contained diesel fuel, which could catch on fire or explode if someone smoked or lit a match in the area. Mr. Richards testified that there was a "no smoking" sign on the trailer about 50 feet from the cited portable fuel storage tank. (Tr. 453-54). He further testified that none of his employees smoke. He stated that a fire or explosion was highly unlikely.

The safety standard requires that the warning sign must be posted "where a fire or explosion hazard exists." The only warning sign was 50 feet away on a trailer. The portable fuel storage tank can be moved at any time and it was not at the same location on the date of the hearing. *Id.* I find that the Secretary established a violation. The violation was not very serious. The fact that no employee smokes is not controlling since a truck driver or other person could smoke in the area without realizing the hazard. The operator's negligence was moderate. A penalty of $50 is appropriate.

Citation No. **7904244** alleges a violation of section 56.4200(a)(1) because firefighting equipment was not present at the portable fuel storage tank at the crushing plant. Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. Section 56.4200(a)(1) provides that each mine shall have "onsite

firefighting equipment for fighting fires in their early stages." The Secretary proposes a penalty of $224 for this alleged violation.

The inspector testified that this citation involves the same fuel storage tank. He stated that he could not find any firefighting equipment in the vicinity of the fuel tank. (Tr. 122). Richards testified that he had fire extinguishers in his trailer and a water hose was about 24 feet from the fuel tank. (Tr. 455). In addition, he testified that the best way to fight a fire is to throw dirt on the fire. A shovel was located near the fuel tank and there was plenty of dirt available.

I find that the Secretary did not establish a violation. The safety standard provides that the mine operator must have "onsite firefighting equipment," but it does not require that this equipment be located at fuel storage tanks. Inspector Smith did not know what firefighting equipment the operator had at the pit. (Tr. 122). This citation is vacated.

Citation No. **7904250** alleges a violation of section 56.12004 because the outer jacket on the orange extension cord in use behind the electrical trailer was damaged, but bare copper wire was not exposed. The safety standard provides, in part, that electrical conductors "exposed to mechanical damage shall be protected." Inspector Smith determined that the violation was not S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $224 for this alleged violation.

Smith testified that he saw an extension cord that had a broken jacket in at least one location. (Tr. 198; Ex. P-3, p. 6 bottom photo). The cord had not been spliced or repaired. The cord was plugged into an outlet. (Tr. 202). Mr. Richards testified that the cited cord was not one of his cords. (Tr. 479). The cord cited by the inspector looks very cheap and unreliable. Richards believes that one of his employees must have brought it for his radio. He believes that this cord was not being used for anything and was not energized. Richards stated that if he knew that the cord was at the pit, he would have thrown it away. (Tr. 480). Richards testified that his negligence should be low.

I find that the Secretary established a violation. The violation was not serious and the operator's negligence was moderate to low. It created a slight risk of an electric shock. A penalty of $30 is appropriate.

Citation No. **7904253** alleges a violation of section 56.18013 because a communication system was not provided at the crushing plant for employees to use in the event of an emergency. The safety standard provides, in part, that a "suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency." Inspector Smith determined that the violation was S&S and that it was the result of Richards Construction's moderate negligence. The Secretary proposes a penalty of $655 for this alleged violation.

Inspector Smith testified that Lance Richards told him that he had a cellular phone but that there was no provision for a phone to be present at all times. (Tr. 230-31). Smith determined

that the violation was S&S because there were a number of serious hazards at the pit and there was no way to obtain emergency assistance. For example, if someone were to become caught in a tail pulley, he would need immediate medical assistance. (Tr. 232). Smith relied on the statements made by Lance Richards in issuing the citation. (Tr. 233). Mr. Richards testified that there was a house, which is kept unlocked, about 300 feet from the pit where there was a telephone. (Tr. 486). He also testified his truck has a CB radio in it that can be used to obtain emergency assistance. Richards further testified that there were other facilities nearby, including a state maintenance yard, that could be used for emergency communications. Finally, he stated that the scale house contained a telephone. (Tr. 487). He agrees that it is important to have a means of obtaining emergency assistance. Richards testified that the Seeley Lake paramedics are about 2.5 miles away and that they could be at the pit in about three minutes. *Id.*

I find that the Secretary established a violation. The safety standard requires that the mine operator provide an emergency communication system. Richards Construction cannot rely on off-site telephones under the control of others to comply with the standard. *See Ferndale Ready Mix & Gravel, Inc.*, 6 FMSHRC 2154, 2160 (Sept. 1984) (ALJ). The CB radio in Mr. Richards truck is not sufficient because the truck is not always at the pit. *See Robert L. Weaver*, 21 FMSHRC 370, 372 (March 1999) (ALJ). Finally, I question Richards' testimony concerning the telephone in the scale house. Mr. Richards testimony about this phone was almost an afterthought. The scale house was kept locked and the employees were apparently not provided with a key so an employee would be required to break the window to use this phone. Lance Richards made no mention of such a telephone to the inspector. Since Lance Richards did not remember this phone, the two employees at the pit may not remember it either. Given these facts, I find that Richards Construction did not comply with the safety standard.

I also find that the violation was S&S. A quick response to a medical emergency can help prevent permanent injuries and fatalities. *Id.* When an accident occurs, the lack of a communications system can contribute to a fatal accident. I find that it was reasonably likely that the violation would contribute to an injury of a reasonably serious nature, assuming continued mining operations. The operator's negligence was moderate. A civil penalty of $200 is appropriate.

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 13 non-S&S citations were issued at the pit between February 4, 1997, and February 3, 1999. (Ex. P-6). Richards Construction is a very small operator with two employees in addition to Mr. Richards. MSHA's records show that the pit worked about 1860 man-hours in 1998, less than 900 man-hours in 1999, and 286 man-hours in 2000. (Ex. J-1). All of the citations and orders were abated in good faith. In the absence of evidence to the contrary, I find that the penalties assessed in this decision will not have an adverse effect on Richards Construction's ability to continue in business. My findings with regard to gravity and negligence are set forth above. Based on the penalty criteria, I find that the

penalties set forth below are appropriate. The reduction in the penalties is based primarily on the very small size of the operator and, where noted above, the gravity and negligence criteria.

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 99-348-M		
7903871	56.1000	Vacated
WEST 2000-168-M		
7904240	56.14107(a)	$200.00
7904241	56.14107(a)	10.00
7904242	56.14107(a)	50.00
7904243	56.4101	50.00
7904244	56.4200(a)(1)	Vacated
7904246	56.14107(a)	200.00
7904247	56.14107(a)	10.00
7904248	56.14107(a)	250.00
7904249	56.14107(a)	200.00
7904250	56.12004	30.00
7904251	56.14107(a)	25.00
7904252	56.14107(a)	25.00
7904253	56.18013	200.00
WEST 2000-470-M		
7904235	56.14130(g)	500.00
7904236	56.15002	300.00
7904237	56.15003	500.00
7904238	56.14132(a)	200.00
7904239	56.9300(a)	50.00
7904245	56.12005	50.00
7904256	56.18002(a)	500.00
Total Penalty		$3,350.00

Accordingly, the citations and orders contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Richards Construction is **ORDERED TO PAY** the Secretary of Labor the sum of $3,350.00 within 90 days of the date of this decision, unless the parties agree upon a different payment schedule. Upon payment of this penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

John Richards, John Richards Construction, Box 316, Seeley Lake, MT 59868 (Certified Mail)

RWM