FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 15, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 96-67-M
Petitioner	:	A. C. No. 30-01545-05512
v.	:	
	:	Docket No. YORK 96-69-M
F. PALUMBO SAND & GRAVEL,	:	A. C. No. 30-01545-05513
Respondent	:	
	:	Dover Pit

DECISION

Appearances: John G. Campbell, Esq., James A. Magenheimer, Esq., Office of the Solicitor, U. S. Department of Labor, New York, New York, for the Secretary; Fortunato Palumbo, Pro Se, F. Paulumbo Sand and Gravel, Dover Plains, New York.

Before: Judge Barbour

In these civil penalty cases, the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), seeks the assessment of civil penalties against F. Palumbo Sand & Gravel (the company), for numerous alleged violations of the mandatory safety standards for surface metal and nonmetal mines. (The standards are found at 30 C.F.R. Part 56.) The Secretary alleges the violations occurred at the company=s Dover Pit located in Duchess County, New York, and that several of the violations were significant and substantial contributions to mine safety hazards (S&S violations). The alleged violations were cited on April 10, 17-19, 1996.

The company raises a general defense to the validity of the inspections that resulted in the citations and specific defenses to the particular alleged violations. The cases were heard in Poughkeepsie, New York.

THE NATURE OF THE FACILITY

John Paterson, an MSHA inspector, and Fortunato Palumbo, an owner of the company, described the facility as a sand and gravel extraction and processing operation. At the pit, stone is extracted and processed. Once extracted, the stone is put into a hopper, passed from the hopper into a vibrating feeder, and passed from the feeder onto a vibrating screen. Stone smaller than an

inch and a half in size is dropped onto a main conveyor belt . Larger material is passed through a jaw crusher where it is reduced in size and dropped onto the same belt. Once on the main conveyor belt, the crushed stone is carried to a screen tower where three vibrating screens separate the stone. Larger stone is carried on a transfer conveyor to a cone crusher where it is reduced to a smaller size. It then is transported by conveyor belt to a stock pile (Tr. 44-45, 58). Also, sand is processed at the facility (Id.).

MOTION TO DISMISS

At the commencement of the proceedings, Carmine Palumbo, co-owner of the company, moved in effect to vacate the citations and to dismiss the proceedings. He explained that MSHA improperly inspected the pit and issued the citations before the facility was ready to operate. According to Palumbo, MSHA instructed the company to advise it by telephone when it was going to commence operations in the spring. Previously, inspectors had not come to the mine until the agency was notified. However, in April 1996, MSHA did not wait for a telephone call. Rather, MSHA=s inspectors arrived unannounced. In Carmine Palumbo=s view, their visit was premature. He maintained that the inspectors Ashouldn=t have been there until [the facility] was officially open for business@ (Tr. 22).

Fortunato Palumbo explained that due to weather conditions the pit closed for the winter and that it was customary for the company to make repairs and to do needed maintenance prior to staring operations in the spring. Normally, this work was done in March. However, the winter of 1995-1996 was a long one, with heavy snow in March and snow and rain in April. Therefore, when the inspectors arrived, the company was still in the process of repairing equipment and replacing needed components (Tr. 51-53).

Fortunato Palumbo expressed the company=s objection to the April inspections:

> We . . . feel like the man that=s got a car in a repair shop with brakes being replaced and a policeman coming in and giving you a citation for bad brakes. It is not something that we consider to have been fair or equitable (Tr. 53).

Counsel for the Secretary responded that the Mine Act prohibits prior notice of inspections and that MSHA inspectors acted within the law when they conducted the inspections in question (Tr. 21).

I took the arguments under advisement (Tr. 23). After considering all of the testimony, and for the reasons that follow, I conclude the facility was operating when MSHA=s inspectors arrived at the mine and that the April inspections were proper.

Patterson was the first inspector to visit the pit in April. His testimony regarding what he was told at the mine and what he saw during his inspections was credible and is decisive. He stated that Carmine Palumbo told him Ahe would rather [Patterson] left and came back another time,@ that the facility Ahad been operation for only a week or two and they hadn=t had a chance . . . to get things done they wanted to do@ (Tr. 43). Moreover, while at the pit Patterson observed the front end loader operating, as well as the jaw crusher and the vibrating screens. In addition, the conveyor belts were running and stone was being conveyed to the stock piles (Tr. 44).

The Palumbo=s argued the pit was in a Ashakedown@ period, and I do not doubt it. It is logical that the first few days after the pit reopened for the season, the company would check and repair equipment. However, it is also true equipment at the facility was operating, and even if very few miners were as yet working at the pit, those present were entitled to the protection of the Act and the regulations promulgated pursuant to the Act. MSHA=s inspectors had every right to arrive unannounced at the pit and, based upon what they saw, to inspect the facility (see 30 U.S.C. ' 813(a)).

CONTESTED CITATIONS
YORK 96-67-M

Citation	Date	56 C.F.R. '	Proposed Penalty
4285641	4/8/96	12025	$81

The citation states:

> The 3 phase power circuit of [the] 5 horsepower, 230/460 volt Teco motor that powers the cone crusher hydraulic pump was not grounded.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Section 56.12025 requires in part that AAll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.@

Patterson described the motor that provided power for the cone crusher=s pump as cylindrical in shape and 10 to 12 inches in diameter. The motor was encased in metal and mounted on a metal platform (Tr. 68-69). Electricity entered the motor through a junction box. (Although he stated on the citation the electricity rated 230 to 460 volts, Patterson testified it was actually 240 to 460 volts (Tr. 77-78)).

Patterson saw only three wires entering the box. In his opinion, there should have been a fourth wire, a ground wire. When Patterson did not see the fourth wire, he concluded the metal casing of the motor was not grounded and section 56.12025 was violated (Tr. 69; see Gov. Exh. 2B).

Patterson was not alone in this view. MSHA electrical inspector, Jon Montgomery, who inspected the mine a few days after Patterson, also believed that a fourth wire was necessary to meet the standard=s grounding requirement. He testified a ground wire was Athe best way@ to insure a path back to the electrical source (Tr. 278, 280).

Patterson believed the lack of a ground wire was dangerous. If insulation on a conduit wore and exposed a naked wire, and if the bare wire touched the motor=s metal casing, a person who touched the metal could be severely shocked or electrocuted (Tr. 70). However, if the metal casing were properly grounded, the electricity would travel back to the source of the power, rather than through the person (Tr. 71).

Employees regularly traveled in the area where the motor was located to grease the crusher or to check oil levels on the equipment. Also, there was a portable welder in the area, sitting within a foot or two of the motor (Tr. 72). The mine floor in the area where the motor was located was saturated with water (Tr. 71). In Patterson=s opinion, this increased the likelihood of a person becoming Aa fantastic conductor@ for electricity (Tr. 76).

Fortunato Palumbo asked Patterson if he knew whether the motor casing and the entire structure on which it sat was grounded Athrough steel beams and . . . steel lattice work,@ i.e., if he knew whether everything was frame grounded (Tr. 77). Patterson did not know, but he testified he told Carmine Palumbo that even if the motor casing were frame grounded, there had to be a wire ground that went back to the electrical source (Tr. 81-82). Patterson emphasized that MSHA did not accept frame grounding. The agency required a four wire system (Tr. 79). According to Patterson, MSHA=s policy was set forth in the agency=s *Program Policy Manual* (*PPM*) (85-86).

Fortunato Palumbo stated that he did not know if the ground wire was missing, as Patterson maintained (Tr. 84), but in any event, the pump motor was frame grounded.

THE VIOLATION

Patterson was specific in describing the lack of an observable ground wire (Tr. 69), whereas Fortunato Palumbo did not know whether it was missing (Tr. 84). Therefore, I find the Secretary established that there was no fourth wire to ground the motor=s metal casing.

Fortunato Palumbo was equally specific in testifying how the cited equipment was frame grounded (Tr. 83-84), whereas Patterson did not know whether or not it was (Tr. 85). Therefore, I find the company established the motor casing was frame grounded.

Section 56.12025 does not set forth any particular means for grounding metal enclosing or encasing electrical motors. The standards for metal and nonmetal mines define Aelectrical grounding@ as Ato connect with the ground to make the earth part of the circuit@ (30 C.F.R. ' 56.2). This is exactly what Fortunato Palumbo described with respect to the frame grounding of the cited motor casing.

In a case involving a similar set of facts, Commission Administrative Law Judge Richard Manning stated that he did Anot doubt that a fourth wire grounding system is state of the art at the present time and that it offers certain advantages over . . . [a frame grounding] system,@ but that if the proof established the cited casing was frame grounded, A[t]he Secretary failed to show . . . that the metal encasing the cited motor was not grounded nor provided with equivalent protection@ *Tide Creek Rock, Inc.*, 18 FMSHRC 390, 396-397 (March 1996)). I find Judge Manning=s reasoning equally applicable here.

Further, although Patterson believed the *PPM* prohibited frame grounding, I do not read it to do so. There is no provision of the *PPM* dealing with section 56.12025, and the provision to which the inspector apparently referred, 56/57.12028, is intended to insure that continuity and resistance tests of grounding systems are conducted on a specific schedule. While the provision may have been premised on the assumption that the systems tested are not frame grounded systems, it does not specifically prohibit frame grounding (Gov. Exh. 3; see also IV *PPM* at 51-52).

Commission Administrative Law Judge Augustus Cetti has suggested, AIf the Secretary believes frame grounding should be prohibited, the Secretary should initiate appropriate rule making to achieve this goal@ (*Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384, 388 (March 1996) (ALJ Cetti)). It is a good suggestion.

I conclude the alleged violation has not been proven.

Citation	Date	56 C.F.R. '	Proposed Penalty
4286260	4/8/96	14112(b)	$ 111

The citation states:

> The guard had been removed from the back-side of the crossover belt tail pulley and was not replaced. The self cleaning tail pulley was approximately 2 feet above ground level. Existing hardware for attaching the guard indicates this tail pulley had previously been guarded.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson observed stone being carried on the crossover conveyor belt (Tr. 41-42). Although the belt was operating, the guard protecting its tail pulley assembly was missing. There had been hooks on the tail pulley to which a guard screen had been attached, but the hooks either were so bent they could not be used, or they had been removed (Tr. 38-39).

The tail pulley assembly was between 1 and 2 feet above ground. A space that measured about 1 1/2 feet wide existed on both sides of the tail pulley. This was enough room for a miner to walk without restriction into the tail pulley (Tr. 28). Employees had to go into the area to grease the pulley. From time to time they also needed to clean spillage under and around the pulley, to dislodge stones stuck in the pulley, and to adjust the belt (Tr. 30).

Without a guard, Patterson believed it reasonably likely a miner=s clothing would be caught in the tail pulley and the miner would be dragged into the mechanism. The miner would suffer injuries ranging from broken bones to death (Tr. 29-31).

Fortunato Palumbo agreed with Patterson that the guard was missing (Tr. 37). However he disagreed with Patterson=s assessment of the hazard. He testified that all maintenance of the equipment was done in the morning before the equipment was started, and if there was any spillage it was cleaned up after the equipment was shut down (Tr. 63).

THE VIOLATION

Section 56.14112(b) requires that AGuards . . . be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.@

The company did not dispute that the guard was missing and the belt was operating. Therefore, I find these conditions existed. The company maintained as a general matter that it was in the process of repairing and maintaining the equipment at the pit and the guard Awould normally have been there when [the company] completed [the] repairs and maintenance@ (Tr. 37). However, no one was doing adjustment or maintenance on the tail pulley assembly or the conveyor belt when Patterson was there, and Patterson saw no evidence such work was in progress. I conclude the Secretary proved the violation as charged.

S&S AND GRAVITY

A violation 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 reasonable serious nature@ (*Cement Division, National Gypsum Co.*, 3 FMSHRC 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard **C** that is, a measure of danger to safety contributed to be 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 reasonable serious nature (*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984); see also *Austin Power Co.* v. *Secretary*, 861 F.2d 99, 104-105 (5th Cir. 1988) (approving *Mathies* criteria)).

The question of whether a violation is S&S must be resolved on the basis of the conditions as they existed at the time of the violation and as they might have existed under continued normal mining operations (*Eastern Associated Coal Corp.*, 13 FMSHRC 178, 183 (February 1991); *U. S. Steel Mining Co., 7* FMSHRC 1125, 1130 (August 1985)).

Here, there was a violation, and the lack of a guard at the tail pulley contributed to the hazard that a miner working in the vicinity of the pulley would be caught in the pulley mechanism and be seriously injured or worse.

I credit Patterson=s testimony that from time-to-time miners needed access to the tail pulley to adjust it, clean up around it, and/or maintain it (Tr. 30). While I credit Fortunato Palumbo=s testimony such work usually was done either before the belt was started or after it was shut down (Tr. 63), I would be naive to believe this always occurred. It is common knowledge that clean up or maintenance work is at times required after the belt has started operating and that miners attempt to do the work quickly before the belt is shut down. It is something that happens in the context of continued normal mining operations.

I therefore conclude that as mining continued it was reasonably likely that a miner would attempt to do clean up or maintenance work around the unguarded trail pulley assembly, would be caught and dragged into the pulley, and that the resulting injuries would be of a reasonably serious nature. The violation was S&S.

Because the company was doing maintenance work at the same time it was processing stone, it is likely miners either had been and would be in the vicinity of the tail pulley. In view of the fact that I believe it is likely some work around the pulley would be conducted while the conveyor belt was running, and in view of the gravity of the injuries that could be expected when a miner was caught in the unguarded pulley assembly, I find the violation was serious.

NEGLIGENCE

I have found there was maintenance work going on at the facility. I also believe the Palumbos= contention the facility was not yet in a total operational mode. Because the facility was not yet operating at Afull tilt,@ the frequency with which miners were exposed to the hazards of everyday mining was lessened, as was the company=s duty of care. I conclude, therefore, that the company=s negligence was moderate.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285642	4/8/96	14109(b)(1)	$50

The citation states:

> The metal rails that were used to prevent a person from falling against the first 4 troughing rolls and [the] belt (both sides) of the crossover conveyor had been removed and were not replaced. The unguarded rolls were approximately 3 1/2 to 5 1/2 feet above ground level.

Patterson testified the conveyor belt below the cone crusher was not guarded adequately to prevent miners from contacting the belt or four troughing rolls under the belt (Tr. 100). (ATroughing rolls@ are defined as A[R]olls . . . that are so mounted on an incline as to elevate each edge of the belt into a trough@ (U. S. Department of the Interior, *A Dictionary of Mining Mineral and Related Terms* (1968) at 1169)). Patterson stated the purpose of the rolls was to Amake the belt into a trough . . . to keep the material within the belt so it doesn=t run off all over the ground@ (Tr. 102; see Gov. Exh. 2C, 2 BB).

The conveyor belt was between 3 1/2 to 5 1/2 feet above the ground. The belt was running and there was stone on it. Railings that had protected miners from the danger of contacting the belt and rollers had been removed. Patterson feared a person walking by the belt could fall or trip or slip and be caught in turning rollers (Tr. 101-103).

Fortunato Palumbo again maintained that the plant was being operated only on a Atest run@ basis and that, in fact, the plant could not have been fully operational because at that time there was no water to clean the material as it was processed (Tr. 105). According to Palumbo, the railings had been taken down when new rollers were installed (Tr. 108-109). There was stone on the belt and the belt was running because the only way to make sure the belt was aligned properly was to run it (Tr. 110).

THE VIOLATION

Section 56.14109(b)(1) states that AUnguarded conveyors next to the travelways shall be equipped with **C** [r]ailings which **C** [a]re positioned to prevent persons from falling on or against the conveyor.@

To establish a violation the Secretary must prove the cited conveyor was unguarded, that it was next to a travelway, and that it did not have a railing to prevent a person from falling on or against the conveyor. Patterson testified without dispute that both sides of the crossover conveyor were unguarded (Tr. 100). Patterson also testified without dispute that there were no railings to prevent a person from stumbling or tripping into the belt mechanisms (Tr. 101). Patterson did not specifically testify that a travelway was next to the belt, but he did state that without the railings, a person walking by the belt could fall, trip, or slip and be caught in the unguarded conveyor belt and rollers (Tr. 101). Obviously, a person could not fall, trip, or slip into these mechanisms unless the person was or had traveled in the vicinity of the rollers. It is obvious too that a person would have to walk or travel next to the belt to gain access to the conveyor belt rollers. I infer from these factors, as well as from the fact railings had been in place previously (Tr. 108), that the belt was next to a travelway, and I conclude the Secretary established the violation.

In finding the violation, I reject any suggestion compliance was not required because the railings had been removed in order to install new rollers. That work was over. Fortunato Palumbo spoke of the rollers as having been Anewly installed@ (Tr. 108). The railings should have been replaced once the work was finished.

I also reject the suggestion there was no violation because the pit was operating on a Atest run@ basis. As I have found, while I do not doubt maintenance work was being done, it is also true that equipment was being operated and stone was moving along and through the equipment. As a result, the company=s miners were entitled to the full protection of the Act, whether or not the facility was totally operational.

GRAVITY

Patterson found that the violation was not serious. It long has been held the gravity of a violation is determined by analyzing the potential hazard to the safety of miners and the probability of the hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 120 (May 1972)). While Patterson testified regarding the potential hazard to miners, neither he nor any other witness for the Secretary offered a view as to the probability of a miner being caught in the conveyor belt rollers or being injured by falling onto the belt. For example, there was no testimony regarding the frequency with which miners accessed the travelway nor was there testimony regarding conditions on the travelway. I find, therefore, that this was not a serious violation.

NEGLIGENCE

For the reasons stated with regard to Citation No. 4286260, I find the company=s negligence was moderate.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285643	4/9/96	12025	$117

The citation states:

> The 110 volt electrical circuit that provides power to the diesel pump located at the diesel fuel skid tank was not provided with a guard. The ground prong had been removed from the power cord plug in the switch/utility trailer.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

While at the pit=s motor control trailer, Patterson noticed and inspected the electric cable that provided power to the diesel fuel pump. (Patterson described the fuel pump as the Atype of . . . pump that . . . would pump gas into your vehicle at a service station@ (Tr. 121).) The cable carried 110 volts of electricity. The cable ran from the trailer up a hill to the fuel pump. The pump was enclosed in a metal housing. A rope was tied around the housing and Patterson noticed that the wire which had served as the ground wire for the pump was hanging loose, unconnected to the pump (Tr. 121, 123; see Gov. Exh. 2F). The disconnected ground wire indicated to Patterson that the metal casing enclosing the pump motor was not grounded (Tr. 122).

Patterson believed that the failure to ground the motor=s casing subjected miners to the danger of being shocked or burned. If the electrical circuit to the pump contained a fault, a miner who was pumping fuel and touched the pump could, as Patterson put it, Aget zapped@ (Tr. 123). Further, the earth around the pump was damp (Id.).

Fortunato Palumbo maintained the pump had been idle all winter and when Patterson saw it the company was in the process of checking the pump=s electrical integrity. This was part of the normal spring Ashakedown@ procedure (Tr. 127).

THE VIOLATION

As noted, section 56.12025 requires the grounding of metal enclosures or casings of electrical circuits. Patterson=s testimony describes, and the Secretary=s photographic evidence confirms, that the metal casing of the electrical motor of the fuel pump was not grounded (Tr. 121-123; Gov. Exh. 2F). Fortunato Palumbo essentially agreed that Patterson accurately described the condition of the pump (Tr. 126-127). Patterson saw no evidence the company was

engaged actively in checking the pump=s electrical circuits when he inspected the pump. If the company checked the circuits prior to Patterson=s inspection, it should have reconnected the ground wire. Further, the company did not contend the pump casing was frame grounded. Therefore, I find that the violation existed as charged.

S&S and GRAVITY

The Secretary established three elements of the proof necessary to sustain an S&S finding. There was a violation of the cited mandatory safety standard, the violation subjected those who used the pump to the possibility of being shocked, perhaps seriously. However, it is not possible to determine the reasonably likelihood of the injury. Patterson testified that if there was a fault in the circuit, any miner touching the pump could be shocked (Tr. 123). He also testified that the pump might be used up to two times a day (Tr. 124). What he did not reveal was how likely an electrical fault was or would be as mining continued. Nor did he explain how miners using the pump would touch its energized casing or how likely such contact was. Without evidence on the Alikelihood@ factor, I cannot find the violation was S&S.

Nevertheless, the violation was serious. Although the likelihood of an electrical fault is not clear, it is possible one could have occurred. The conductor to the pump carried 110 volts, and the metal casing could have been energized. Also, it is possible that a miner using the pump could have touched the casing. The ground around the pump was damp. As Patterson explained, the violation could have lead to a miner=s body becoming the shortest route to ground the current (Tr. 123). Further, although the circuit carried only 110 volts, Montgomery persuasively described, in the context of another violation, how shocks from low voltage can have serious consequences (Tr. 276-277).

NEGLIGENCE

For the reasons stated with respect to Citation No. 4286260, I find the company=s negligence was moderate.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285644	4/9/96	4101	$50

The citation states:

> Signs prohibiting smoking and open flames were not posted at the diesel fuel skid tank.

Patterson noticed an above-ground fuel tank attached to the pump. The tank contained diesel fuel. Patterson saw no signs warning against smoking or open flames. Patterson believed the signs were required by section 56.4101 (Tr. 138).

In Patterson=s opinion the lack of warning signs could have lead to someone smoking or to someone using an open flame **C** a blow torch, for example **C** which in turn could have resulted in a fire or explosion (Tr. 139). However, Patterson agreed with Fortunato Palumbo, that diesel fuel is less volatile and harder to ignite than gasoline and that this somewhat lessened the chance of a fire or explosion (Tr. 141-142).

THE VIOLATION

Section 56.4101 states AReadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists.@ The company does not dispute there were no signs. Nor does it dispute there was a fire or explosion hazard at the tank. Rather, it argues the danger was less with diesel fuel than if the tank held gasoline. Therefore, I agree with Carmine Palumbo who stated, AWe are guilty of not having a sign@ (Tr. 142), and I find that the company violated section 56.4101.

GRAVITY

Failure to post the signs was not a serious violation. The signs are not a primary preventive measure. Rather, they are secondary in that they are designed to remind miners of what they already know **C** not to smoke or use open flames around a visually obvious fuel tank. The fact that few miners were at the mine reduced the possibility the lack of a sign would contribute to a fire or explosion, and Patterson agreed that the diesel fuel was less likely to be ignited by a lighted cigarette or an open flame (Tr. 141-142).

NEGLIGENCE

Although the violation was visually obvious, the company=s negligence was low given the fact that the company was just beginning its seasonal operation, the fact that few miners were at the mine, and the fact that hazard was not serious.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285645	4/9/96	14112(b)	$111

The citation states:

> Both sides and the back of the tail pulley guard at the main belt below the jaw crusher were removed and were not replaced before the belt was energized. Existing bolts on the conveyor frame indicate this area had been guarded

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson found the tail pulley of the main conveyor belt beneath the jaw crusher was not guarded. (The conveyor transports material from the crusher to the screen tower.) The pulley was located about 1 1/2 to 2 feet above the ground. The pulley was different from a drum type

pulley in that it had rotor-like fins that spun around and helped keep the pulley area clean (Tr. 143; see Gov. Exh. 2H). Both the conveyor belt and the jaw crusher were operating when Patterson observed the condition (Tr. 152).

Because the pulley area was unguarded, Patterson feared miners who reached into the area with shovels or with their hands to dislodge stuck stone or foreign materials, or to grease the mechanism, would become caught by the Afins@ and pulled into the pulley (Tr. 143-145). AWe have accidents all the time,@ he stated, Awhere people loose arms, hands, the entire arm gets ripped off. We=ve had guys caught in these things and sucked into the equipment and . . . [t]hey come out hamburger@ (Tr. 144-145).

Moreover, the bottom part of the belt was running in accumulated materials, and Patterson felt that a miner might come at any time to clean up beneath the unguarded area (Tr. 144, 148). The tail pulley had been guarded (Tr. 151-152). However, the guards had been taken off. They were not in the area, and no one knew where they were (Tr. 151).

Fortunato Palumbo maintained that the guards had been removed because the company was in the process of getting the belt ready for use during the season, and that once the Ashake-down@ period was over, the guards would have been replaced (Tr. 150).

THE VIOLATION

As previously stated, section 56.14112(b) requires guards on pulleys to be in place while the machinery is being operated, except when the equipment is being tested or adjusted and when such work cannot be done without taking off the guards.

I find the violation existed as alleged. The company did not dispute the pulley area was unguarded. Nor did the company dispute the conveyor belt was being operated. While it would have been difficult for a miner accidentally to access the area and become caught in the pulley, one who purposefully tried to clean the area under the belt or to service the pulley while the belt was operating, easily could have been caught by the Afins@ and pulled into the unguarded pulley.

The company=s arguments it should not have been cited for a condition existing while it was readying the facility for full production and it had to remove to guards to do maintenance work on the conveyor belt and pulley again are rejected (Tr. 150). While it may well be true the guards were removed to facilitate maintenance work on the conveyor belt and pulley, I conclude the work had finished and the company was too slow in replacing the guards. I am persuaded of this by Patterson=s testimony that when he observed the tail pulley, the conveyor belt and jaw crusher were operating (Tr. 152). Patterson did not see anyone working on the pulley or belt and when he asked about the guards, all he was told was that no one knew where they were (Tr. 151). There was no testimony that anyone told him the guards had been removed to make repairs or adjustments to the conveyor belt and/or tail pulley. Nor was there any visual evidence such repairs or adjustments were necessary.

S&S and GRAVITY

There was a violation of the standard. The violation meant those who tried to service the pulley while the conveyor belt was running or who tried to clean accumulated materials from under the belt would have been subjected to being caught in the pulley and seriously injured. Patterson offered valid reasons why it was reasonably likely such an accident would have happened. First, although access to the pulley area was difficult, it was not impossible. Anyone who purposefully tried to service or to clean up under the pulley could have done so. Second, there was an accumulation under the pulley and the belt was running in it. This created an immediate incentive for the company to insure the area was cleaned. As Fortunato Palumbo explained, the belt cost approximately $2,500. Keeping it from running in accumulations extended the life of the belt, as did keeping the pulleys greased (Tr. 153).

I have credited Fortunato Palumbo=s contention it was the company=s policy regularly to clean up and service the belts and pulleys while the belts were not running (Tr. 153). It is simply good mining practice to implement such a rule. However, miners do not always do what they are instructed to do, and access to the unguarded area presented miners with the opportunity to do those jobs without waiting for the belt to shut down, an opportunity that easily could have been too tempting for a miner in a hurry (see Tr. 147-148). Given access to the area, the need to work in the area, and the economic incentive quickly to do the work, I conclude it was reasonable likely as mining continued a company employee would have been caught in the unguarded pulley and severely injured or killed (Tr. 144-145). The violation was S&S.

The violation was also serious. There was an obvious need to access the area to clean under the unguarded pulley. This need raised the real possibility that a person trying to clean material from under the pulley or trying to service the pulley would, as Patterson graphically stated, become entangled in the mechanism and loose a hand, an arm, or worse.

NEGLIGENCE

For the reasons stated with respect to Citation No. 4286260, I find the company=s negligence was moderate.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285646	4/9/96	14112(b)	$111

The citation states:

> The guards had been removed and were not replaced from the head pulley (lower side) and from the gear reducer drive pulleys leaving the conveyor belt and v-belts . . . nip points exposed. [The e]xposed belts & pulleys were approx. 6 feet above [the] screen deck walkway. Existing bolts indicate a guard had been attached at this location.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson testified that during the inspection he noticed there were no guards for the lower side of the head pulley of the conveyor belt, the main conveyor belt drive motor, and the gear reducer pulley. He explained that the head pulley is located at the discharge end of the main conveyor belt, approximately 6 feet directly above the walkway on the screen tower (Tr. 156-157). The motor that powers the gear reducer also is located at this end of the belt (Tr. 155-156).

When Patterson noticed that the guards were missing, the belt and head pulley were operating (Tr. 161; see Gov. Exhs. 2I, 2J). Patterson also noticed bolts and Amaybe brackets,@ indicating guards once had been in place (Tr. 156).

Patterson feared an employee who traveled the walkway under the pulley in order to clean up spillage, to grease the pulley, or to adjust the belt, would slip, would put out an arm or hand to maintain his or her balance, and would become entangled in the moving parts of the pulley, drive motor, or the motor=s v-belt (Tr. 157, 164). Also, he was concerned if the belt frayed, that one of the loose pieces of belt would catch an employee=s clothing. The result would be cuts, broken bones, the loss of a limb, or death (Tr. 157-158).

Patterson stated that Ain many cases@ MSHA inspectors found miners servicing belts and pulleys while the belts were running, although he was not aware of any such incidents at the Dover Pit (Tr. 160).

Fortunato Palumbo maintained the equipment that lacked the guards was closer to 8 feet above the walkway than to 6 feet (Tr. 167). At first he also maintained that when the shaker screen was operating the walkway under the pulley vibrated so much that no one but Aa blooming idiot@ would stand under the pulley and try to service the conveyor or pulley (Id.), and Patterson appeared to agree with Palumbo that it was extremely unlikely any miner would stand on the walkway under such conditions (Tr. 169). However, in subsequent testimony, both men seemed to agree that operation of the shaker screen did not cause the walkway to vibrate to any great extent (Tr. 201-205).

Fortunato Palumbo confirmed that the area had been guarded. He stated the guards had been removed because all of them were being changed (Tr. 171). In addition, Carmine Palumbo explained that the stairs leading to the shaker screen walkway had a bar across them to prevent access and that a person could not get to the walkway unless he or she went over or under the bar (Tr. 172-173).

Patterson concurred there was a bar on the stairs (he called it a Agate@), however, as he recalled, the Agate@ was open when he was there (Tr. 174). In any event, Patterson testified he explained to Carmine Palumbo that area guards were not an acceptable means of complying with the standard (Tr. 175).

THE VIOLATION

The requirements of the standard have been stated previously.

Here, the company did not disagree with Patterson=s testimony that the cited machinery was operating and unguarded (see Tr. 171). Rather, the company=s primary defenses were that the machinery was 7 or 8 feet above the walkway and access to the walkway was barred.

While 30 C.F.R. ' 56.14107(b) exempts operators from guarding exposed moving parts that are at least 7 feet away from walking or working surfaces, I conclude the exemption is not applicable. I credit Patterson=s estimate that the cited machinery was approximately 6 feet above the platform. Patterson saw the area and the fact the machinery was guarded previously implies his on site estimate was accurate.

Further, the violation is not excused by the fact that the stairs leading to the walkway had a bar or Agate.@ Patterson, at the time he cited the violation, recalled that it was open (Tr. 174). Even if it was closed, the gate could not serve as a defense. There was nothing to prevent a miner from going under or over it to reach the walkway, (see *Jamison Company*, 15 FMSRHC 2549, 2554 (December 1993) (ALJ Lasher)).

S&S and GRAVITY

Patterson testified about the injuries that would have befallen miners who became caught in the moving and unguarded machinery, but neither Patterson nor any other witness offered testimony there was a reasonable likelihood the hazard would result in such injuries. Patterson=s statement that Ain many cases@ MSHA=s inspectors found miner=s working on unguarded machinery while the machinery was operating was followed by an admission this had not occurred at the Palumbos= operation (Tr. 160). Further, the Secretary offered no evidence regarding the frequency of service on the cited equipment and no explanation of how such work was done. Also, while the height of the unguarded machinery did not make service of the equipment impossible, it made service and contact extremely difficult and greatly reduced the likelihood of contact (Tr. 169). For these reasons, I conclude the violation was not S&S.

Because the likelihood of injury arising from the violation was remote, I also conclude the violation was not serious. The gravity of injuries that might have occurred was more than offset by their improbability.

NEGLIGENCE

Because I credit the company=s contention the pit was in the process of being placed on a fully operational basis, because few miners were exposed to the hazards of noncompliance, and because, in this instance, the hazards resulted in a very remote chance of injuries, I find the company=s duty of care was lessened and its negligence was low.

Citation	Date	56 C.F.R. '	Proposed Penalty

4285647	4/9/96	12025	$111

The citation states:

> The 30 horse power, 230/460 volt, 3 phase electric drive motor for the shaker screen was not grounded. This is a wet screen which causes the entire screen deck[,] walkway, and electric motor to be wet during plant operations, depending on wind.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson testified that the 30 horse power electric drive motor for the shaker screen is 16 to 18 inches long and 10 to 12 inches in diameter (Tr. 176). The motor is attached to a steel plate, which in turn is attached to the metal walkway that passed under the machinery referenced in the previous citation (Tr. 177-178).

Patterson saw only three wires coming out of the drive motor (Tr. 176; Gov. Exh. 2K). He did not see a ground wire (Tr. 181). Patterson again stated his belief that Ayou=ve got to have that fourth wire to provide a ground . . . When you see a three phase with only three wires, you know that you don=t have a ground@ (Tr. 181). At the time Patterson saw the motor, the shaker screen had been running. As a result, the tower walkway was wet.

Patterson feared the vibrations of the shaker screen would case the electrical conductors entering the motor to rub against the motor=s metal casing and to fray their insulation, exposing the naked wires. Because the conductors were not grounded, they could energize the motor casing, the plate to which it was attached, and the metal walkway that touched the plate. Anyone who touched the metal could suffer a sever shock or be electrocuted (Tr. 178). The hazard was heightened by the fact the walkway was wet.

The company maintained it did not violate the standard. Fortunato Palumbo testified that the motor was frame grounded and that he believed frame grounding constituted compliance with the standard (Tr. 183). Carmine Palumbo added that because the motor was frame grounded, if there were a short in one of the motor=s conductors, the motor and all the metal contacting it would have been grounded (Tr. 184).

THE VIOLATION

Section 56.12025 required the metal casing of the drive motor to be grounded. The Secretary did not refute Palumbo=s contention the motor was frame grounded, and I accept it. For the reasons stated with regard to Citation No. 4285641, I conclude the Secretary has failed to establish a violation of the standard. In other words, I find that the frame grounding described by the Palumbos constituted compliance.

Citation	Date	56 C.F.R. '	Proposed Penalty

4285648	4/9/96	14107(a)	$81

The citation states:

> The shaker screen drive motor v-belts & pulleys guard did not extend a distance to prevent accidental contact with the moving machine parts or exposed in-running nip points. Two 1/2 -5/8 inch rebars were used to restrict travel to the exposed belts[,] pulleys, & machine parts [.] One of the top bar[s] was out at this time.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Patterson testified that he issued the citation because the cited moving parts (the drive motor and pulleys), Awere not guarded . . . per MSHA specs@ (Tr. 188). The equipment, which is part of the shaker screen tower structure, was operating when he observed it. The drive motor was turning and the pulleys were revolving (Tr. 190). Some screen cloth was placed approximately 8 to 10 inches from the equipment. (AScreen cloth@ is defined as A[a] woven medium suitable for use in a screen deck@ (U. S. Department of the Interior, *A Dictionary of Mining, Mineral and Related Terms* (1996); see also Tr. 189). The screen cloth did not cover all of the pinch points created by the belts and pulleys and Patterson stated that he Aexplained to Carmine Palumbo . . . that [the] entire assembly belt and pulleys had to be guarded so that [a] . . . person would not reach into or behind [the] belts and pulleys and make contact@ (Tr. 195). Further, the location of the screen cloth left room for a miner to reach behind the cloth and become entangled (Tr. 195-196). The adjacent walkway was wet and subject to freezing, factors that Patterson believed added to the hazard (Tr. 204-205).

Patterson feared any person on the walkway who traveled past the cited parts would be in danger of becoming entangled in the unguarded pulleys and belts. He described the drive motor and associated pulleys as located 3 1/2 to 4 feet above the walkway, and he maintained that the moving machine parts were easy to contact (Tr. 191; Gov. Exh. 2K). He testified there were a number of reasons a miner would used the walkway and pass by the parts, including checking the screen for debris or holes and cleaning spillage from the walkway (Tr. 191, 210-211). In addition, he had seen persons trying to grease pulleys while the equipment was running, although not at this mine (Tr. 192). Any person who contacted the moving parts would be badly cut and/or bruised, or would loose fingers or an arm, or would be killed (Id.).

In Patterson=s opinion, the condition was S&S because the height of the equipment, combined with the wet walkway and the loose stones scattered on the walkway, made it reasonably likely persons would slip, trip, or fall and become tangled in the belts and pulleys (Tr. 191).

Fortunato Palumbo argued that there was no reason for a miner to be on the walkway

while the screen was running and the motor and pulleys were operating (Tr. 200). Carmine Palumbo testified that the only time a person would be on the walkway would be to change the bearings on the shaker screen, something that happened twice a year and when the equipment was not operating (Tr. 202-203). He also noted the presence of two guardrails that were intended to keep persons off of the walkway (Id.).

THE VIOLATION

I have no doubt the company violated section 56.14107(a). Patterson carefully described the moving machine parts and how they were either inadequately guarded or not guarded at all and explained how the parts could cause injury. The company did not contest Patterson=s description of the unguarded parts, or that they were moving. Rather, the company maintained guarding was unnecessary because there was no reason why miners would access the area while the parts were operating. Because the language of the standard Aspecifically and unequivocally requires guarding for any of the enumerated moving parts that can cause injury if contacted@ (*Highlands Board of County Commissioners*, 12 FMSRHC 270, 291 (February 1992) (ALJ Koutras)), the company=s concerns do not bear upon whether compliance was required, but rather upon the S&S nature of the condition, its gravity, and the company=s negligence in allowing the condition to exist. In other words, because the moving machine parts cited by Patterson could cause injury and were inadequately guarded or totally unguarded, the violation existed as charged.

S&S and GRAVITY

The violation was both S&S and serious. Unlike the testimony presented regarding Citation No. 4285646, the government established the reasonable likelihood the hazard posed by the unguarded machinery would result in miners becoming caught in the moving and unguarded machine parts. The machinery was easily accessible to miners present on the walkway. Neither of the Palumbos contested Patterson=s description of the equipment as being 3 1/2 to 4 feet above the walkway (Tr. 191). Further, neither contested his contention that the wet walkway and loose stones on the walkway combined to create a slipping hazard and that a person who slipped or fell toward the belts and pulleys could become entangled in them. Further, it is logical that the water and stones on the walkway increased the likelihood of a slip or fall in the direction of the belts and pulleys.

While I accept Carmine Palumbo=s assertion that bearings on the shaker screen were changed twice a year and that the equipment was not be operated while this work was performed, I reject his testimony that this was the only work that brought miners to the walkway. Obviously, the cited belts and pulleys had to be serviced from time to time. Also, Patterson=s contention that from time to time employees needed to check the shaker screen for debris and holes and to clean spillage from the walkway was logical and credible (Tr. 191, 210-211). It is the kind of work that always needs to be done.

From this I infer miners were at times required to travel and to work in the vicinity of the unguarded equipment. Further, and as I have explained previously, while I credit the company=s

contention that it was company policy to turn off the equipment when such work was done, I cannot conclude the policy was followed invariably. Human nature being what it is, it defies belief that miners would always insist on the operation shutting down before accessing the walkway to work.

Therefore, I conclude it was reasonably likely that as mining continued at the pit, a miner would have slipped or fallen on the walkway and become entangled in the unguarded belts and pulleys, or would have been otherwise pulled into the moving parts. It was also reasonably likely that when this happened the miner would have suffered injuries ranging from relatively minor (bruises), to very serious (major cuts, the loss of a digit or appendage), or worse (death).

In addition, because the injuries posed by the unguarded belts and pulleys could have been severe and because miners were from time to time exposed to such injuries by accessing the walkway, I also find that the violation was serious.

NEGLIGENCE

For the reasons stated with respect to Citation No. 4286260, I find the company=s negligence was moderate.

YORK 96-69-M

Citation	Date	56 C.F.R. '	Proposed Penalty
4285649	4/9/96	14112(b)	$111

The citation states:

> The tail pulley guard had been removed and was not replaced on the 3/8 stone belt. The unguarded tail pulley was approximately 2 feet above the existing ground level. Existing bolts indicate the tail pulley had been guarded previously.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

YORK 96-67-M

Citation	Date	56 C.F.R. '	Proposed Penalty
4285650	4/9/96	14112(b)	$111

The citation states:

> The tail pulley guard had been removed and was not replaced at the sand belt. The unguarded tail pulley was approximately 4 to 5 feet above the existing ground level. Existing bolts indicate the tail pulley had previously been guarded.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Essentially, the allegations concerning Citation Nos. 4285649 and 4285650 were tried together.

With regard to Citation No. 4285649, Patterson testified the tail pulley assembly area of the 3/8 inch stone conveyor belt was not guarded. (The belt transported finished stone from a transfer point to a stock pile.) Patterson noticed Aattachments like hooks and so forth@ that had been used to attach a guard (Tr. 216, 220; Gov. Exh. 2M). The stone conveyor belt was operating during the inspection (Tr. 215-216).

Because the conveyor tail pulley was within 4 to 5 feet of the ground, Patterson believed any person working or traveling near it could be entangled in the unguarded pulley or the belt (Tr. 217, 219). Work activities that would being a miner in close proximity to the unguarded area were aligning the belt to get it running as straight as possible or cleaning up accumulated spillage under the belt (Tr. 219). If the clothing of the miner doing such work became caught in unguarded tail pulley, the person could be pulled into the conveyor belt and be Aturned into hamburger@ (Id.). Adding to the hazard was the fact that it was April and that miners wore extra clothing that could more easily be caught in the mechanisms (Tr. 219).

Fortunato Palumbo testified that the stone conveyor belt was misaligned. The misalignment had to be corrected, and the only way to correct it was to make an adjustment and then to run the belt to see if it was aligned properly (Id.). Palumbo also testified that to realign the belt, the guard had to be removed from the belt drive area (Tr. 225).

When questioned by Fortunato Palumbo, Patterson agreed the stone conveyor belt was misaligned (Tr. 221). Patterson also agreed that belts usually are operated while they are realigned (Tr. 225). Patterson stated that Athe guard can be taken off if there is an adjustment@ (Tr. 226). However, Patterson saw no tools indicating the company was in the process of adjusting the belt, nor did he find the guard anywhere near the tail pulley assembly (Id.).

With regard to Citation No. 4285650, Patterson stated that as he approached the tail pulley of the sand conveyor, he noticed the pulley guard was missing. (The sand conveyor carries sand from the sand screw to a stockpile (Tr. 231)). Like the stone conveyor tail pulley,

Patterson saw indications the sand conveyor tail pulley once had been guarded. Hooks and bolts indicated where the guard had been attached (Tr. 230-231; Gov. Exh. 2N). Patterson recalled the sand conveyor belt and the tail pulley as being in operation during the inspection (Tr. 231-232).

There was standing water in the area, but enough sand had built up around the pulley for a miner to access the unguarded area (Tr. 231). Therefore, the lack of a guard meant that when the belt was running and a miner was near it, there was danger the miner would be caught in the pulley. His or her clothing would be entangled in the moving parts or in the pulley=s nip points, and the miner would be dragged into the pulley mechanism. Patterson believed it reasonably likely that broken bones, lost limbs, or death would result (Tr. 232).

Because of its height, the tail pulley was easily accessible to anyone working around it. Such a person would be greasing the pulley, cleaning up around the belt, checking the operation of the sand screen, or making adjustments to the belt (Tr. 233). Patterson felt that Aat any time someone could walk right up to [the unguarded area]@ because A[t]here was nothing to restrict anyone from going up@ (Tr. 234).

Fortunato Palumbo agreed the guard was not in place (Tr. 235-236).

THE VIOLATIONS

To prove a violation of the standard, the Secretary must establish that the guards were missing and that the tail pulleys were operating. In both instances, the parties agreed the guards were missing. Further, Patterson testified credibly that he had seen the belts and the pulleys operating during the course of his inspection (Tr. 216-217). Based upon all of the evidence, I find that the cited tail pulleys were not guarded and were Abeing operated@ within the meaning of the standard.

However, the standard also states that a guard need not be in place when an operator is Amaking adjustments which cannot be performed without removal of the guard@ (30 U.S.C. '56.14112(b)), and I find this exception applicable in the case of the stone conveyor tail pulley. The gist of Fortunato Palumbo=s testimony was that the company was in the process of realigning the belt and that to do this the guard had to be and was removed (Tr. 225). Patterson agreed the stone conveyor belt was misaligned (Tr. 221) and the guard could be taken off to align the belt.

The fact Patterson saw no tools or the old guard near the tail pulley, does not defeat the exception. The company may have taken its tools and the old guard elsewhere. Or, it may have disposed of the old guard. The evidence establishes that the belt was in need of alignment, that the company was in the process of getting the plant ready for the operating season, and that

the guard could be removed to do the realignment. Therefore, I have no reason to doubt Fortunato Palumbo=s assertion that the guard was missing because the belt was being aligned. The violation of section 56.14112(b) alleged in Citation No. 4285649 has not been established.

The allegation with regard to the sand conveyor tail pulley (Citation No. 4285650) is another story. Although Fotunato Palumbo stated that he Aoffered the same comments@ regarding both the sand conveyor tail pulley and the stone conveyor tail pulley, neither he nor Carmine Palumbo testified that the sand conveyor belt was misaligned or had been realigned. Nor did Patterson testify he observed a problem with the belt=s alignment.

The Palumbos were representing the company without benefit of counsel, and I allowed them considerable leeway. However, to find the exception applied there has to be testimonial or documentary evidence the guard was missing so that necessary adjustments could be made, and there is no such evidence here. Therefore, the violation of section 56.14112(b), as alleged in Citation No. 4285650, has been established.

S&S and GRAVITY

The violation was both S&S and serious. The Secretary proved it was reasonably likely the hazard posed by the unguarded sand conveyor tail pulley would result in a miner being caught in the pulley. First, the unguarded pulley was easily accessible. The company did not dispute Patterson=s opinion that there was nothing to prevent or deter access to the pulley, and the fact that water was standing in the area was negated by the sand Abridge@ that was present (Tr. 231). Nor did the company question the fact that location of the unguarded pulley, was such that a miner easily could walk into it or have an extended arm or piece of clothing caught in it (Tr. 230). Further, Patterson credibly testified to activities that would bring a miner into contact with the unguarded pulley **C** cleaning up around the belt and checking the operation of the sand screen (Tr. 233). Clearly, as mining continued these activities would have taken place and when they did, open access to the tail pulley made it reasonably likely an accident would occur. Finally, as Patterson testified, the result of any accident would have been reasonably serious or worse (Tr. 232).

Because the injuries posed by the unguarded sand conveyor tail pulley would have been serious or worse, and because as mining continued, miners would have been exposed to the danger, I find the violation was serious.

NEGLIGENCE

For the reasons stated with regard to Citation No. 4286260, I find the company=s negligence was moderate.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285651	4/9/96	18002	$50

The citation states:

> Records of inspections of working places for conditions which adversely affect safety or health . . . were not being . . . completed and recorded by a competent person or the operator.

YORK 96-69-M

Citation	Date	56 C.F.R. '	Proposed Penalty
4285652	4/10/96	12028	$50

The citation states:

> The operator did not have available for review records of the annual continuity & resistance test of the plant=s grounding system. MSHA records indicate the last continuity & resistance test was conducted on 3/12/95.

Essentially the allegations concerning Citation Nos. 4385651 and 4385652 were tried together.

With regard to Citation No. 4385651, Patterson explained that section 56.18002(a) in part requires a competent person to examine each working place at least once each shift for conditions which may adversely affect safety or health and that section 56.18002(b) requires a record of the examinations to be kept for 1 year. In addition, the records must be available for review by MSHA and its inspectors (Tr. 237-238).

Patterson stated it was his usual practice upon conducting an inspection to ask the person in charge of the mine where such records are located. At the Dover Pit, Patterson asked Carmine Palumbo. Palumbo responded that the records might be at the office. When Patterson and Palumbo got to the office, Palumbo could not find them (Tr. 238).

Patterson did not believe there was Aany great hazard@ associated with failing to have available the results of the examinations (Tr. 242). Nevertheless, Patterson noted the records could be useful to an operator because they could alert the operator to conditions that needed correction (Tr. 243).

Fortunato Palumbo testified the examinations were conducted but that he Awas not aware . . . there was a requirement for a written record@ (Tr. 240).

With regard to Citation No. 4685652, Patterson explained that section 56.12028 requires in part that the continuity and resistance of grounding systems be tested annually after the systems have been installed. In addition, a record of the resistance measured during the most recent tests must be made available to MSHA and its inspectors upon request. The tests establish the continuity of the system and reveal the presence of any electrical faults (Tr. 245).

According to Patterson, when he was at the mine on April 10, he asked to see the result of the last annual continuity and resistance test for the plant=s grounding system. Carmine Palumbo thought the reports might be at the office. When Patterson and Palumbo got to the office, Palumbo could not find the records (Tr. 244-246).

Fortunato Palumbo testified that the continuity and resistance tests were last done in the spring of 1995, but that he too could not find a record of the tests (Tr. 249-250, 251).

THE VIOLATIONS, GRAVITY, & NEGLIGENCE

Patterson and Fortunato Palumbo agreed the required records were not kept (Tr. 240, 249-250, 251). Patterson essentially testified that the failure to keep the records was not serious (Tr. 242). Therefore, I find that the violations occurred and that they were of minimal gravity.

The company=s failure to keep written records represents a moderate lack of care. The record keeping requirements are clearly stated in the regulations, and it is the duty of an operator to know and abide by the regulations. Ignorance does not lessen the operator=s duty to comply.

Citation	Date	56 C.F.R. '	Proposed Penalty
4285271	4/17/96	12030	$157

The citation states in part:

> The MCC [motor control center] trailer used to power the plant has not been maintained, or, used in a workman-like manner, has no evidence of a proper and safe grounding system, and contains other violations creating some potentially dangerous conditions.

In additional to alleging a violation of the standard, the citation contains an S&S finding.

Jon Montgomery is an MSHA electrical inspector. He went to the Dover Pit on April 17, 1996, in order to further inspect the operation=s grounding system (Tr. 253-255). Montgomery first inspected the motor control center trailer (a van-type trailer). In addition to being used for storage, the trailer housed the electrical controls for almost all of the electrical equipment at the pit, including the conveyor belts, shakers, and the cone crusher (Tr. 257).

Inside the trailer Montgomery noticed a number of exposed and energized relay devices. He also noticed starters, disconnecting devices, and conduits that were exposed and unprotected (Tr. 258, 262-263, 267-270, 271; Gov. Exhs. 2O, 2P, 2T, 2U, 2V). In addition, he observed cables that were not bushed where they left junction boxes (Tr. 265-266; Gov. Exh. 2R), other cables that were not installed in a workman-like manner, and fuses that were too large for their

conductors (Tr. 259). Finally, the electrical service mast (a conduit that rose above the trailer and that provided access to incoming electrical wires) was laying on an angle and was not supported (Tr. 259-260; Gov. Exh. 2W). The condition of the service mast put additional stress on the cables entering the trailer (Tr. 273).

Carmine Palumbo=s son was at the mine on April 17, and Montgomery asked him how long the conditions had existed. He did not know (Tr. 275). On the other hand, Fortunato Palumbo told Montgomery the conditions had Abeen like that for many years@ and that other MSHA inspectors had Ano problem@ with them (Tr. 275-276).

In Montgomery=s opinion all of these conditions created a serious shock and fire hazard, and he cited the company for failing to correct them before the electrical equipment was energized (Tr. 259-261, 263, 267). Montgomery believed that a short in the system would have resulted in a fire in the trailer or a shock hazard to miners working in the trailer (Tr. 260). In his view, the confluence of the conditions made it reasonably likely an injury would have resulted (Tr. 282-283). He noted employees often were exposed to the conditions because they frequently entered the trailer during the course of a shift to start and stop equipment and to obtain parts (Tr. 283).

Fortunato Palumbo reiterated what he had told Montgomery, that the wiring in the trailer had been in place for Aa number of years@ (Tr. 285). Indeed, some of it was installed in 1971 or 1972 (Id.). He maintained many of the unprotected wires did not require conduits because they had an Aextra heavy covering@ (Tr. 286), and that, in any event, the trailer itself was grounded by structural frame grounding (Tr. 287). He admitted, however, that the service mast was not as straight as Agood practice@ required (Tr. 288).

THE VIOLATION

Section 56.12030 requires that Aa potentially dangerous condition@ be Acorrected before equipment or wiring is energized.@ I credit Montgomery=s testimony regarding the conditions he found inside the trailer and the condition of the outside service mast. Montgomery=s recitation of the conditions was detailed and was confirmed by pictorial evidence entered into the record by the Secretary (see Gov. Exhs. 20-2X). Further, the company did not contest his description as much as challenge the conclusions he drew from the conditions. Since it is clear from Patterson=s testimony the electrical equipment had been running at the plant, and since it is also clear that the conditions Montgomery described existed when Patterson was there and the equipment was running, the question of whether or not a violation occurred turns upon whether the conditions were potentially dangerous.

I agree with Montgomery that the exposed wiring should have been protected from unintended damage, and that failure to protect it presented a fire and shock hazard. The standards do not exempt conductors from the protection afforded by covers or conduits on the basis of their jackets. Vibrations or other stress factors eventually can wear through the toughest outer jackets.

I also agree with Montgomery that fuses that were too large for the conductors they serviced added to the danger. He persuasively described what could happen: A[I]n the event of a short circuit [or] overload, the fuse is intended **C** or the circuit breaker is intended [to] open. If you size that too large then the fuse or the circuit breaker will not open . . . and the conductor will start overheating resulting in, most times, a fire@ (Tr. 259).

I further agree that the bent service mast put stress on the incoming electrical wires and made it more likely the live wires would disconnect in the trailer, especially in view of the fact the wires outside were subject to the weight of ice forming on them during spring storms (Tr. 273). In this regard, I note Fortunato Palumbo=s statement that A[g]ood practice@ required the mast head to be straight and supported (Tr. 288).

The fact that miners frequently entered the trailer to start or stop equipment and to obtain parts, meant that they were directly subjected to the hazards, and this too contributed to making the conditions Apotentially dangerous@ within the meaning of the standard.

Without considering whether or not there was a Asafe grounding system@ (Citation No. 4285271) there is more than ample evidence of the potential dangers posed to miners by the other cited conditions, and I sustain the alleged violation.

S&S and GRAVITY

The violation was both S&S and serious. The conditions cited by Montgomery, created a measure of danger to the safety of the miners who entered the trailer. Moreover, as mining continued, the frequent visits of the miners to the trailer, combined with the unprotected wires, the improper fuses, and the added strain on the electric conductors coming into the trailer made it reasonably likely a short circuit or an exposed live wire would result in a miner being burned or shocked or both. The resulting injuries would have been reasonably serious, if not fatal.

Electrical conduits, connections, and overload protective devices are potentially very dangerous if they are not installed and maintained as required. In view of the gravity of the injures that could be expected and the extensiveness of the violative conditions in and immediately outside the trailer, this was a serious violation.

NEGLIGENCE

The conditions that constituted the violation were numerous and visually obvious. The potential danger to miners from the electrical components in and immediately outside the trailer meant the company had a high duty of care to make certain all were properly installed and maintained. The extensive disarray found by Montgomery and the length of time the conditions apparently existed are indicative of the company=s more than moderate failure to meet its duty.

OTHER CIVIL PENALTY CRITERIA
HISTORY OF PREVIOUS VIOLATIONS

The company has a very small history of previous violations in that during the 2 years prior to the first violation alleged in these cases, the company=s applicable history consisted of two violations (Tr. 13-17; Gov. Exh. 1).

SIZE OF BUSINESS

It is clear that the company is very small. When Patterson was at the mine only two miners were working (Tr. 26). Further, in proposing penalties for the alleged violations, MSHA assigned the company no points for its size, which means that according to MSHA=s records, 10,000 annual hours or less are worked at the mine. This is the smallest category MSHA recognizes (see 30 C.F.R. ' 100.3(b)).

ABILITY TO CONTINUE IN BUSINESS

The burden is on the operator to come forward with proof that the size of any penalty will effect adversely its ability to continue in business. The company did not offer any evidence in this regard, and I find that the size of the penalties assessed will not effect the company=s ability to mine.

GOOD FAITH IN ATTEMPTING TO ACHIEVE RAPID COMPLIANCE

The parties stipulated that the company exhibited good faith in rapidly abating any violations that existed (Tr. 66-67).

CIVIL PENALTY ASSESSMENTS

YORK 96-67-M

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285641	4/8/96	12025	$ 117	$ 0

There was no violation of the standard.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment

4285642	4/8/96	14109 (b)(1)	$50	$75

The violation was not serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $75 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4286260	4/8/96	14112(b)	$ 111	$90

The violation was serious and the company=s negligent was moderate. Given these and the other civil penalty criteria discussed about, I conclude a penalty of $90 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285643	4/9/96	12025	$117	$90

The violation was serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $90 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285644	4/9/96	4101	$50	$50

The violation was not serious and the company=s negligence was low. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $50 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285645	4/9/96	14112(b)	$111	$90

The violation was serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $90 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285646	4/9/96	14112(b)	$111	$50

The violation was not serious and the company=s negligence was low. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $50 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285647	4/9/96	12025	$111	$0

There was no violation of the standard.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285648	4/9/96	14107(a)	$81	$90

The violation was serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $90 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285650	4/9/96	14112(b)	$111	$90

The violation was serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $90 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285651	4/9/96	18002	$50	$75

The violation was not serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $75 is appropriate.

YORK 96-69-M

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285649	4/9/96	14112(b)	$111	$0

There was no violation of the standard.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285652	4/10/96	12028	$50	$75

The violation was not serious and the company=s negligence was moderate. Given these and the other civil penalty criteria discussed above, I conclude a penalty of $75 is appropriate.

Citation	Date	56 C.F.R. '	Proposed Penalty	Assessment
4285271	4/17/96	12030	$157	$150

The violation was serious and the company=s negligence was more than moderate. Given these and the other civil penalty discussed above, I conclude that a penalty of $150 is appropriate.

ORDER

Within 30 days of the date of this decision, the Secretary **WILL VACATE** Citations No. 4285641, 4285647, and 4285649 and **WILL MODIFY** Citation Nos. 4285643 and 4285646 by deleting the S&S findings. Within the same 30 days, Palumbo Sand & Gravel WILL PAY civil penalties as follows:

Docket No. YORK 96-67-M **C** $700
Docket No. YORK 96-69-M **C** $225

Upon vacation and modification of the citations and payment of the assessed penalties, these proceedings are **DISMISSED**.

David Barbour
Administrative Law Judge

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dcp