

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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August 8, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-1156
Petitioner	:	A.C. No. 35-00454-148808
	:	
v.	:	Docket No. WEST 2009-972
	:	A.C. 35-00454-183688
ALSEA QUARRIES,	:	
Respondent	:	Mine: Alsea Quarries
	:	

**DECISION**

Appearances: Mr. Evan L. Nordby, Esq., U.S. Department of Labor, Seattle, Washington on behalf of the Secretary

Ray Perin; Candy Hockema on behalf of Alsea Quarries

Before: Judge David F. Barbour

These cases arise from petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”) on behalf of her Mine Safety and Health Administration (“MSHA”) against Alsea Quarries (the “company”). The Secretary alleges that in 16 instances the company violated various of the Secretary’s mandatory safety standards for surface metal and nonmetal mines (30 C.F.R. Part 56) at the company’s quarry in Benton County, Oregon. The Secretary further alleges that several of the violations are significant and substantial contributions to mine safety hazards (“S&S” violations) and that one violation also is the result of the company’s unwarrantable failure to comply. The company, through its president, denies the alleged violations and states that the proposed penalties are excessive. The two cases were assigned to the court and upon the motion of the Secretary they were consolidated for hearing and decision. The court further ordered the parties to confer to determine if they could settle any of their differences and upon being advised that they could not, the court scheduled a hearing which was conducted in Albany, Oregon. The Secretary was represented by her counsel. The company was represented by its president and office manager.

Prior to the hearing, the company agreed that the quarry came within the jurisdiction of the Mine Act and at the commencement of the hearing the parties stipulated to the admissibility of certain exhibits. Tr. 3-4.

## THE MINE

At the quarry rock is drilled and shot. The shot material is moved to a mine-site hopper, fed onto a conveyor belt, conveyed along the belt to a feeder, and funneled into a series of crushers. The material is then crushed to size. Tr. 14-15. Although three different types of crushing are involved, the crushing unit is considered a single entity and is commonly referred to as the “crushing plant.” Tr. 15.

The company’s president, Raymond (“Ray”) Perin, testified that the company has operated the quarry since November 4, 1981, except for short periods of time when it was leased and that under the company’s management the facility never has experienced a lost time accident. Tr. 80. Indeed, the company has been awarded certificates of achievement by MSHA for its commendable safety record. Tr. 81; Resp. Exs. 18, 19.

### DOCKET NO. WEST 2008-1156

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6438726	01/22/08	56.11002	\$2,000

Cory Michael Owens has more than four years of experience as an MSHA inspector. In addition, Owens has several years of experience in the sand and gravel industry working as a fabricator, a mechanic, a truck driver, and a crushing plant operator. Tr. 9-10. On January 22, 2008 Owens inspected the quarry. He began his inspection at the truck scales and he traveled to the crushing plant. The plant was not operating. In fact, it had not been operating for the last two or three days because of needed plant maintenance. Tr. 13-14, 37. Even though the plant was “down,” it was MSHA’s policy to check the plant’s equipment for compliance with all applicable safety regulations. Tr. 16.

Upon inspecting the plant, Owens noticed that the top half of the crusher had been removed and was sitting on the ground. Tr. 16. The top half “basically unscrew[ed]” from the rest of the crusher. Tr. 17, *see also* Tr. 22. It was sitting “right below the crusher itself.” Tr. 17. Owens climbed onto the crushing plant walkway. He followed the walkway to where it ended. At this point the walkway provided access to the crusher platform. The platform consisted primarily of planking that surrounded the top half of the crusher. Because the top half of the crusher had been separated from the bottom half and because most of the planking had been removed from the platform to perform the job, there was a void or an opening inside the platform. Tr. 20, 28. A handrail was not in place around the opening. *Id.*

Perin told Owens that before the top half of the crusher was removed it protruded up through the planking and that the planking fit snugly around the top of the crusher. Tr. 22-23. When the top and much of the planking was removed, the opening, which Owens estimated measured approximately 6 feet by 6 feet square, was created. Tr. 21.; Gov’t Ex. 1 at 4. The distance from the platform to the top of the bottom half of the crusher was approximately one to

two feet. Tr. 23, 54. The platform was approximately 15 feet above the ground. Tr. 26. Also, below the opening, were numerous pieces of crushing plant equipment. Tr. 24; *See* Gov't Ex. 1 at 5. Owens believed that the conditions violated 30 C.F.R. §56.11002, which requires handrails on elevated work platforms. He thought the lack of handrails or other restraints created the hazard of falling into and through the unguarded opening onto the equipment below or all the way to the ground. Tr. 24, 30, 54. In Owens's opinion the result of such a fall would be "broken bone type injur[ies], sprains, strains . . . [and] if you hit your head [a fatality.]" Tr. 30; *See also* Tr. 32, 49.

Owens found that such serious injuries were "reasonably likely" because "there was very little avoidance of the hazard if for whatever reason a person were to walk out [on] that walkway." Tr. 30-31. He noted that the walkway "exited right towards the center of [the] opening." Tr. 31. Although the opening was "very" visible (Tr. 45), if a miner slipped or tripped or was not paying attention, the miner could "[step] right into [the] hole." *Id.* There were no steps or other structures to provide solid footing. Tr. 53. Making a fall into and through the opening more likely as mining continued was that fact that in January there could be rain, snow, and wind all of which could make for hazardous footing. *Id.*

To correct the condition the company installed a rope with magenta hanging strips around the opening. Tr. 26; Resp. Exh. 2. According to Owens, the rope and strips "warn[ed] people of the opening." Tr. 27. The company also placed a board across the entrance to the walkway. *Id.*

Owens found that the condition was caused by the company's "high" negligence and its "unwarrantable failure" to comply with section 56.11002. He stated that "anyone walking up that walkway . . . could see that something was amiss, that there should have been something blocking off that [opening]" Tr. 34. He added, "[I]t . . . [was] obvious." *Id.* Owens maintained that Perin lead him to believe the condition existed for two or three days before Owen arrived at the mine. *Id.* According to Owens Perin "was working on the crusher . . . and was aware that the condition existed." Tr. 38. Despite the fact the company was aware of the requirement to provide protection <sup>[1]</sup>, no effort was made to warn miners using the walkway of the open area. Tr. 44.

Owens testified that Perin told him that the company was putting a new hard surface on the rolls crusher. Tr. 34. Owens described the process as "long [and] drawn-out," one that would take a day or two. Tr. 36. Although Owens never had seen such work performed (Tr. 56), he believed that it was Perin who was actually doing this job and that Perin had to pass the opening to access the rolls crusher work area. Tr. 35. As a result, it was Perin whom the inspector believed was most endangered by the lack of handrails. However, he also thought that any miner who brought Perin supplies or simply came to check how the job was progressing likewise would be endangered. Tr. 36; *see also* Tr. 44-45.

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<sup>1</sup> Handrails were provided elsewhere at the facility. Tr. 38.

In addition to miners involved in the rolls crusher project, there were others whom Owens believed were in danger. He noted that a miner had to be on the walkway to remove the planking around the top of the crusher before its top half could be lifted. Tr. 59. Moreover, when lifting the top half of the crusher, a tag line had to be attached to the equipment to guide the top half during the lift. The miner manning the tag line would be standing on the walkway near the opening. Tr. 59-60; *see also* Tr. 60-61. Owens feared that the miner would focus on the part of the crusher being lifted and the hand signals being given to the hoist operator. Tr. 61. The miner would not pay sufficient attention to the unguarded opening and the hazard it posed. Tr. 61. Owens agreed, however, that no violation existed as long as the planking surrounded the top of the cone crusher. Tr. 65. The violation was created when the planking was removed and no hand rails were installed. *Id.*

Candy Hokema works in the company's office at the mine. She has numerous clerical and quasi-managerial duties. Tr. 67. Hokema identified and reviewed a copy of the company's time book for January 21, 2008, the day before Owens began his inspection. Resp. Ex. 16. According to Hokema it showed that January 21 was a short work day. Miners arrived around 7:00 a.m. and left at 10:00 a.m. "because of the weather." Tr. 67; Resp. Ex. 16. Hokema explained that it had been snowing, no customers came to pick up material, and Perin decided everyone should go home. Tr. 70-72. Hockema could not recall what kind of work was going on at the crusher on January 21 (Tr. 73), but she thought that it "probably . . . was a maintenance day." Tr. 74.

Perin testified that in fact Hockema was right and that on the morning of January 21 maintenance was done on the crusher. Tr. 75. He described what happened: "We . . . cut that deck loose, [got] up there with tag lines on that . . . crusher and [lifted the top half of the crusher] up out of there with the big crane and set it on the ground, and then we [went] home." Tr. 76. When the top half of the crusher was lifted, one miner was on the walkway handling a tag line and another miner was on the ground handling a tag line. Tr. 84. He stated that the miner on the walkway was not "anywhere near where that hole [was]." Tr. 83. He further stated that on January 22, the day of the inspection, maintenance work resumed and the miners disassemble the part of the crusher that was set on the ground the day before. *Id.* After the top half of the crusher was removed, no one had any reason to be on the walkway until the top half of the crusher was replaced.<sup>2</sup> Tr. 77.

Perin noted that the cited condition was abated by tying a rope between the sides of the walkway thereby blocking access from the walkway to the open area. Tr. 76, 90. The company

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<sup>2</sup> The cone crusher was disassembled to replace an interior part. Tr. 78-79. After the repair, the top half had to be lifted and moved back over the bottom half. During the move a miner would return to the walkway to handle a tag line. Tr. 79-80

also put a board across the walkway.<sup>3</sup> Tr. 89. Further, the company provided fall protection (harnesses and lanyards) to its miners. Tr. 89-90. Perin maintained that Owens was wrong when he thought miners were working on the rolls crusher. Tr. 77-78. Rather, according to Perin the rolls crusher was “out of commission” and had been “for at least a couple of years.” Tr. 77. Perin was candid about the company’s failure to block entry to the open area. He stated “We should have had a rope up there.” Tr. 92.

### THE PARTIES’ POSITIONS

Counsel for the Secretary states that the company concedes that “there was a pretty big, [unguarded] hole in the upper platform around the . . . crusher” and that this establishes the violation. Tr. 94.

With regard to the S&S nature of the violation, counsel contends that because there was no handrail around the hole in the upper platform and because the walkway was no more than two to three feet away from the hole, there was a reasonable likelihood that a miner who fell off of the walkway into the hole would “strike obstructions on the way down to the base of the . . . crusher.” Tr. 95. The result would likely be a head injury or other type of permanently disabling injury. *Id.* The hazard existed from the time the planking was removed around the cone crusher on January 21 until the inspector issued the citation on January 22 at 2:10 p.m. During this time “a miner could have been exposed to the hazard.” Tr. 96.

Owens maintained that a miner might have had to go up on the walkway to retrieve a part or a tool. *Id.* The Secretary also noted that on January 21 during the time the top half of the crusher was removed a miner with a tag line was on the platform, and Owens surmised was likely the miner was paying attention to the suspended load and the tag line, not to the hole at the end of the walkway. Tr. 96-97.

With regard to the Secretary’s allegation that the violation was the result of the company’s unwarrantable failure to comply with section 56.11002, counsel stated that the government was not asserting that the company through Perin “intentionally put [its] miners in harm’s way” or that it was reckless or indifferent. Tr. 98. However, “the obvious nature of the hazard, its duration for more than one shift, and the high degree of danger posed by the hazard” indicated a serious lack of reasonable care on Perin’s and the company’s part. Tr. 98.

Perin emphasized that the company had operated for twenty-eight years without an accident. Tr. 101-102. He further emphasized that the rolls crusher was not being worked on and had not been operating “for a couple of years.” Tr. 103. As a result, no miners were exposed to the hazard due to work on the rolls crusher. Moreover, there was no work done after 10:00 a.m.

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<sup>3</sup> Although the citation states the cited condition was abated when “a handrail was . . . placed around the . . . opening” (Gov’t Ex. 1), the alleged handrail was not referenced by any of the witnesses. *See* Tr. 90.

on January 21, and no one was exposed to the hazard for the rest of that day. *Id.*

### **THE VIOLATION**

Citation 6438726 states:

No handrail was provided around the cone crusher opening in the elevated platform accessing the cone and roll crusher. The platform is approximately 15 feet above ground level, the opening is approx. 6 by 6 feet square, approx. 5-6 feet above the lower platform for the cone crusher with a walkway around the opening approximately 2-3 feet wide. The opening in the platform has existed for several days as the cone is dismantled for maintenance. This area is accessed daily for maintenance while the plant is down. This area is subject to adverse outside weather conditions such as rain and snow. If a person were to misstep and fall through the opening fatal injures could result. This condition was obvious and has existed for several days. The owner[,] Ray Perin[,] has engaged in aggravated conduct constituting more than ordinary negligence in that he was aware of the condition and continued to direct employees to work in the area. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Ex. 1.

### **THE VIOLATION**

Section 56.11002 requires in pertinent part: “[E]levated walkways . . . shall be provided with handrails and maintained in good condition.” There is no doubt that the standard was violated. Work around the top half of the cone crusher was accessed by the walkway. In addition, the walkway itself served as a place from which to work. In this respect, it was both a work platform and a walkway. The platform/walkway was “elevated.” The inspector testified without contradiction tht it was 15 feet above ground level and that it was five to six feet above a lower crusher platform. Tr. 26; Gov’t. Ex. 1. No handrails were provided around the platform/walkway. Tr. 20. Perin essentially agreed with the inspector that there was nothing for a miner to grab if the miner lost his balance. Tr. 92. Therefore, I find the violation existed as charged.

## S&S and GRAVITY

An S&S violation is a violation “of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.” 30 U.S.C. § 814(d). A violation is properly designated S&S, “if, based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Div., Nat’l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). As is well recognized, in order to establish the S&S nature of a violation, the Secretary must prove: (1) the underlying violation; (2) a discrete safety hazard – that is, 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 will be of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.* 52 F. 3rd 133, 135 (7th Cir. 1995); *Austin Power Co., Inc. v, Sec’y of Labor*, 861 F. 2d 99,103 (5th Cir. 1988) (approving *Mathies* criteria).

It is the third element of the S&S criteria that is the source of most controversies regarding S&S findings. The element is established only if the Secretary proves “a reasonable likelihood the hazard contributed to will result in an event in which there is an injury.” *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985). An S&S determination must be based on the particular facts surrounding the violation and must be made in the context of continued normal mining operations. *Texasgulf, Inc.*, 10 FMSHRC 1125 (Aug. 1985); *U.S. Steel*, 7 FMSHRC at 1130.

The S&S nature of a violation and the gravity of a violation are not synonymous. The Commission has pointed out that the “focus of the seriousness of the violation is not necessarily on the reasonable likelihood of serious injury, which is the focus of the S&S inquiry, but rather on the effect of the hazard if it occurs.” *Consolidation Coal Co.*, 18 FMSHRC 1541, 1550 (Sept. 1996).

The Secretary established the first of the S&S criteria. There was a violation of section 56. 20011. She also established the second criteria. The violation created a discrete safety hazards in that it subjected a miner on the platform/walkway to the possibility of slipping or tripping or otherwise losing his balance and falling into the opening at the edge of the platform/walkway.

The next question is whether in the context of continued normal mining it was reasonably likely a miner would fall into the opening. The question is a close one, but I conclude that in the particular circumstances of this case the answer is, “yes.” The inspector believed that a miner was reasonably likely to fall into the opening because “there was very little avoidance of the hazard if for whatever reasons a person were to walk out [on] that catwalk.”<sup>4</sup> However, there

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<sup>4</sup> The inspector frequently used the word “catwalk” when he referred to the platform/walkway. *E.g.* Tr. 31.

was little reason for a miner to access the platform/walkway, and in fact, some of those whom Owens believed to be endangered by the violation were not. For example, Owens believed that the company was in the process of resurfacing the rolls crusher, a job requiring up to two work days during which a miner would pass the opening as he proceeding to and from the job. Tr. 35-36. Owens also believed that those bringing supplies to the miner would be exposed to the hazard of falling into the opening. Tr. 36; 44-45. Owens thought that Perin said this work was ongoing. Tr. 34. Owens was sincere in his testimony, but I conclude that his memory was faulty. Perin's testimony that the rolls crusher had not operated for two years and that no work whatsoever was done on it was more persuasive than Owens's recollection. Tr. 77-78. Perin testified that the belts were off of the rolls crusher and he pointed out that the rolls crusher's pulley was rusty. Tr. 77. This testimony was not refuted, and Owens agreed that he had not seen anyone working on the rolls crusher during his inspection. Tr. 56. Given Perin's more credible testimony, I find that no one was working on the rolls crusher when the violation occurred and that no one would be working on it as mining continued. This narrows the field of those reasonably likely to be exposed to the hazard.

Owens also feared that workers going to retrieve tools or other items left on the platform/walkway would be endangered (Tr. 44-45), but aside for those using the platform/walkway to remove the top half of the cone crusher and to replace it, the record does not support finding other miners used it. In fact, the record establishes that the only work requiring its use was removal and replacement of the top half of the crusher. Owens testified that a miner had to use it to remove the planking around the top half of the crusher. Tr. 59. In addition, a miner stood on the walkway to guide the lifted load with a tag line. Tr. 59-61.

Perin agreed that a miner used the platform/walkway to remove the planking from around the cone crusher. Tr. 83. Perin also agreed that a miner would have been on the platform/walkway tending a tag line during the lifting and replacement of the crusher's top half. But, Perin testified that given the length of the tag line, the miner would have been nowhere near the open area. Tr. 83. This testimony was not refuted and because Perin was very knowledgeable about the procedures used when removing and replacing the upper half of the cone crusher, I credit his testimony, and find that miners tending the tag line were not endangered by the violation.

I therefore find the record establishes that the only miners exposed to the hazard of falling into the opea area were those who used the platform/walkway to remove and replace the planking around the crusher. (Obviously, the miners' exposure would not have commenced until enough of the planking was removed to create the opening and it would have ended once enough was replaced to close the opening.)

Although exposure to the hazard was very limited, I conclude those exposed were reasonably likely to be injured. The conclusion is premised on the fact that as Owens noted, during January the weather at the mine was subject to wind, rain and snow. Tr. 53. This obviously increased the likelihood of the exposed miner slipping, tripping or otherwise losing his

balance, and with no handrail to grab to steady himself, the miner was reasonably likely to fall into the opening.

I have no doubt that the result of such a fall would have been reasonably serious in nature. I accept Owens's testimony that if a miner fell into the opening and hit the top of the remaining half of the crusher he would have suffered a fall of one to two feet. Tr. 50. Nonetheless, such a fall is enough to cause broken bones or a contusion. Further, if the miner continued falling he was likely to hit other pieces of metal equipment between the opening and the ground 15 feet below the platform. Tr. 24, 49. Broken bones, contusions and/or internal injuries were reasonably likely to result. For all of these reasons, I find that the violation was S&S.

The violation also was serious. As noted, if an injury occurred its result could be to remove a miner from the workplace for days, weeks, or months.

### **UNWARRANTABLE FAILURE AND NEGLIGENCE**

In *Emery Mining Corp.*, 8 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. 8 FMSHRC at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." 8 FMSHRC at 2004-2004; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); see also *Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 136 (7<sup>th</sup> Cir. 1995) (approving the Commission's unwarrantable failure test). The Commission has examined various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts in abating the violative condition. *Mullines & Sons Coal Co.*, 16 FMSRHC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp.*, 6 FMSHRC 1596, 1603 (July 1984); *BethEnergy Mines, Inc.* 14 FMSHRC 1232, 1243-1244(Aug. 1992); *Warren Steen Constr., Inc.* 14 FMSHRC 1125, 1129 (July 1992). The Commission also has examined the operator's knowledge of the existence of the dangerous condition. *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1604, 1608 (Aug. 1994). In order to establish unwarrantable failure there must be a showing of aggravated conduct, that is to say, a showing the operator exhibited significantly more than ordinary negligence. Ordinary negligence, or as the Secretary defines it, "moderate negligence" is when "[t]he operator knew or should have known of the violative condition . . . but there are mitigating circumstances." 30 C.F.R. §100.3(d) (Table X).

The issue of whether the violation of section 56.20011 was the result of the company's unwarrantable failure must be based on all of the circumstances. The existence of several of the traditional unwarrantable factors does not necessarily compel an unwarrantable failure finding.

I note that the government acknowledges that the violation was not the result of

intentional conduct by the company or that the company, acting through Perin, “was necessarily reckless or indifferent.” Tr. 98. Rather, the government hinges its allegation of unwarrantable failure on the “obvious nature of the hazard, its duration of more than one shift, and the high degree of danger” posed by the violation. *Id.* But what the government does not reference is telling. The violation was not extensive. It only affected a six foot by six foot area around the top half of the crusher. Further, the violation exposed a very limited number of miners to a hazard in that, as I have found, when the violation came into existence and as it mining continued the only miners endangered were those who removed and replaced the planking around the top half of the crusher. Contrary to the inspector’s testimony, the record does not support finding that miners working on the rolls crusher and those manning tag lines were exposed. Moreover, as mining continued the time during which the hazard would have existed was not open ended. When the top half of the crusher was reconnected to the bottom half and the planking was replaced, the hazard was eliminated. According to Perin it would not have been very long before this work was done. Tr. 91. Further, everyone agreed that the company had not been placed on notice that it needed to place handrails around the opening. This was the first time that the company was cited for violating section 56.20011 with respect to an opening, although Perin recognized the company should have complied. Tr. 89. Finally, the company has an enviable safety record and is not an habitual offender. Perin’s statement that the mine had operated for 28 years without an accident was not refuted, and the government’s records indicate the mine has no pertinent history of prior violations. Tr. 101-102, 107-108.

Although the company was indeed remiss in failing to provide a handrail around the opening, I find that its failure was not the result of such a heightened lack of care as to justify the inspector’s unwarrantable finding. Rather, the company’s lack of care in this instance squarely fits the definition of “moderate negligence,” which is to say that the company “knew or should have know of the violative condition . . . but there were mitigating circumstances.” 30 C.F.R. § 100.3(d) (Table X). Therefore, I hold that the company’s negligence was moderate.

**WEST 2009-972**

The Secretary’s petition in Docket No. WEST 2009-972 seeks the assessment of civil penalties for 15 alleged violations. However, at the hearing counsel for the Secretary stated his belief that two of the alleged violations were not at issue because the proposed civil penalties had been paid. The company confirmed that the check with which it paid the proposed penalties for the violations alleged in Citation No. 6479639 and Citation No. 6479644 was cashed. Tr. 104-105. Accordingly, at the close of this decision, I will dismiss all allegations regarding the violations alleged in Citation No. 6479639 and Citation No. 6479644.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479635	03/09/09	56.14132(a)	\$100

Citation No. 6479635 states:

The manually-operated horn provided as a safety feature/warning device on the . . . excavator . . . had not been maintained in a functional condition. The horn did not work unless the control joystick on which the horn control switch was mounted was moved back and forth, making it impossible to sound the horn when needed and without moving the excavator. The operator stated that this intermittent function was sometimes better than others. Miners working or traveling in the area risked receiving very serious injuries should the excavator operator be unable to warn them of movement or other hazards. This excavator was in operation in this condition, which had not been noted on the equipment preshift examination.

Gov't Ex. 2.

Brian Chaix is a federal mine inspector. He is employed in the agency's Vacaville, California office. Tr. 109. Chaix began working for MSHA in 2007. *Id.* Prior to working in the Vacaville office, Chaix worked in MSHA's Albany, Oregon office where he spent several hundred days a year inspecting sand and gravel facilities and quarries. Tr. 111. Before taking a job with MSHA Chaix also worked for a number of private mine operators at both small and large facilities. He held a number of positions with the companies. Tr. 110. Chaix received a B.A. degree from Southern Illinois University. Tr. 110-111.

On March 9, 2009 Chaix inspected the company's quarry. Tr. 112. Upon arriving at the mine Chaix noticed that the mine's conveyor was operating. Tr. 113. Once at the office he introduced himself to Perin and Ms. Hockema and explained that he had come to conduct a regular inspection. *Id.*

The first piece of equipment that Chaix inspected was an excavator. Chaix testified that he asked Perin, who was accompanying him, to sound its horn. Perin tried for 30 seconds and could not get the horn to work. Tr. 116. Chaix found that if the joystick on which the horn was mounted was jiggled, the horn would occasionally sound. It was the only way he could get the horn to function. *Id.* In his notes, Chaix wrote that Perin stated the horn "had worked sporadically . . . for some time." Tr. 116; Gov't Ex. 2 at 4. In other words, Perin agreed that the horn was defective. *See* Tr. 122.

Chaix believed that a non-functioning horn could contribute to an accident in the event the excavator operator tried to alert someone to the impending movement of the equipment. He stated that the horn also helped the excavator operator "communicate" with other equipment in

the area. Tr. 118. However, traffic in the area was very limited. Tr. 117; Gov't Exh. 2 at 4. Although a miner could be badly hurt or even killed if he was struck by the excavator, given the limited traffic, Chaix thought it unlikely that the defective horn would cause an accident. Tr. 118-119. Therefore, he found that the company's negligence was moderate. Tr. 119. He stated, "[T]he degree of inattention was not extraordinarily disproportionate to the degree of the hazard based on likelihood." *Id.*

### **THE VIOLATION**

Section 56.14132(a) requires "manually operated horns . . . provided on self-propelled mobile equipment" to "be maintained in functional condition." The excavator was mobile equipment. It was provided with a manually operated horn. The horn did not always work when activated. Tr. 116. The violation existed as charged.

### **GRAVITY**

Chaix found that an injury was unlikely to result from the violation. Gov't Ex. 2; Tr. 117. His testimony that vehicular traffic near the excavator was limited was not disputed (Tr. 118-119), and the record contains no testimony of foot traffic in the vicinity of the loader. I therefore find that Cahix's assessment was correct. Although the violation created the potential for a very serious injury it was unlikely that any injury would occur.

### **NEGLIGENCE**

Negligence is the failure to meet a duty of care required under all of the circumstances including those that mitigate the duty. Here, because of the unlikely prospect of an injury occurring due to the violation, the inspector found that the company exhibited a "moderate" degree of neglect. Tr. 119. I agree. The low level of gravity meant that the company's duty of care was commensurate. At most the company was moderately negligent.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479636	03/09/09	56.14103(b)	\$100

Citation No. 6479636 states:

The front and rear windshields on the . . . front end loader were broken, which posed a cutting hazard to the operator as well as obscuring visibility. The front glass was broken in approximately 6 places within the field of view, and the rear glass was broken in more than 12 places within the field of view. A miner cleaning the glass

risked receiving cut injuries from sharp glass edges. Visibility was also impaired by the multiple reflective lines within the operator's field of view, which exposed miners working or traveling nearby to the risk of serious injury resulting from obscured visibility. This loader had been in operation in this condition, which was not noted on the preshift examination. This condition was obvious and had apparently existed for some time.

Gov't Ex. 3.

There were two front end loaders at the mine, and Chaix inspected both. With regard to the first one, Chaix found that its front and rear windshields were cracked, conditions that posed a cutting and visibility hazard to the loader operator.<sup>5</sup> Tr. 123; Gov. Ex. 3 at 4. Chaix testified that Perin told him the loader had been operated in this condition. Tr. 145. In Chaix's view the most serious hazard was not that a miner would be cut<sup>6</sup>, but that the cracks in the front windshield impaired the loader operator's visibility. When sunlight hit the cracks the light could reflect in such a way as to cause a glare making it difficult for the loader operator to see miners on the ground and to maintain eye contact with the operators of other equipment. Tr. 125-126. The operator's restricted visibility could result in the loader hitting someone or colliding with other equipment, accidents that could cause very serious injuries to the loader operator and/or others. *Id.* However, Chaix believed that injuries were unlikely to occur because the the cracks did not completely obscure the loader operator's vision. Tr. 126. Moreover, anyone cleaning the window was likely to be aware of the cracks and take care not to be cut. Tr. 126. Chaix found that the company was moderately negligent. He asserted that the violation was "easily seen." Tr. 127. He testified that Perin told him that the windows had been in a defective condition for a number of years. Tr. 128.

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<sup>5</sup> Chaix was sure that the cutting hazard existed because he moved is pen across the windows' cracks and the pen caught on their jagged edges. Tr. 125.

<sup>6</sup> Chaix was asked if cleaning the window with a squeegee would eliminate the cut hazard. Tr. 129. In responding he implied that while a person using a squeegee might not be cut (Tr. 129; *see also* Tr. 130, 145), a photograph of the front windshield (Gov. Exh. 3 at 4) showed streaks that were inconsistent with those left by a squeegee, and that in any event using a squeegee did not relieve a mine operator of its duty to replace the cracked windows. Tr. 131, 145-146.

## THE VIOLATION

Section 56.14103(b) states in part: “If damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced.” Chaix’s testimony that loader’s front and rear windshield’s were cracked obscuring the loader operator’s visibility and creating the possibility of an accident was not refuted. Tr. 125-126. Nor was his testimony that an accident would endanger the loader operator and/or others. *Id.* Further, his testimony regarding the possibility of a miner cutting himself on the cracked glass was credible. Tr. 126. Therefore, I find that the damaged windows both “obscure[d] visibility necessary for safe operation” and “create[d] a hazard to the equipment operator” (section 56.14103(d)) and that the company violated the standard.

## GRAVITY

Chaix found that the violation was unlikely to result in an injury producing accident, and I agree. As Chaix noted and as photographs of the windows make clear, despite the cracks, the loader operator’s visibility was not totally obscured. Gov’t. Ex. 3 at 4 & 5. In addition, the cracks in the windows were plainly visible to the loader operator and it is reasonable to assume, as Chaix testified, that the operator would take precautions against cutting his hand when cleaning the windows. Tr. 145-146.

## NEGLIGENCE

Chaix seems to have based his finding of moderate negligence on the fact that the violation was unlikely to cause an injury. The fact that the violation was not serious means that the company’s lack of care was commensurately low. I therefore sustain Chaix’s negligence finding.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479637	03/09/09	56.14100(d)	\$100

Citation No. 6479637 states:

Defects on self-propelled mobile equipment affecting safety have not been recorded as required . . . Multiple defects affecting safety on multiple pieces of equipment which were obvious had existed for some time and/or were known to mine management [but] had not been recorded as required by the standard, which exposed miners operating equipment or working and traveling near to the risk of receiving very serious injuries resulting

from collision (from not knowing the [equipment] operator's intention to turn or stop, or from obscured visibility,) as well as other hazards.

Gov't Ex. 4.

Chaix testified that during the course of his inspection he observed "multiple defects on multiple pieces of equipment" that were not recorded in the required examination books. Tr. 132. When asked to be more specific about the unrecorded "multiple defects," Chaix testified that brake lights on the front end loader were not functioning.<sup>7</sup> Tr. 135-136. In addition, Chaix stated that there were cracked windows on the front end loader (Citation No. 6479636) and on an excavator (Citation No. 6479640). Tr. 136-137; Gov. Ex. 4 at 2. Chaix testified that on March 9, 2009 during the course of his inspection he asked Perin for the book in which the results of pre-operational examinations of equipment were recorded. Tr. 134. Perin produced a book entitled "Daily Inspection Log," and when Chaix looked at it he found that the aforementioned defects were not noted. Tr. 132-133. Chaix took a photograph of the pertinent page in the book. Gov't Ex. 4 at 3. To abate the condition the company recorded the defects in the "comments" section of the records book, and Chaix took a photograph of the corrected page. Tr. 135; Gov. Ex. 4 at 4.

In the inspector's opinion the hazard created by failing to record the defects was that company would not "remember about the defects and stay on them and ensure that they were corrected." Tr. 133. However, he did not believe that an injury was likely to result from failing to record the defects. Tr. 137. He stated that none of the unrecorded defects created hazards that were "outrageous." Tr. 137. Chaix also found that the company's failure to record the defects was the result of its moderate negligence.. While Chaix maintained Perin, as the representative of the company, was responsible for ensuring compliance with the standard, MSHA's records did not show the company had been previously cited for violating section 56.14100(d). For this reason, Chaix believed there was "some mitigation" of the company's negligence. Tr. 138.

### **THE VIOLATION**

Section 56.14100(d) requires defects on self-propelled mobile equipment that affect safety and that are not corrected immediately to "be reported to and recorded by the operator." Chaix's testimony that the brake lights on the front end loader were not working was not contradicted, nor was his testimony that the windows of the loader and the excavator were cracked. Tr. 135-136. The equipment was self-propelled. Brake lights that do not work and windows that are cracked are defects affecting safety. The defects were not recorded as required. Tr. 134. The violation existed as charged.

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<sup>7</sup> The allegedly defective brake lights were not cited by the inspector as a separate violation. Tr. 136.

## GRAVITY

Chaix found that the violation was unlikely to result in an injury producing accident, and he was right. Failure to record the defects made it less likely they would be corrected, but in and of itself the failure did not pose an immediate hazard to miners.

## NEGLIGENCE

Chaix also found that the violation was due to the company's moderate negligence, and . again, I agree. The defects were obvious. They should have been noted and recorded. However, the non-serious nature of the hazard carried with it a commensurately moderate duty of care.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479641	03/09/09	56.14103(b)	\$100

The left front window on the CAT 980B front end loader . . . was broken in approximately 6-8 places, posing a cut hazard to the operator as well as obscuring visibility. Miners risked receiving cut injuries from sharp glass edges, as well as from obscured visibility within the operator's field of view. This loader had been in operation in this condition, which had not been noted on the preshift examination. This condition was obvious and had apparently existed for some time.

Gov't Ex. 6.

Chaix testified that the second front end loader owned and operated by the company also had a cracked window. He cited the first front end loader in Citation No. 6479636. He cited the second in the subject citation. Tr. 141, Gov. Ex. 6 at 4. Chaix believed that the cracked widow somewhat limited the loader operator's visibility and subjected a person cleaning the window to a cut hazard. Tr. 142. He recalled that the glass did not appear to be loose and did not completely obscure visibility. *Id.* As with the other loader, he thought it unlikely that the cracked widow would cause an injury but that if it did, the result could be lost workdays or restricted duty to the affected miner. *Id.*

Although Chaix did not know how long the window was cracked, he testified that the cracks did not appear new. Tr. 143. He speculated that the window had been cracked "more than a day or two." Tr. 144. He also testified that he believed the continuing presence of the cracked

window violated section 56.14103(b) and was the result of the company's moderate negligence. Tr. 143-144. The defect was easy to see. Tr. 144. He did not know however whether the condition had been brought to Perin's attention so he thought the company's lack of care might be mitigated. *Id.* None the less, he emphasized that the company was responsible for the condition and for maintaining the loader in good condition and that it did not live up to its responsibility. *Id.*

### **THE VIOLATION**

As previously noted, section 56.14103(b) requires the replacement of damaged windows that obscure visibility necessary for safe operation or that create a hazard. Both Chaix's testimony and the government's photographic evidence establish the cracks in the loader's left front widow somewhat obscured the loader operator's visibility. Tr. 142; Gov't Ex. 6 at 4. In addition, although he acknowledged the risk was slight, Chaix's belief that the cracks subjected a miner cleaning to the window to the chance of being cut was not challenged. *Id.* Therefore, I find that the damaged window both "obscure[d] visibility necessary for safe operation" and "create[d] a hazard to the equipment operator." 30 C.F.R, §56.14103(b). The company violated the standard.

### **GRAVITY**

Chaix found that the violation was unlikely to result in an injury producing accident, and he was right. As Chaix noted and as a photograph of the window makes clear, despite the cracks, the loader operator's visibility was not totally obscured. Gov't. Ex. 6 at 4. In addition, the cracks in the window were plainly visible and it is reasonable to assume that any miner cleaning the window would take precautions against cutting his hand. I conclude that the violation was not serious.

### **NEGLIGENCE**

As Chaix noted, the company had a duty to maintain the loader in good condition, and it should have replaced the cracked window. Tr. 144. However, the cracked window created a hazard that was unlikely to occur and the low level of the danger posed by the violation means that the company failed to meet a commensurately low standard of care. At most it was moderately negligent. Tr. 143-144.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479642	03/09/09	56.14132(b)(1)	\$100

The automatic reverse-activated alarm provided on the CAT 980B front end loader . . . had not been maintained in functional condition. The loader was observed in operation reversing

with no audible alarm, and upon investigation was found to function only if the loader operator wiggled the controls. Miners working and traveling in the area risked receiving very serious or grave injuries resulting from not knowing this loader's intention to reverse. The loader was in operation in this condition, which was not noted in the preshift examination.

Gov't Ex. 7.

The front end loader in question is the same equipment cited in Citation No. 6479641 for a cracked window. When inspecting the loader Chaix saw it back up but did not hear its back up alarm. Tr. 147. Checking more closely, Chaix found that the back up alarm only worked if the alarm's controls were wiggled. *Id.* In his contemporaneous notes, Chaix wrote that the alarm "functioned intermittently at best" and that it "[o]nly worked when fiddled with." Gov. Exh. 7 at 3; Tr. 149. Chaix explained that the purpose of the alarm is to warn miners on the ground or in other equipment of the motion of the equipment when it is put in reverse. Tr. 149. In particular, it alerts those standing behind it when the loader begins to move toward them. Miners standing behind often cannot be seen by the loader operator. *Id.* When the alarm does not work, they are at risk of being struck. Tr. 149-150.

The inspector found that the improperly working alarm was unlikely to result in a miner being injured. Tr. 150. He did so because the alarm "may have worked occasionally" and the number of miners exposed to the hazard was limited. Tr. 151. None the less, if a miner was run over by the loader as a result of its alarm not working, Chaix believed that the miner was likely to be killed. *Id.*

Chaix found that the improperly working alarm was the result of the company's moderate negligence. He had no evidence that Perin knew about the condition, and he speculated that the fact the alarm functioned at times may have lead the company to believe the alarm was in compliance. Tr. 152. In addition, Chax testified that because the loader was "pretty [loud]" it was possible the loader operator might not have noticed when the alarm did not sound. *Id.*

### **THE VIOLATION**

Section 14132(b)(1) requires the installation of alarms or signals "when the operator of [self-propelled mobile equipment] has an obstructed view to the rear." The cited front end loader is self-propelled and mobile. The record establishes the loader operator has an "obstructed view to the rear." As Chaix put it, the loader is "a fair sized piece of equipment with a big blind spot. If I'm standing right at the rear of the equipment, the operator cannot see me." Tr. 149. Section 14132(B)(1)(I) requires such equipment to have a reverse-activated signal alarm. A back up alarm does not fulfill this requirement unless it is fully operational. Here, Chaix's undisputed

testimony that the alarm only worked when its controls were jiggled means that the alarm was not fully operational and that the violation existed as charged. Tr. 147, 149; Gov. Ex. 7 at 3.

**GRAVITY**

Chaix found that the improperly functioning alarm was unlikely to result in an accident, and I agree. Tr. 150. As he noted, the alarm may have worked intermittently and few miners exposed to the hazard. Tr. 151. This was not a serious violation.

**NEGLIGENCE**

I also agree with Chaix that there were factors that mitigated the company's negligence and that justified his belief the company was moderately culpable in failing to meet its required standard of care. The fact that the alarm may have worked occasionally meant that those responsible for detecting and correcting the malfunctioning nature of the alarm may have been misled as to its functional state. *See* Tr. 152. I affirm the inspector's moderate negligence finding.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479643	03/09/09	56.14101(a)(1)	\$243

The service brake system provided on CAT 980B front end loader . . . was not capable of stopping the loader with its typical load on the maximum grade it travels. This loader was observed in operation at the time of inspection on grades measuring up to approximately 12%, but when tested on a grade measuring approximately 5-7% [the service brake were] insufficient to stop the loader. Miners operating this loader or working and traveling nearby risked receiving very serious or grave injuries resulting from overtravel or run away.

Gov't Ex. 8.

After examining the back up alarm, Chaix watched as the loader operator, who was loading trucks with mine product, used the loader's gears to stop and hold the equipment. Tr. 154. Chaix concluded that the loader's service brakes were incapable of stopping the loader when it was carrying its typical load. Tr. 154. At the time Chaix observed the loader it was

operating on a 5% -7% grade. Tr. 156. The maximum grade at the mine is approximately 12%.<sup>8</sup> Tr. 160. The 12% grade is located on the mine's haulage road between the crushing plant and the pit, and miners and other equipment work and travel on the road. Tr. 159-160. Chaix decided not to test the loader's brakes on the 12% grade because it "was too dangerous." Tr. 155; *See* Tr. 156-157, 158; *See also* Gov't Exh. 8 at 3. If the service brakes did not work on a 5% - 7% grade, testing them on a 12% grade would be "professionally reckless." Tr. 158.

Chaix believed that the non-working service brakes were reasonably likely to result in a fatal injury. Tr. 160. He noted that there was "mixed traffic" (Tr. 160) – meaning vehicular and foot traffic – in the areas where the loader operated. Tr. 161-162. If the loader's gears failed while it was on a grade and the loader operator could not shift into reverse, the only way that the loader might be kept from running away was to drop its scoop, but this procedure was not an alternative to working service brakes, and the lack of adequate service brakes could "result in a very bad accident." Tr. 161. The loader operator was exposed to the hazard as were miners in other equipment and miners on foot. Tr. 162.

The inspector found that the violation was S&S. There was a "discrete safety hazard" in that the service brakes were not functional and the loader was sometimes operated on grades with mixed traffic. Tr. 163. Had the inspector not forced the issue by charging the company with a violation, Chaix believed that an accident due to the malfunctioning brakes would have been reasonably likely as mining continued. *Id.* Miners and others using the road where the loader was operated were exposed "to an unreasonable degree of hazard given that there was a loader that didn't have brakes." Tr. 164. Chaix also believed that injuries resulting from such an accident would be "at least permanently disabling, if not fatal." *Id.*

The inspector found the condition was the result of the company's moderate negligence. While the loader operator told Chaix that the service brakes needed to be adjusted, the inspector was unable to determine whether the company's management actually knew about the loader's condition. Although, he added, management should have known. Tr. 162-163.

### **THE VIOLATION**

The fact of violation is not subject to serious dispute. Section 56.14101(a)(1) requires that "self-propelled mobile equipment . . . be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." The cited front end loader was self-propelled and mobile. The inspector's testimony establishes that its service brakes did not work on a 5% to 7% grade where it was loading trucks with its typical load. Tr. 155, 159. The maximum grade at the mine is approximately 12%. Tr. 160. As Chaix noted, if the service brakes did not hold the truck with its typical load on the lesser grade, they would not hold it on the maximum grade. Tr. 158. The violation existed as charged.

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<sup>8</sup> Chaix measured the grade with a level. Tr. 160.

**S&S AND GRAVITY**

I have found a violation of section 56.14101(a)(1). I also find that the violation created a discrete safety hazard. If the loader was operated on a grade of 5% to 7% or more at the mine and if the loader stopped, it was subject to rolling out of control because its service brakes were faulty. Tr. 155, 156-158. Chaix’s testimony establishes that the loader shared the areas where it operated with equipment operated by other miners as well as with miners on foot. Tr. 160-161. All of these miners were in danger of being struck by the loader as it rolled down a grade. Tr. 162-163.

I agree with Chaix that the hazard was reasonably likely to occur. The failure of the service brakes to hold the loader, the prevalence of other miners both in equipment and on foot on the grades where the loader operated, and the fact that as mining continued the loader would be stopping on the grades between 5% to 7% and 12% in the vicinity of other miners meant that an injury producing accident was reasonably likely to occur. *See* Tr. 164. Finally, as the inspector accurately noted, the kind of injury that was likely to result would be serious “if not fatal.” Tr. 164. For these reasons, I find that the violation was S&S.

It also was very serious. The inspector stated that the injury likely to result from the violation would at least be at that level, and he was right. Tr. 164.

**NEGLIGENCE**

Because Chaix could not determine whether mine management actually knew the service brakes were not working properly, he concluded the company’s negligence was moderate. Tr. 162-163; Gov’t Ex. 8. I will not gainsay the inspector’s finding except to state that he was correct when he observed that whatever the state of mine management’s actual knowledge, the company should have known about the brakes’ condition. Tr. 162-163. I affirm the inspector’s finding that the company was moderately negligent.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479640	03/09/09	56.14100(a)	\$100

The citation states:

Preshift examinations have not been performed on the Cat 908B front end loader . . . as evidenced by multiple defects affecting safety: several of which were unknown to the operator because they were not checked, whereas others were not noted despite being obvious (56.14100(d) cited separately.) The front left seat mount was cracked off, making the seat excessively loose and exposing miners

operating this equipment or working nearby to the risk of injury from loss or inaccuracy of control. The brake lights did not work, which were not checked. The front left windshield was also broken, the backup alarm was not maintained in functional condition, and the service brakes were insufficient to stop the loader with a typical load on the maximum grade it traveled (56.14103(b), 56.14132(b), and 56.14101(a)(1) cited separately.) Failure to perform a preshift examination, then document and correct defects affecting safety exposed miners to the risk of very serious injury resulting from hazards of which miners were unaware.

Gov't Ex. 5.

The inspector testified that he cited the company for a violation of section 56.14100(a) because, "The standard requires that equipment to be used on a shift be examined prior to being placed in operation" and the cited front end loader had not "received a thorough preshift examination." Tr. 165; The inspector listed the deficiencies: "The front left seat mount was cracked . . . making the seat loose, the brake lights didn't work, the front and left windshield was broken, the backup alarm [did not function,] and the service brakes . . . didn't stop the loader." Tr. 165; *See* Gov. Exh. 5 at 5. Chaix testified that when he checked the company's pre-operational shift inspection log, no defects were listed. Tr. 168.

The defects that were not the basis for separate citations were the cracked seat mount and the non-functioning brake lights. In Chaix's view neither of these was likely to cause an accident. Tr. 166. Still, it was possible that the cracked seat mount could cause the loader operator's seat to wiggle, leading to a loss of control of the equipment and a resulting collision or to over-travel of the roadway. Tr. 167. In addition, the defective brake lights could cause a collision if an equipment operator approaching from behind was unaware that that loader stopped. *Id.* If such accidents occurred, Chaix believed the resulting injuries to the equipment operators and others nearby could be "pretty serious." Tr. 167.

Chaix found that the failure to conduct an adequate preshift examination was the result of the company's moderate negligence. The loader operator stated that he did not check the seat mount or the brake lights and although the conditions were obvious Chaix thought it possible that the company did not know about them. Tr. 167, 169.

## THE VIOLATION

Section 56.14100(a) states: “Self-propelled mobile equipment to be used during the shift shall be inspected by the equipment operator before being placed on operation on that shift.” The standard goes on to require any equipment defects to be corrected in a timely manner (30 C.F.R. § 56.14100(b)) and defects affecting safety that are not corrected to be reported to and recorded by the mine operator. 30 C.F.R. § 56.14100(d).

Here, the government charges the company with failing to conduct an adequate pre-operational examination of the front end loader. It asserts that the inadequacy of the examination is evidenced by specific defects found on the loader (*i.e.*, the loose seat, inoperable brake lights, cracked windows, a malfunctioning backup alarm, and ineffective service brakes). Tr. 168. Chaix’s testimony about the loose seat and the inoperable brake lights was not challenged, and I find they existed and they affected safety just as Chaix maintained. Tr. 166, 168. I previously found the other specified defects existed and affected safety. Chaix testified without dispute that he looked at the company’s records of its examination of the loader and found that no defects were recorded. Tr. 168. An examination conducted pursuant to the standard must be carried out adequately in order to meet the standard’s requirements. Conversely, an examination conducted inadequately violates the standard. Five defects affecting safety existed and none were recorded. Tr. 168. Thus, the record supports finding that company’s examination of the loader was inadequate and hence that the company violated the standard.

## GRAVITY

The inspector found the violation was unlikely to cause an accident although if one occurred it would have “pretty serious” consequences for those involved. Tr. 167; Gov’t Ex. 5. The hazard posed by the violation was that the undetected safety defects would not be corrected and the ongoing problems would result in a number of events that would endanger the loader operator and other miners. Tr. 167. The inspector’s on-the-spot assessment that the record keeping violation was unlikely to result in an accident is not without support. I conclude that the violation was not serious.

## NEGLIGENCE

The inspector found that the violation was the result of the company’s moderate negligence. He thought it possible that mine management did not know the examinations were inadequately conducted. Tr. 167, 169. Still, management should have known, and it clearly failed to meet the standard of care required. Its failure was not of a heightened degree, and I affirm Chaix’s negligence finding.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479645	03/09/09	56.9300(a)	\$108

The citation states in part:

Neither berms nor guardrails were provided in several areas of the mine access road, in lengths up to approximately 500 feet and over drop-offs of up to approximately 100 feet. The gated, single lane road, measure approximately 18 feet wide between turnouts, and approximately 12% in grade. All mine traffic uses this road, as it is the only access to the mine. The mine's gate and sign are at the bottom of the road where it meets a paved public roadway, the road is maintained by the mine operator, and was built by/for the mine. The mine operator had bermed some of this road in the past, but several significant areas remain unbermed. Miners and haul truck drivers using this road risked receiving very serious or grave injuries resulting from overturning or over traveling any of the several areas. This road was in service in this condition, which was not noted on any examination.

Gov. Ex. 9.

During the course of the inspection Chaix noticed that the mine's "gated, single-lane access road . . . lacked berms in several areas." Tr. 171. The road was the only way to get into and out of the mine and all mine traffic used it. Tr. 175. Perin told Chaix that he and his employees maintained the road. Tr. 176-177. According to Chaix, while there were indications the company provided berms along the road in the past, the berms had deteriorated. Tr. 177-178. Chaix identified a photograph (Gov't Ex. 9 at 7) that shows the access road when looking toward the gate where a public road passes the mine entrance. The photograph depicts a drop-off on the left side of the mine road. Tr. 172. It also shows how the roadbed goes "up to the edge of the drop-off without an intervening berm or guardrail." *Id.* Chaix also testified that further uphill there was another area of unbermed mine road with a drop-off on one side. Tr. 173-174; Gov't Ex. 9 at 10. Even further along there was an unbermed corner with a drop-off on one side of the corner. Tr. 174; Gov't Exh. 9 at 11. At the top of the hill there was still another unbermed area of the road with a drop-off. Tr. 174-175; Gov't Exh. 9 at 12. Chaix estimated that in total approximately 500 feet of the road lacked required berms. Tr. 175. He calculated one of the drop-offs had a slope of an approximately 45 degrees and a vertical height of approximately 129 to 140 feet. Tr. 179-180. There was, he testified, "plenty of distance for somebody to get hurt." Tr. 180.

Chaix found that the lack of berms was reasonably likely to contribute to a serious accident. He testified that “every vehicle coming to or from this mine would climb up [the inadequately bermed road] toward the mine empty and descent the grade full.” Tr. 180. Vehicles that overtraveled the road would fall in excess of 100 feet to the bottom of the drop-offs. Tr. 181. In Chaix’s opinion, such accidents “would be expected to result in extremely serious injuries” (Tr. 181) or in fatalities. Tr. 182. He noted that most haul trucks using the road did not have rollover protection. Tr. 181.

Chaix found the company was moderately negligent in failing to adequately berm the road. Tr. 183. Although the lack of berms was visually obvious, he believed the company’s failure to meet its duty of care was mitigated. He stated, “[T]here may have been a misunderstanding regarding the requirement to berm.” Tr. 183. Perin added more information about the “misunderstanding.” He stated that the company was advised by a previous inspector that it did not need to berm the cited parts of the road. Tr. 257. Given the possibility of conflicting advice from MSHA, Chaix acknowledged that the company might feel “a little bit like a moving target.” Tr. 185. He added, “maybe that’s why I was willing to allow that this could have been moderate . . . negligence.” *Id.*

Perin stated that the issue of whether or not to fully berm the road had caused the company “heartburn.” Tr.252. He maintained that in 2004 or 2005 in response to being cited elsewhere for failing to have a berm, he decided the company should berm all of the road. Tr. 253, 255. The work started but an MSHA inspector told Perin the road did not have to be bermed, so the work stopped. Tr. 253, 257. Perin remember the inspector saying that the company only was responsible for hazards that affected on-site miners, not hazards affecting those traveling to and from the active mining site. Tr. 256.

If there was a violation, Prein thought that it was not S&S because the company had been in the process of complying until the previous inspector orally advised the company that he did not think berming was necessary. Tr. 253, 270-271. Perin added that “99 percent” of his argument with MSHA was due to the lack of consistency among its inspectors. Tr. 186. Perin also observed that berming the road narrowed it and in his opinion made it more rather than less hazardous. He stated, “[W]e . . . probably created a bigger hazard then the one that we solved.” Tr. 254.

Finally, Perin testified that in November, 2008 and in January, 2009 the mine received a compliance assistance visit from an MSHA employee named Evan Church. Tr. 273–274, 279. Perin was not at the mine at the time, but Church left a written note on which he listed things he saw and approved of and things he saw and believed needed correction. Tr. 274. With regard to berms, Church wrote, that they “look[ed] good.” *Id.*; Resp. Ex. 7. After Perin’s testimony was received, the Secretary called Church as a witness. Church testified that when he wrote that the berms “look[ed] good” (Tr. 274) he was referring to berms “everywhere the miners worked or traveled during their shift,” not just to the mine road. Tr. 281. Church agreed that he and Perin discussed the part of the road that was later found by Chaix to lack berms. At the time of the

compliance assistance visit Church did not consider the area to be a part of the mine because he did not think that the road belonged to the mine. Therefore, he did not think that berming that part of the road “[should] be the mine’s deal.” Tr. 281.

### **THE VIOLATION**

Section 56.9300(a) states: “Berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of such sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment.” The Secretary easily established the violation. The cited road was part of the mine. It lead from the gate to the area where extraction and processing took place. Tr. 171, 180. As Chaix noted, every vehicle traveling to and from the site of the actual mining operations used the road. Tr. 180. Chaix’s testimony and the photographic exhibits he identified make it abundantly clear that the road either was not bermed or was inadequately bermed at points where precipitous drop-offs existed. Tr. 172, 173-175, 179-180, 182; Gov’t Exh. 9 at 10, 11, 12. In this regard, Chaix’s undisputed testimony as to the steepness and depth of the drop-offs was especially compelling. Tr. 179-181. The record supports finding that just as Chaix testified, a vehicle over traveling an unbermed portion of the road next to a drop-off would have fallen in “excess of 100 feet.” Tr. 181. That such an accident “would be expected to result in extremely serious injuries” is an understatement. Tr. 181.

### **S&S AND GRAVITY**

I have found a violation of section 56.9300(a). I also find that the violation created a discrete safety hazard. The operators of all vehicles using the road were in danger of over traveling the road and falling in excess of 100 feet because parts of the road next to precipitous drop-offs were not bermed or were inadequately bermed. I also agreed with Chaix that such accidents were reasonably likely to happen as mining continued. The unbermed or inadequately bermed areas of the road were extensive, approximately 500 feet (Tr. 175), and every vehicle entering and leaving the mine used the road. Tr. 175, 180. It was only a matter of time before a vehicle operator’s misjudgement or a vehicle’s mechanical malfunction sent a vehicle perilously close to the road’s edge and with no berm or with an inadequate berm to restrain the vehicle, it was likely to go off the road and fall to the bottom of the drop-off. Chaix’s observation that such an accident “would be expected to result in extremely serious injuries” (Tr. 181) or in a fatality gives voice to the obvious. Tr. 182. For these reasons, I find that the violation was S&S.

It also was very serious. As the inspector stated, the likely result of the violation was at least an “extremely serious” injury. Tr. 181.

### **NEGLIGENCE**

Chaix found that the company’s negligence was “moderate,” but I conclude that it was “low.” Perin credibly testified that it was not clear to the company if it was required to berm the subject parts of the road. Perin’s testimony that the company was advised by a representative of

MSHA in 2004 or in 2005 that berms were not required in the cited areas and that it relied on the representative's opinion and stopped efforts to berm the road was not refuted. Tr. 253-257. Further, despite what Church may have intended when he wrote the note that the mine's "berming look[ed] good," the statement can reasonably have been read by the company as an endorsement of the berming conditions as they were at the time of Church's visit, and those conditions were essentially the same as those later cited by Chaix. While these factors do not absolve the company of failing to meet the standard of care required, they mitigate its failure to a greater extent than Chaix believed.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479646	03/10/09	56.15004	\$108

The citation states:

A miner was observed not wearing any eye protection while using compressed air to actuate brake cylinders on a truck, which exposed his eyes to the risk of receiving very serious injuries from impact and/or contamination. The miner was laying on his back under . . . [a] haul truck, using a handheld air nozzle to actuate the brake cans. The air compressor was set to approximately 100 psi, and the air . . . was vented directly to atmosphere at the miner's hands every cycle. Mud, grit and rock on the floor of the shop and on the truck were exposed to the explosive release of air every cycle. Eye protection was provided to the miner, and it was available nearby.

Gov't Ex. 10.

Chaix left the mine after he issued the berm citation. He returned the following afternoon. When he arrived at the shop area he saw a miner repairing a haul truck. The miner was using a hand held compressed air nozzle to actuate the truck's brake cylinders. To gain access to the cylinders the miner crawled under the truck and lay on his back on the shop floor. Tr. 188-189. When Chaix saw the miner, his face was about one foot from the particular cylinder he was trying to activate. He was holding the air nozzle about one foot from his face, and he was not wearing safety glasses. Tr. 188-190.

Chaix believed that each time compressed air was released from the nozzle mud and grit

on the cylinder and on the undercarriage of the truck was liberated. He noted that the air was compressed to a pressure of 100 pounds per square inch. Tr. 194. Chaix feared that because the miner was not wearing eye protection, dirt particles would fly into his eyes. Tr. 190. Chaix thought that the miner was reasonably likely to suffer an eye injury in the form of a scratched cornea with a possible accompanying eye infection. Tr. 194. Chaix described this outcome as a “multiple [week] . . . miserable experience.” Tr. 191.

Chaix asked the miner if he had safety glasses. The miner said that he did. He stopped working on the truck, got the glasses and put them on. Tr. 197. Chaix testified that the miner either forgot to use the glasses or chose not to. Tr. 192-193. Because the company was not directly responsible for the miner failing to use the available eye protection, Chaix found that the company was moderately negligent. Tr. 193-194.

Perin maintained that he had spoken with his miners about the need to wear eye protection and that he had seen the particular miner involved in the incident wearing safety glasses “a hundred times.” Tr. 264; *see also* Tr. 276. Perin did not know why the miner failed to wear the glasses. He speculated that the miner might have had a “memory lapse.” Tr. 264. The miner had been trained. The safety glasses were available. *Id.*

### **THE VIOLATION**

Section 56.15004 states that “All persons shall wear safety glasses, goggles or face shields . . . when in or around an area of a mine . . . where a hazard exists which could cause injury to unprotected eyes.” The Secretary proved the violation. Chaix’s testimony that a miner was not wearing eye protection and that he was working in a situation where particles liberated by blasts of compressed air could fly into the miner’s unprotected eyes was not disputed. Tr. 190. Nor was his common sense testimony that such an accident could result in the miner suffering a scratched cornea and a possible eye infection. Tr. 191.

### **S&S AND GRAVITY**

I have found a violation of section 56.15004. I also find that the violation created a discrete safety hazard. As Chaix testified, without safety glasses mud and dirt freed by blasts of compressed air could be propelled into the miner’s unprotected eyes. Chaix thought as mining continued it was reasonably likely the miner would experience an eye injury, and I agree. Tr. 191. The miner was engaged in ongoing work on the haul truck’s brake cylinders. The work involved repeated uses of the air nozzle, which in turn lead to repeated projections of mud and dirt particles in the immediate vicinity of the miner’s unprotected eyes. The likelihood a foreign particle lodging in one or both of the miner’s eyes increased with each blast of compressed air making an eye injury reasonably likely. Further, the resulting eye injury was likely to be of a reasonably serious nature. Chaix rightly described such an injury as likely to be a “miserable experience.” Tr. 191.

In addition to being S&S the violation was serious because a damaging eye injury was its most likely result.

### NEGLIGENCE

Chaix found that the company was moderately negligent. Tr. 193-194; Gov't Ex. 10. The record, however, shows that the company met the standard of care required. The company made eye protection available to its employees. Tr. 197. It advised miners about the requirements of section 56.15004. Tr. 264. Indeed, Perin specifically spoke with the miner in question about wearing safety glasses. Tr. 276. No one knows why the miner did not wear them. Both Chaix and Perin speculated that he possibly forgot. Tr. 192-193, 264. Chaix also thought it possible he purposefully decided not to. Tr. 192-193. In either case there was no showing by the Secretary that the violation was due to any failing on the company's part, and I find that the company was not negligent.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479648	03/11/09	56.16006	\$100

The citation states:

The valves on 4 compressed gas cylinders stored or use in the shop area were not protected by covers as required by the [s]tandard. They were not in use at the time of inspection, and miners working and traveling in the area risked receiving very serious injuries from this missile/ fire/explosion hazard.

Gov't Ex. 11.

After observing the miner who was not wearing eye protection, Chaix left the mine. He returned the next day and traveled again to the shop area. There he saw four compressed gas cylinders that were not equipped with protective valve covers. Tr. 200; Gov't Ex. 11 at 3 and 4. The cylinders, which usually fueled a cutting torch, were not in use. Tr. 200, 203. Their hoses were coiled and their valves were shut off. Tr. 203. Miners were working in the shop in the vicinity of the cylinders. *Id.*

Chaix believed that the cylinders contained gas and were available for use. He note that it was a "common practice" to remove empty cylinders "from the location of use and place [them] where the gas supplier can pick [them] up." Tr. 202. The cylinders Chaix saw were still located where they could be used. *Id.* He testified that the tanks contained acetylene and oxygen. Acetylene was stored at "several hundred psi [pounds per square inch]" and oxygen was stored at "several thousand psi." *Id.* Without a cover the cylinders' valves were exposed to the risk of

being damaged. If a valve was damaged uncontrolled gas could be expelled from a cylinder, the cylinder could become a missile-like projectile. Tr. 204. Or, a cylinder's regulator and its valve could be dislodged and they too could be propelled with great force. Tr. 204. In addition, if a cylinder's valve was damaged but the tank or its parts were not put in motion, the valve could still leak and create a fire or explosion hazard. Tr. 205.

In Chaix's opinion if a cylinder or a part of a cylinder was projected and hit a miner, the miner's resulting injuries were likely to be permanently disabling. Tr. 206. Chaix "wouldn't want to be on the receiving end of the degree of force." *Id.* However, Chaix recognized that because the tanks were secured by chains, they were unlikely to tip or fall and suffer damage. Therefore, it was unlikely an injury would result from the violation. Tr. 205-206. Moreover, Chaix saw no moving equipment near the tanks. *Id.*

Chaix found the lack of valve covers was due to the company's moderate negligence. He believed that the company simply overlooked the requirement of keep the caps over the valves. Tr. 207. He noted that the covers were "nearby and available." Tr. 209. Perin agreed that during the compliance assistance visit two to three months before Chaix's inspection, Church indicated the company should cover the valves. Tr. 275; Resp. Ex. 7. Perin forthright stated, "[W]e didn't do that. We slid on that." Tr. 275.

### **THE VIOLATION**

Section 56.16006 states in part: "Valves on compressed gas cylinders shall be protected on covers when being transported or stored." There is no dispute about the facts. They establish that four compressed gas cylinders stored in the shop area had valves that were not protected with valve covers. Tr. 200-203. The facts establish the violation.

### **GRAVITY**

Chaix found that the hazards created by the violation were unlikely to occur although if they did they could result in serious injuries to the company's miners. Tr. 204-206. The facts confirm that Chaix's analysis of the gravity of the violation was in all respects correct. The subject cylinders were chained upright and unlikely to fall or tip in such a way that the cylinders or parts of the cylinders would become uncontrolled projectiles or leaked gas that would explode or catch fire. Tr. 205-206. Moreover, Chaix detected no evidence of equipment operating in the vicinity of the tanks that could hit them causing the same results. *Id.* For these reasons, I agree with Chaix that the violation was not serious.

### **NEGLIGENCE**

I also agree with Chaix that the company was moderately negligent in allowing the violation. Tr. 207; Gov't Ex. 11. The company's duty of care was low. Perin candidly admitted that the company was on notice compliance was required. Tr. 275; Resp. Ex.7. While this might

have otherwise increased the company's level of neglect, because the violation was very unlikely to result in an injury, the company's standard of care was commensurately low. Its prior notice to comply had the effect of raising what would have been its low negligence to the level of moderate.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479652	03/11/09	56.12030	\$100

The citation states in part:

A potentially dangerous electrical condition was not corrected prior to the energization of the system. Three open holes were left on the "Lighting Panel Main" disconnect box in the electrical shed. Two were on top, measuring approximately 2 inches in diameter and 75 inches in height. One was on the bottom, measuring approximately 1 3/4 inches in diameter and 59 inches in height. Miners working or traveling in the area risked receiving very serious . . . injuries resulting from this shock/burn/fire hazard. The electrical system had been in operation in this condition which was not noted.

Gov't Ex. 12.

The inspector, whose testimony tracked the citation, testified that as he continued his inspection on March 11 he saw three open holes in the lighting panel main disconnect box. The box was located in the mine's electrical shed. Tr. 210-211. The top two holes were approximately 2 inches in diameter and located 6 feet 3 inches above the shed floor. The bottom hole was approximately 1 3/4 inches in diameter and was located approximately 4 feet 11 inches above the shed floor. Tr. 210; Gov't. Ex. 12 at 4. Chaix could not recall if the electrical panel was energized and in use at the time of the inspection.<sup>9</sup> Tr. 212.

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<sup>9</sup> Chaix is not an electrician and he agreed that it was possible the box could have been out of service, although he added that he "was informed at the time of the inspection, that [the box] had been in operation in [the] condition [I cited]." Tr. 216-217. He also stated that he was told by miners that the box was used for lighting and that 120 volts of electricity passed through it. Tr. 217-218.

The inspector was concerned that insects or mice might enter the box through the holes, make nests and cause a fire. Tr. 212-213. However, Chaix believed this was unlikely. *Id.* In addition to the fire hazard, Chaix thought that there was a chance that a miner could in some way contact energized parts inside the box and be shocked or even electrocuted. Tr. 213-214. However, Chaix recognized that a shock injury also was not “terribly likely.” Tr. 214. He added that he thought that the area around the box was visited by a miner at least once or twice a shift. Tr. 215. Chaix found that the company was moderately negligent. Tr. 215; Gov’t Ex. 12. He testified that the existence of the holes was “one of those ordinary types of circumstances where something was overlooked.” Tr. 215.

Perin testified that the electrical box had been in place unchanged since 1981, that it had been inspected every year since 1981 and that no citations had been issued with regard to it. Tr. 267. Given the prior citation-free inspections he did not think that the company was negligent. Tr. 268. If there was a violation, the company was not responsible because of the “inconsistencies” of MSHA’s enforcement actions. Tr. 269.

### THE VIOLATION

Section 56.12030 states that when a “potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.” The standard is one that is “simple and brief in order to be broadly applicable to myriad circumstances.” *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (Nov. 1981). In applying the standard the Commission has mandated an objective standard, *i.e.* the reasonably prudent person test. *BHP Minerals International, Inc.*, 18 FMSHRC 1342, 1345 (Aug. 1996). The question is whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard. *Ideal Cement Co.*, 12 FMSRHC 2490, 2416 (Nov. 1990). The Commission has stated that various factors that bear upon what a reasonable, prudent person would do, including accepted safety standards in the field, considerations unique to the mining industry, and the particular circumstances at the mine. *See U.S. Steel Corp.*, 5 FMSHRC 3, 5 (Jan. 1983).

It is a close question whether the Secretary proved a violation of the standard, but on balance I conclude that she did. I credit Chaix’s testimony that he was told the box was used for lighting and that 120 volts of current passed through it. Tr. 120. I do so because it was not challenged and/or contradicted by Perin. I also find that Chaix’s uncontradicted belief the area around the box was visited by a miner at least once or twice a shift was factually correct. Tr. 215. Although Chaix did not know if the box was energized and in use at the time of inspection (Tr. 212-213), the evidence supports finding that the box had been used in the past with the holes present and that it would be used in the future. Tr. 216-218. With 120 volts passing through the box and with a miner in the immediate vicinity of the box, I conclude that a reasonably prudent mine operator would not have used the box in the condition that Chaix found.

Chaix forthrightly recognized that there was a very little chance that insects or animals

nesting in the box would cause a fire. Tr. 213-215. He also acknowledged that there was very little chance that a miner would suffer a shock injury because of the holes in the box. Tr. 214. However, the fact that a fire or shock hazard was not “terribly likely” does not mean that a reasonably prudent operator would have ignored the hazard. Rather, Chaix’s testimony that these very hazards happened in the past at other mines is a persuasive indication that a reasonably prudent operator would have taken steps to prevent them. Tr. 215. In other words, a reasonably prudent operator would have covered the holes. The underlying purpose of the standard is to protect miners working around electrical equipment and electrical circuits. To fully effectuate this purpose, the company should have eliminated access to the box’s internal components. For these reasons I conclude the company violated section 56.12030.

**GRAVITY**

The inspector testified that fire and shock hazards were created by the violation, and the record supports finding that he was correct. Tr. 212-214. The record also supports finding that the hazards were not “terribly likely” to occur. Tr. 214. There was at best, one miner who visited the area on a regular basis. Tr. 215. Moreover, the Secretary did not quantify the chance of an insect or animal nesting in the box, and I suspect the reason she did not is because the chance is so slight. The inspector found it unlikely the violation would cause an injury, and the record bears him out. This was not a serious violation.

**NEGLIGENCE**

While Chaix also found that the violation was caused by the company’s moderate negligence, I conclude its negligence was low. The company’s duty of care was as minimal as the violation’s gravity. Further, the company was not the only entity that failed to detect the violation. The record supports finding that the government too repeatedly failed to notice it. Perin’s testimony that the box had been the way Chaix found it for approximately 20 years was not challenged. Tr. 267. While this does not absolve the company of failing to meet the standard of care required, it confirms that company’s failure was of a minimal magnitude.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479653	03/11/09	56.14107(a)	\$100

The citation states in part:

Multiple moving machine parts on the “some main belts” were not guarded to protect miners performing inspection, maintenance and cleanup, or lubrication activities in these areas from contact, exposing them to the risk of receiving very serious injuries resulting from entanglement. The rapidly

rotating v-belt drive on the conveyor, which was located immediately adjacent to the walkway at the left side of the head pulley, was unguarded on the bottom, the back, and the front, with the opening on the bottom measuring approximately 6 inches wide by 46 inches long and the secondary drive pulley protruding from the guard by approximately 3 inches on the bottom, all at a height of approximately 58-60 inches. . . . The pinch points at the left and the right sides of the head pulley were also open to contact at a height of approximately 72 inches above the walkway. Three return idlers on this conveyor were exposed to contact: the first, at a height of approximately 12 inches and distance of approximately 13 inches from the adjacent railed walkway; the second, at a height of approximately 60-64 inches on uneven ground and a distance of approximately 4 feet from the adjacent railed stairway; and the third was partially guarded with exposure to contact on the front for approximately 3-4 inches, on the left side, at a distance of 12 inches from the existing side guard and a height of approximately 36 inches above ground, and on the right side at a distance of 9 inches from the existing side guard at a height of approximately 42 inches above ground, all adjacent to an established walkway. The tail pulley on this conveyor was also inadequately guarded to prevent contact, with open exposure on both sides and the bottom: on the right side, the self-cleaning pulley was approximately 7 inches from and flush with the bottom of the existing side guard at a height of approximately 32-34 inches above uneven ground; on the left side, at approximately 6 inches from the existing side guard and at a height of approximately 34 inches above ground; and

across the bottom. These conditions were obvious and extensive, but apparently had not been raised to mine management's awareness as hazards.

Gov't Ex. 13.

The inspector testified that on March 11, 2009 he observed "multiple moving machine parts on the main belt which were not guarded to protect miners from injury resulting from contact." Tr. 219. The main belt transports extracted product from a hopper to the plant. Chaix described the length of the belt as "one hundred feet or so." Tr. 220. He recalled that the belt was operating when he arrived at the mine. *Id.*

Among the belt's unguarded moving parts were three return idlers. Tr. 220; Gov't Ex. 13 at 11. There were tracks throughout the area and there was a significant amount of belt spillage. Chaix testified that miners usually cleaned the spillage with hand shovels. Tr. 222-223. However, he saw a fire hose in the area and he agreed that the hose also could be used to clean spillage "depending on the circumstances at the time." Tr. 237. But even if the hose was used miners still had to go near unguarded parts to perform maintenance on the belt. Tr. 238. For these reasons Chaix believe that miners were exposed to a hazard because of the unguarded return idlers all of which could be easily contacted. Tr. 221. One of the idlers was approximately 12 inches above the floor of the mine. Another was approximately 5 feet to 5 feet 4 inches above the floor and a third, which was partly guarded, was approximately 3 feet above ground level. Tr. 221-222.

In addition to the return idlers, Chaix noticed that a self-cleaning tail pulley was inadequately guarded. Tr. 223; Gov't Ex. 13 at 12. The bottom side of the pulley was approximately 2 feet 10 inches about ground level, and the ground near the pulley was uneven. Tr. 223. Chaix testified that miners would be adjacent to the pulley when they were cleaning spillage. In addition, a mechanic would be checking on the pulley while it was operating, something that would bring the mechanic near to the unguarded pulley. Tr. 224. Chaix observed "extensive tracks and tool marks throughout the area." Tr. 226. He also noted that the pulley itself was not smooth but had fins (Tr. 223) which made the inadequately guarded tail pulley "really dangerous." Tr. 226. A miner "snagged" by the fins would be pulled into the pinch point between the belt and the pulley and would "not . . . live to tell the story." Tr. 227.

There was also an unguarded v-belt drive on the conveyor at the discharge end of the belt adjacent to the walkway on the left side of the head pulley. Tr. 227; Gov't Ex. 13 at 13. The head pulley had multiple pinch points. Tr. 228. Chaix explained that inadvertent contact with the v-belt drive could result in a miner being seriously injured when pulled into the pulley's pinch points. *Id.* In addition, the pulley's shaft turned at several hundred revolutions per minute. *Id.* If a miner came into contact with the rotating shaft the result would be like "being struck with a chunk of metal at high speed." Tr. 229. Chaix "wouldn't expect to get [the miner's] body parts

back in the same way as they started.” *Id.* The inspector testified that miners worked in the vicinity of the unguarded v-belt drive and pulley. There were tracks on the ground near the pulley and he noted that miners were expected to travel near the pulley to observe it, lubricate it, and if necessary to clean around it. Tr. 230.

Chaix found that given the multiple unguarded parts in areas where miners were expected to travel and work, it was reasonably likely that miners would contact the moving parts. Tr. 231; Gov’t Ex. 13. Moreover, such contact would create a substantial hazard of dismemberment or death. Tr. 231-232. He described the main belt as the mine’s “bread and butter . . . something you want to keep an eye on and make sure it keeps running,” which meant that miners would be exposed to the hazards of contact with the unguarded parts on a repetitive basis. Tr. 231. Chaix also found that the company’s negligence in failing to provide the guards was “low.” Tr. 133; Gov’t Ex. 13. He believed that the company was “really trying” to comply. Tr. 233.

Perin maintained that although the mine was previously cited twice for failing to properly guard moving parts of the conveyor belt, areas cited by Chaix were not involved in the prior citations.<sup>10</sup> Tr. 260. Except for guards added due to the previous citations, the belt’s structure was “exactly as it was in 1981,” and it had been inspected at least once a year since 1981. Tr. 262. Perin maintained that in 2008 Chaix’s predecessor issued only one citation at the mine. However, in 2009 when Chaix became the mine’s regular inspector, Chaix issued 21 or 22 citations to the company. Tr. 262. Perin attributed the increase to the “inconsistency” of MSHA’s enforcement efforts. Tr. 260, 262. Perin complained about MSHA changing the “ball game from one guy to the next.” Tr. 262. However, Perin also admitted that among the items noted for correction by Church as a result of his compliance assistance visit was “guarding on the main belt.” Tr. 274. In fact, Church specifically listed the “guarding around tail pulleys” as needing the company’s attention. Tr. 280; Resp. Ex. 7.

### **THE VIOLATION**

Section 56.14107(a) states in part: “Moving machine parts shall be guarded to protect persons from contacting . . . drive, head, tail and take-up pulleys . . . and similar moving parts that can cause injury.” Chaix’s testimony echoed the citation and established that in fact three return idlers on the main belt were unguarded (Tr. 220), a self cleaning tail pulley was inadequately guarded (Tr. 223), and a pulley v-belt drive was unguarded. Tr. 227. In each of these instances his testimony also established that miners had worked and/or traveled in the vicinity of the unguarded and inadequately guarded moving parts. Tr. 222-223, 224, 226, 230, 238. There is no question but that any miner who contacted the moving machine part would be subject to a severe or fatal injury. Tr. 227-229. For these reasons I conclude that the violation existed as charged.

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<sup>10</sup> The mine was cited once in 1999 and once in 2000. At the time the mine was run by a lessee not by the company. Tr. 260.

## S&S AND GRAVITY

I have found a violation of section 56.14107(a). I also find that the violation created a discrete safety hazard. Miners who worked and/or traveled in the vicinity of the unguarded moving belt parts were in danger of being caught in the moving parts and of being dismembered or killed. I agreed with Chaix that accidents of this nature were reasonably likely to happen as mining continued. There were multiple opportunities for miners to come in contact with the unguarded moving parts. Miners not only cleaned belt spillage in the vicinity of the parts (Tr. 222-223, 223-224, 230), they also lubricated and maintained the parts (Tr. 230, 238) and observed the parts to make sure they operated properly (Tr. 224). These activities were carried out in close proximity to the parts, and I fully agree with Chaix that given the number of unguarded and inadequately guarded parts and the proximity of miners to them, it was reasonably likely as mining continued that an accident would happen. Tr. 231-232. The violation was S&S.

It also was very serious. The multiple nature of the infractions increased the likelihood of contact for miners who worked and/or traveled in the vicinity of the cited parts. The speed at which the belt and parts moved (Tr. 229) ensured that contact would almost certainly produce a very serious injury or a fatality. Tr. 231-232. Chaix stated that he would not expect the body parts of an entangled miner “to come back the same way,” and neither would I. Tr. 229.

## NEGLIGENCE

The inspector found that the violation was caused by the company’s low negligence. Tr. 133; Gov’t Ex, 13. I do not agree. Although Chaix thought the company was “really trying” to comply (Tr. 233), the record compels finding that whatever its intent, it significantly failed to meet its required standard of care. The guarding standard is clearly stated and well known in the industry. In addition, the hazards engendered when the standard is violated are equally well known. While it may be true as Perin testified that MHSA’s inspectors previously failed to cite the same or similar conditions on the belt (Tr. 262), the company is deemed to be on notice as to what is required and to understand that it is obligated to meet the requirement.

Here, the company did not have a single isolated incident of inadequate guarding. Rather, it was responsible for multiple instances. Moreover, its failures came in the wake of having been placed on notice by Church that it needed to attend to guarding on the main belt. Tr. 274, 280. Despite this warning, the company was woefully out of compliance. Its lack of care arose in the context of few if any mitigating circumstances. Rather than low, the company’s negligence was high.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479656	03/19/09	56.14130(g)	\$243

The citation states in part:

A miner was observed not wearing the seatbelt provided while operating [a] . . . front end loader[.] Grades at this mine measured up to in excess of 12%, the grade on which the loader was being operated measured approximately 10-12%, with multiple ramps, berms, obstacles, and drop-offs in the area. A miner not wearing the provided seat belt in this . . . loader risked receiving very serious . . . injuries from collision from within the cab, being ejected from the loader, or from not being protected by the ROPS provided around the operator's seat.

Gov't Ex. 14.

On March 19, 2009 Chaix went to the mine to monitor the abatement of several previously issued citations. Upon arriving he saw a miner operating a front end loader. The miner was not wearing a seat belt. Tr. 239; Gov't Ex. 14. The belt was draped over the loader operator's seat and he was sitting on part of it. Tr. 239-240; Gov't Ex. 14 at 3. Although the company instructed its miners that they were required to wear seat belts, Chaix believed it likely the loader operator ignored the instruction. Tr. 241, 246.

Chaix testified that an injury was reasonably likely to result from the miner's failure to wear the seat belt. Tr. 242. He noted that he saw the loader operated on grades of at least 12 % and in areas with multiple drop-offs. Tr. 242, 250. By failing to wear the provided seat belt, the loader operator gave up much of the safety otherwise afforded by the loader's roll over protection system. Chaix thought that in the context of continued mining, it was likely an accident would occur, and he observed that when a loader operator who is not wearing a set belt is involved in an accident, the operator has "a tendency to die." Tr. 243. Chaix also found that the company's negligence was "moderate." Tr. 244-145; Gov't Exh. 14. The violation was the fault of the rank and file miner alone. Tr. 245.

Perin testified that the miners were trained to use seat belts, and obviously, the seat belt was available. Tr. 265; Resp. Ex. 21, Gov't Ex. 14 at 3. Perin had no idea why the miner did not buckle it, but it was the loader operator who was negligent not the company. Tr. 266.

### **THE VIOLATION**

Section 56.14130(g) states in pertinent part: "Seat belts shall be worn by the equipment operator[.]" Chaix not only testified without dispute that he saw a miner operator operating the equipment while not wearing a seatbelt, he identified a copy of a photograph that depicted what he saw. Tr. 239; Gov't Exh. 14 at 3. I therefore find that just as Chaix testified and as the copy

of the photograph shows, that the loader operator failed to wear the provided seat belt and the company violated section 56.14130(g).

### **S&S AND GRAVITY**

I have found a violation of section 56.14130(g). I also find that the violation created a discrete safety hazard. If the loader was involved in an accident or otherwise overturned, the loader operator would be in serious danger of being thrown from the cab of the loader or of being thrown inside the cab. With nothing to restrain him, the operator could be seriously injured or killed. Chaix's observation that operators involved in accidents when not wearing seat belts have "a tendency to die" makes the point. Tr. 245.

Chaix believed that the loader operator was reasonably likely to be seriously injured as mining continued, and I agree. Tr. 242, Gov't Ex. 14. This is not a situation where the equipment in question was operated on flat ground and away from drop-offs. It was just the opposite. The grade was steep with multiple drop-offs. Tr. 242, 250. The terrain on which the loader was operated made it reasonably likely as mining continued that the equipment would experience an accident that would cause the loader operator to be severely jostled inside the cab or thrown from it. With nothing to hold the operator in his seat the least that could be expected is that the operator would be seriously injured. The violation was S&S.

The violation also was serious. Chaix's observation that miners involved in accidents like the kind he feared usually are killed was not hyperbole. Tr. 243.

### **NEGLIGENCE**

Although the inspector found that the violation was caused by the company's moderate negligence (Tr. 244-245; Gov't Ex. 14), I disagree and conclude that the company met the standard of care required. I note that a seat belt was provided, that it was in good condition and that it was readily available. Rather than "buckle up" the loader operator chose to sit on the belt. Tr. 239; Gov't Ex. 14 at 3. I note as well that there is no evidence the miner was operating the equipment within sight of a supervisor or that the company's employees had a history of disregarding the seatbelt requirement. Moreover, both Chaix and Perin agree the company instructed its miners in the necessity of using provided seat belts. Tr. 241, 265. Perin had "no idea" why the equipment operator chose not to use the belt. Tr. 266. Neither did Chaix. Nor do I. The company was not negligent.

### **OTHER CIVIL PENALTY CRITERIA**

### **HISTORY OF PREVIOUS VIOLATIONS**

The exhibits attached to the Secretary's petitions indicate the company has no applicable history of prior violations. Exhibits A.

**SIZE AND ABILITY TO CONTINUE IN BUSINESS**

The exhibits attached to the Secretary's petitions indicate the operator is small in size. Exhibits A.

**GOOD FAITH ABATEMENT**

The parties stipulated that the company showed good faith in abating the violations. Tr. 283-284.

**CIVIL PENALTY ASSESSMENTS**

**DOCKET NO. WEST 2008-1156**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6438726	01/22/08	56.11002	\$2,000

I have found that the violation existed, that it was serious, that it was not the result of the company's unwarrantable failure and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$200.

**DOCKET NO. WEST 2009-972**

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479635	03/09/09	56.14132(a)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479636	03/09/09	56.14103(b)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<b><u>CITATION NO.</u></b>	<b><u>DATE</u></b>	<b><u>30 C.F.R. §</u></b>	<b><u>PROPOSED ASSESSMENT</u></b>
6479637	03/09/09	56.14100(d)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a

civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479641	03/09/09	56.14103(b)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479642	03/09/09	56.14132(b)(1)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479643	03/09/09	56.14101(a)(1)	\$243

I have found that the violation existed, that it was very serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$300.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479640	03/09/09	56.1410(a)	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479645	03/09/09	56.9300(a)	\$108

I have found that the violation existed, that it was very serious and that the negligence of the company was low. Given these findings and the other civil penalty criteria I assess a civil penalty of \$225.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479646	03/10/09	56.15004	\$108

I have found that the violation existed, that it was very serious and that the company was not negligent. Given these findings and the other civil penalty criteria I assess a civil penalty of \$90.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479648	03/11/09	56.16006	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was moderate. Given these findings and the other civil penalty criteria I assess a civil penalty of \$100.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479652	03/11/09	56.12030	\$100

I have found that the violation existed, that it was not serious and that the negligence of the company was low. Given these findings and the other civil penalty criteria I assess a civil penalty of \$75.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479653	03/11/09	56.14107(a)	\$100

I have found that the violation existed, that it was very serious and that the negligence of the company was high. Given this and the other civil penalty criteria I assess a civil penalty of \$250.

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED ASSESSMENT</u>
6479656	03/19/09	56.14130(g)	\$243

I have found that the violation existed, that it was serious and that the company was not negligent. Given these findings and the other civil penalty criteria I assess a civil penalty of \$125.

### ORDER

In Docket No. WEST 2008-1156 Citation No. 6437826 **IS MODIFIED** to a citation issued pursuant to section 104(a) of the Act, 30 U.S.C. §814(a) and the inspector’s negligence finding **IS MODIFIED** from “high” to “moderate.”

In Docket No. WEST 2009-972 the inspector’s negligence finding in Citation No. 6479645 **IS MODIFIED** from “moderate” to “low.”

In Docket No. WEST 2009-972 the inspector’s negligence finding in Citation No. 6479646 **IS MODIFIED** from “moderate” to “none.”

In Docket No. WEST 2009-972 the inspector’s negligence finding in Citation No. 6479652 **IS MODIFIED** from “moderate” to “low.”

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479653 **IS MODIFIED** from "low" to "high."

In Docket No. WEST 2009-972 the inspector's negligence finding in Citation No. 6479656 **IS MODIFIED** from "moderate" to "none."

In Docket No. WEST 2009-972 the penalties proposed for the violations alleged in Citation No. 6479639 and Citation No. 6479644 have been paid and all allegations with regard to these two citations **ARE DISMISSED**.

Within 40 days of the date of this decision the company **SHALL** pay a total civil penalty of \$1965.00. Payment **SHALL** be sent to the: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63197-0390. The payment should reference Docket No. WEST 2008-1156-M and Docket No. WEST 2009-972-M.

These cases **ARE DISMISSED**.

David F. Barbour  
Administrative Law Judge

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