

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 9, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2005-71-M
Petitioner	:	A.C. No. 39-01323-45049
	:	
v.	:	Docket No. CENT 2005-72-M
	:	A.C. No. 39-01022-45029
T.F. LUKE & SONS, INC.,	:	
Respondent	:	Portable Nos. 1 & 2

**DECISION**

Appearances: Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;  
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against T.F. Luke & Sons, Inc. (“T.F. Luke”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve eight citations issued by the Secretary under section 104(a) of the Mine Act. The Secretary seeks a total penalty of \$2,583.00 for the alleged violations. An evidentiary hearing was held in Sioux Falls, South Dakota. The parties introduced testimony and documentary evidence and filed post-hearing briefs.

T.F. Luke operates several small sand and gravel mines in southeastern South Dakota. The citations at issue in these cases were issued during inspections conducted in September and October 2004 at T.F. Luke’s Portable No.1 and No. 2 plants. T.F. Luke moves these plants from site to site on a regular basis. (Tr. 62). These plants operate on an intermittent basis.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**A. Citation No. 7937754**

On September 9, 2004, MSHA Inspector Robert Lindeman inspected the Portable No. 1 mine. The mine was operating with two end loaders and a dozer. The shaker and

scraper/crusher was operating. (Tr. 17). The inspector issued Citation No. 7937754 under section 104(a) of the Mine Act alleging a violation of section 57.12008 as follows:

The 480 volt power cable entering the field conveyor drive motor is not properly bushed. The cable enters the junction box under the lid of the junction box. The motor is approximately 20 feet off the ground. If the lid were to cut into the energized conductor, it could energize the frame of the conveyor. A person contacting an energized conveyor could be fatally injured.

Inspector Lindeman determined that an injury was unlikely and that any injury could reasonably be expected to result in a fatal accident. He determined that the violation was not of a significant and substantial nature (“S&S”) and that T.F. Luke’s negligence was moderate. The safety standard provides, in part, that “[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Lindeman testified that he observed wires entering the junction box between the lid and the box. (Tr. 20, 33-34; Ex. G-1). Vibration from the motor could have caused the insulation on the wires to wear away. The inspector believed that it was unlikely that the violation would contribute to an injury because it was 20 feet off the ground and miners were not working around the conveyor. He admitted that the equipment was properly grounded. (Tr. 35-36).

Thomas F. Luke, an owner of T.F. Luke, testified that all of the electrical equipment at the mine was tested for resistance and continuity. (Tr. 46). He also testified that employees at the mine operate mobile equipment when the plant is running and they are not walking around the plant.

I find that the Secretary established a non-S&S violation of the safety standard. T.F. Luke argues that no hazard was created by the condition. The Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10<sup>th</sup> Cir. 1989). “[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty.” *Id.* at 1197. The Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

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

*Allied Products, Inc.*, 666 F.2d 890, 892-93 (5<sup>th</sup> Cir. 1982) (footnote omitted). In this case, the Secretary contends that the likelihood that a miner would be killed or injured as a result of the violation was not very great. The gravity of the violation was low and T.F. Luke's negligence is moderate. A penalty of \$60.00 is appropriate for this violation.

**B. Citation No. 7937755**

This citation alleges a violation of section 57.12025 as follows:

The 110 volt receptacle in the generator trailer is not grounded to protect a person from electrical shock if a fault were to occur. The scale on the conveyor is plugged into this energized receptacle. This receptacle is 14 inches off the floor on the south side of the trailer. A person using a tool or equipment that is plugged into this 110 volt receptacle could be fatally injured if a fault were to occur.

Inspector Lindeman determined that an injury was unlikely but, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that T.F. Luke's negligence was moderate. The safety standard provides, in part, that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Lindeman testified that the receptacle did not have a ground conductor or another system for grounding it. (Tr. 27; Ex. G-3). He used a tester to determine that the ground circuit was open. He further testified that if a piece of equipment plugged into the receptacle developed a fault, there would be no place for the fault current to go. If someone were to grab the equipment he could receive a fatal shock. The inspector determined that the violation was not serious because the generator trailer had a wooden floor and it was dry. (Tr. 29).

Mr. Luke testified that T.F. Luke did not install the cited receptacle but that an electrical contractor installed it. (Tr. 45). He assumed that the contractor had properly installed it with a grounding circuit.

I find that the Secretary established a non-S&S violation of the safety standard. I credit the testimony of Mr. Luke that it relied on an electrical contractor to correctly ground the receptacle. I find that the violation was not serious and that T.F. Luke's negligence was low. A penalty of \$60.00 is appropriate for this violation.

**C. Citation No. 7938236**

MSHA Inspector Shane Julien inspected Portable No. 2 mine on October 26, 2004. He described it as a "little roller-crusher-screener operation . . . where a bulldozer would push material into the trap, into a slow moving conveyor, and that feed conveyor would subsequently feed the screen, and then the screen would disperse [material] out from there on various transfer

and stacker conveyors.” (Tr. 55). The facility was operating when he arrived at the mine, but it was shut down during his inspection. He issued Citation No. 7938236 under section 104(a) of the Mine Act alleging a violation of section 56.14108 as follows:

The overhead drive belts on the screen feed conveyor drive motor are not guarded to prevent whipping of persons if the belts broke. The belts are located above a main walkway and miners travel through the area several times per shift. Footprints were observed in the area. If the belts broke and whipped a miner, severe head and face injury could occur to persons.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be permanently disabling. He determined that the violation was S&S and that T.F. Luke’s negligence was moderate. The safety standard provides, in part, that “[o]verhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons.” The Secretary proposes a penalty of \$629.00 for this citation.

Inspector Julien issued the citation because a long, horizontal, overhead drive belt was present and he believed that, if the belt broke, it would whip into the walkway of a person coming underneath the conveyor. (Tr. 58-61; Ex. G-4). He estimated that the belt was about ten feet above the berm and the belt was about nine feet long. (Tr. 65, 107). The conveyor sits up on a large berm that is about five feet above the surrounding land. (Tr. 59, 106). The berm is necessary to give the conveyor the necessary height to feed the crusher. (Tr. 102). The inspector observed footprints in the area and he saw Dennis Soulek, the foreman at the site, walk through the area. (Tr. 59, 65) Inspector Julien issued the citation because Soulek told him that employees walk through the area. (Tr. 157). On direct examination, the inspector testified that the cited belt was running during his inspection. (Tr. 72).

Inspector Julien determined that the violation was serious and S&S because there was a footpath under the area where the belt could break. (Tr. 61). If a belt were to break, it was reasonably likely that someone would be hit by the broken belt.

Inspector Julien discussed abatement with Mr. Soulek. Soulek decided to abate the condition by enclosing the area in expanded metal. (Tr. 66). On November 8, 2004, Inspector Julien issued Order No. 7938258 under section 104(b) because T.F. Luke had not abated the cited condition. (Tr. 67; Ex. G-6). The order stated that no apparent effort had been made to guard the overhead drive belt. (Ex. G-6). T.F. Luke had moved the plant to a new location between October 26 and November 8. (Tr. 68-69, 155). Mr. Soulek stated that he did not have any acetylene for the welders at the site to abate the condition. (Tr. 69). T.F. Luke had not asked for an extension of the abatement time. A guard was installed in response to the order. (Tr. 74).

On cross-examination, Inspector Julien admitted that the berm under the conveyor is only about three feet wider than the structure for the conveyor on each side. (Tr. 103). The berm is slightly longer than the length from the dumping point to the wheels on the conveyor. Inspector Julien testified that every time the plant is moved, it would be set up in the same basic configuration. It is possible, however, that the belts could have been higher off the ground at other locations. (Tr. 153, 166). He admitted that the conveyor was shut down during his inspection so the motor and belts were not operating when he saw Mr. Soulek walk through the area. (Tr. 110, 156). He also admitted that he has no knowledge that anyone walked under or near the overhead drive belts while they were operating. (Tr. 111-13). Inspector Julien believes that, because the violation was open and obvious, the condition should have been observed by MSHA during previous inspections. (Tr. 116).

Thomas Luke testified that the conveyor sits on a similar berm every time the plant is moved. (Tr. 172-73; Ex. B). The berm is usually the same height at every mine site. (Tr. 177). He estimated that the berm was five to six feet high and that the belts were about nine to ten feet above the berm. (Tr. 173; Ex. A). He testified that miners cannot reach the belt with their hands if they are standing on the berm. The overhead belts on the conveyor can be seen all over the plant. (Tr. 177). No previous citations have been issued for these unguarded belts. T.F. Luke has been using the field conveyor for about 20 years. (Tr. 181).

Mr. Luke testified that there is no walkway on or near the berm supporting the conveyor. (Tr. 179). Miners walk around the area before the equipment is started for a pre-operational check and to grease the equipment and check bearings. (Tr. 179-81). Miners also walk around at night after the plant is shut down to clean up. The tools shown on the photo taken by the inspector are used to clean out the hopper when the plant is shut down. (Tr. 182-83). The berm supporting the conveyor is about three feet wider than the wheels on the conveyor structure on each side and the berm slopes steeply to the ground. (Tr. 180). There is no need for any miner to walk up on the berm while the conveyor is operating and Luke has never seen anyone on the berm during operations. (Tr. 180-81).

Dennis Soulek testified that he runs a loader for T.F. Luke. (Tr. 233). He accompanied Inspector Julien on the inspection and was acting as the foreman. He testified that the berm for the conveyor is always about the same height so that the top of the conveyor can go over the crusher. (Tr. 234-35). The cited belts have been unguarded for 20 years, the belts are easy to see, and they have never been cited by MSHA. He cannot reach the belt when standing on the berm. (Tr. 237).

Dennis Soulek testified that miners never walk up on the berm when the conveyer is running and that there would never be a reason for a miner to do so. (Tr. 237). All of the maintenance on the conveyor is done before or after the operating shift. He denied ever telling the inspector that miners walk up on the berm under the belt while the conveyor is operating. (Tr. 238-39).

Jesse Soulek testified that he operates a loader at the plant. (Tr. 272). He testified that employees do not walk on top of the berm while the conveyor is operating and there is no reason for anyone to do so. (Tr. 276). The cited drive belt has never broken, but it has been replaced. Robert Kuntz, a dozer operator at the plant, also testified that nobody walks up on the berm when the conveyor is operating. (Tr. 289-90).

The Secretary argues that Dennis Soulek admitted the violation when he told the inspector that miners walk under the overhead drives as a shortcut to the other side of the plant. Footprints and tools were also found in the area. She also argues that T.F. Luke had adequate notice of the requirements of the safety standard.

T.F. Luke argues that the Secretary failed to establish that anyone walked under the belt while the conveyor was operating. The footprints were made while the equipment was shut down. In addition, the evidence shows that Dennis Soulek did not tell Inspector Julien that miners walk on the berm or under the belt while it was operating. Finally, it argues that T.F. Luke did not have fair notice that the guard was required because the evidence clearly shows that the condition had existed for 20 years, MSHA inspectors have previously observed the condition, and no citations were previously issued.

I find that the Secretary did not establish a violation of the safety standard. The standard requires a guard on overhead belts only when the whipping action of a broken belt “could be hazardous to persons.” Here the inspector incorrectly determined that a walkway or footpath was in the zone of danger. I credit the evidence of T.F. Luke that miners do not walk under the belt or on the berm supporting the crusher when the plant is operating.

Although Inspector Julien initially testified that the cited drive belt was running at the time of his inspection, on cross-examination he admitted that it was not. (Tr. 72, 110, 156). Thus, his testimony that he observed Dennis Soulek walk through the area is meaningless. The footprints in the area could have been made when the plant was shut down and the tools were used when cleaning out the hopper. The plant must be shut down for that maintenance. The cited horizontal belt was 10 feet above the berm and more than 15 feet above the ground. Only three people work at the mine: two loader operators and one bulldozer operator. The area under the cited belt was not a walkway or a working surface during operation of the plant. It was highly unlikely that anyone would ever be in that area while the plant was operating. The height and size of the belt and the amount of foot traffic in the area should be considered when determining whether a broken belt could be hazardous to persons. *See Chrisman Ready-Mix Inc.*, 22 FMSHRC 1256, 1262-63 (Oct. 2000) (ALJ).

I find that a reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not have recognized that a guard was required on the overhead drive belt on the screen feed conveyor at this plant. The fact that no MSHA inspector has ever cited this condition for the past 20 years provides additional support for this conclusion, especially since all witnesses agreed that the condition was open and obvious.

Consequently, I vacate Citation No. 7938236 and Order No. 7938258. Because I am vacating the citation and order on the merits, I have not considered the notice issues raised by T.F. Luke.

**D. Citation No. 7938237**

MSHA Inspector Julien issued Citation No. 7938237 under section 104(a) of the Mine Act alleging a violation of section 56.12008 as follows:

The 460 volt power cable for the crusher rollibrator is not bushed where the cable passes into the drive motor weatherhead. Miners travel in the area several times per shift. Foot prints were observed on the area. Approximately 2 inches of cable is pulled out, exposing the inner conductors. If a miner were to contact the energized unbushed conductors, a fatal electrocution could occur.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Julien testified that the 460-volt cable was pulled out from the weatherhead on the crusher rollibrator. (Tr. 75; Ex. G-7). This cable provided power to the equipment. He testified that the crusher vibrates while it operates with the result that the copper conductors could make contact with the frame of the equipment. (Tr. 76, 162). If the copper conductors make contact with the metal frame, anyone who comes in contact with the equipment could suffer an electrical shock. Miners generally perform routine maintenance while the equipment is shut down. (Tr. 77). Inspector Julien determined that the violation was serious and S&S because miners pass by the area during the shift. (Tr. 77-78). He believed that it was reasonably likely that the violation would contribute to a serious or fatal accident.

Inspector Julien admitted that the crusher was properly grounded. (Tr. 120). He did not know when the bushing slipped out. Copper conductors were not exposed. If miners do not walk or work near the crusher, there is little chance that anyone would be injured. (Tr. 123, 125). Inspector Julien testified that, if there were a fault in the grounding system, there would be no protection in the event that bare conductors were to come in contact with the weatherhead.

Mr. Luke testified that the company tests for continuity and resistance on a regular basis, including every time the plant is moved. (Tr. 183). This testing established that the equipment was properly grounded. He further testified that miners do not work or walk in the area when the plant is operating. (Tr. 184). Dennis Soulek testified that miners do not travel or work near the crusher during the shift and that he never told the inspector that they did. (Tr. 239). He further testified that there would be no reason to perform any cleanup around the crusher while it was operating. (Tr. 240). Soulek testified that when he performed the most recent continuity test,

the test showed that the equipment was grounded. He also said that, when he did the pre-shift examination of the equipment on the morning of October 26, 2004, the bushing was in place. (Tr. 241; 263).

The Secretary argues that Dennis Soulek admitted to Inspector Julien that, although accumulations are generally cleaned up at the beginning or at the end of the shift, if conditions get “bad enough,” cleaning occurs during the shift. (Tr. 77). Given that the equipment vibrates, it was reasonably likely that the copper conductors would make contact with the metal components of the weatherhead. The inspector reasonably determined that the violation was S&S because the unbushed 460-volt power cable posed a significant risk to miners. The crusher rollibrator was in the main part of the plant where miners work and travel during operation. A serious injury was reasonably likely even though the system was grounded.

T.F. Luke argues that the citation should be vacated because no miners were exposed to the hazard. It further argues that, if a violation is found, the Secretary failed to establish that the violation was S&S. It contends that the evidence establishes that the crusher was grounded, miners do not work or travel near the crusher while the plant is operating, the insulation around the conductors was intact, and the condition had only existed for a short time. T.F. Luke maintains that there was not a reasonable likelihood that anyone would be injured by this violation.

I find the Secretary established a violation. There is no question that the required bushing was not in place. The seriousness of the violation is a closer question. A violation is classified as S&S “if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

I find that the Secretary established the first, second, and fourth elements of this test. A discrete safety hazard was contributed to by the violation and, if a miner were hurt by the violation, the injury in question would be of a reasonably serious nature. The more difficult issue is whether the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury.

I conclude that the Secretary met her burden of proof, taking into consideration the particular facts involved. The cited crusher was an integral part of the plant. Because the crusher vibrated as it ran, it was reasonably likely that bare conductors would come into contact with the metal parts of the crusher, assuming continued normal mining operations. The Secretary is not required to establish that the crusher was not properly grounded. If this particular crusher had not been grounded at the time the inspection, the violation would have likely created an imminent danger because the cited condition could reasonably be expected to cause death or serious physical harm before the it could be abated. *See 30 U.S.C. 802(j).*

The Secretary is also not required to show that it was more probable than not that an injury would result from the violation. Although miners do not work on or near the crusher on a regular basis during the shift, miners are in the area from time to time during the shift. I find that the Secretary established that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury. The violation was S&S and T.F. Luke's negligence was moderate. A penalty of \$275.00 is appropriate.

**E. Citation No. 7938238**

MSHA Inspector Julien issued Citation No. 7938238 under section 104(a) of the Mine Act alleging a violation of section 56.14107(a) as follows:

The plant main drive pulley and belts are not guarded to protect persons from contacting the moving machine parts. The pulley is approximately four feet in diameter and spins at high RPMs. Miners travel through the area several times per shift and footprints were observed in the area.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury." The Secretary proposes a penalty of \$1,033.00 for this citation.

Inspector Julien determined that the main drive pulley was not adequately guarded. (Tr. 81; Ex. G-8). He testified that there was "a substantial opening in the pinch points on the return idler pulley . . . and also at the bottom where the drive belts return back into the main drive pulley." (Tr. 82; Ex. G-8). The pulley was about four feet in diameter and the opening was about one and a half feet wide. The bottom was also not guarded. The inspector determined that an accident was reasonably likely because there were footprints in the area and Soulek told him the miners sometimes clean up accumulations in the area during the shift. (Tr. 83-84). Inspector Julien believed that a miner could be killed if he became entangled in the fast moving pulley.

On November 8, 2004, Inspector Julien issued an Order No. 7938257 under section 104(b) of the Act because the cited condition had not been abated. (Tr. 85-86; Ex. G-9). Mr. Soulek explained that the condition had not been corrected because he did not have acetylene for the torches. (Tr. 87). Thomas Luke testified that, although the necessary materials to abate the citation were at the company's disposal, it did not immediately abate the condition because it received an oral extension of time from Joe Steichen, the MSHA field office supervisor. (Tr. 200-02, 230). A guard was installed to terminate the citation and order.

Inspector Julien admitted that he did not know whether the pulley had ever been guarded in the cited location. (Tr. 126). He also admitted that the other sides of the pulley were guarded, including what he referred to as the "walk side." (Tr. 127). He also admitted that the pulley was recessed about three and a half feet. (Tr. 128). Inspector Julien believes that the safety standard required a complete enclosure around the pulley. (Tr. 130). The belts travel around the pulley from the bottom to the top so that the pinch point would be on the opposite side of the pulley from the area cited. (Tr. 134). The only reason anyone would be near the cited area would be for cleanup and maintenance. (Tr. 139).

Thomas Luke testified that he has owned the crusher containing the cited pulley since 1975 and there has never been a guard in the area cited by Inspector Julien. (Tr. 185). MSHA inspectors have never stated that a guard was required in that location and they have never issued citations for lack of a guard. MSHA has inspected the equipment of T.F. Luke on a regular basis. (Tr. 186-87). When the plant is moved, it is set up in the same configuration.

Mr. Luke testified that the guarding on the other sides of the pulley protected miners from any moving parts. He also testified that, with so many other pieces of equipment surrounding the cited pulley, it is difficult to gain access to the area cited by the inspector. (Tr. 189-91; Exs. C & D). He believes that Inspector Julien's implication that miners walk through the area while the plant is in operation is without support. (Tr. 193). Miners do not travel near this area while the equipment is operating. (Tr. 200). In addition, the equipment kicks up a lot of dust making travel through the area even more unlikely. (Tr. 190). Equipment in the area is serviced after the plant is shut down. (Tr. 200). The existing guards on the equipment extend out sufficiently to protect anyone from the moving machine parts. (Tr. 195-96; Exs. D, F, G & H). The opening was only 12 to 14 inches wide. (Tr. 200). It was not reasonably likely that anyone would slip and fall in the area or that they would be injured in such an event by the cited pulley. (Tr. 198).

Dennis Soulek testified that the crusher and conveyors are set up in the same configuration whenever the plant is moved. Soulek testified that nobody walks or works near the cited pulley when the plant is operating. (Tr. 248). Jesse Soulek testified that miners are not near the pulley when the plant is operating. (Tr. 278-79). He denied telling Inspector Soulek that employees worked or cleaned up around the pulley while the plant was operating. (Tr. 250).

The Secretary argues that there was a substantial unguarded opening exposing pinch points on the drive pulley. The open area was more than a foot wide and the bottom was not

guarded. The pulley was four feet in diameter and spun at a high rate of speed. Dennis Soulek told the inspector that miners use shovels to clean up under the pulley to prevent the build up of materials under the belts. The unguarded area was quite obvious. As a consequence, the citation should be affirmed.

T.F. Luke argues that every time the No. 2 plant is moved to a new site, the crusher is set up in the same basic configuration. The main drive pulley has been protected by guards in the same manner since the crusher was purchased by the company. The crusher has been inspected at least annually by MSHA and no warnings, notices, or citations have been issued because of the opening cited by Inspector Julien.

It further argues that the evidence establishes that miners would not be in the area because there is no travelway by or near the cited opening. "It would be extremely difficult for people to walk through even if there were a reason. . ." because of the obstructions created by conveyors and other equipment. (Luke Br. 14). Someone would be required to walk over frames and axles of these conveyors to reach the unguarded area. This area is also extremely dusty during operation which would further discourage entry. The plant was not operating when Inspector Julien observed the cited condition.

In addition, there were no pinch points on the unguarded side of the pulley. The moving parts were recessed about four feet behind the guard that covers the side of the pulley. If a miner were to slip while walking or working in the area while the pulley was in motion, he would not come into contact with a pinch point. As a consequence, T.F. Luke contends that the citation should be vacated.

The language of the standard states that moving machine parts which can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. Thus, the moving machine parts must present a hazard to miners to be covered by the standard. In the preamble to the final rule, the Secretary emphasized the broad construction of this safety standard. The preamble states:

[T]he final standard requires the installation of guards to protect persons from coming into contact with hazardous moving machine parts. The standard clarifies that the objective is to prevent contact with these machine parts. *The guard must enclose the moving parts to the extent necessary to achieve this objective.*

53 Fed. Reg. 32496, 32509 (Aug. 25, 1988) (emphasis added). The preamble further provides:

Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against

deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions.

*Id.* In rejecting these comments, the Secretary stated that most injuries caused by moving machine parts occur when persons are “performing deliberate or purposeful work-related actions with the machinery” and that the installation of a guard would have prevented these injuries. *Id.* The Secretary stated that “[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts.” *Id.* Thus, the Secretary provided notice to the regulated community that she would interpret this safety standard very broadly to protect persons from coming into contact with moving machine parts and that the standard covers deliberate actions by employees.

In construing the standard as applied to coal mines, the Commission stated:

We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., *Great Western Electric*, 5 FMSHRC 840, 842 (May 1983); *Lone Star Industries, Inc.*, 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted, the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-[case] basis.

*Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). Thus, the standard protects a miner who, contrary to his employer's instructions, attempts to perform minor maintenance or cleaning near an unguarded pinch point without first shutting it down. The fact that no employee has ever been injured by an unguarded pinch point is not a defense because there is a history of such injuries at crushing plants throughout the United States. “Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . .” *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

The Secretary bears the burden of proving an alleged violation by a preponderance of the evidence. In this case, I find that the Secretary did not meet her burden, for the following reasons. First, it is important to understand that the cited pulley was substantially guarded. The side of the pulley was guarded with a substantial metal screen that covered the entire area. (Ex.

D). The other side of the pulley and belts were covered with sheet metal that prevented anyone from contacting the moving parts. (Ex. G). The area under the pulley was protected by the guard on the side which extended down below the level of the pulley. This side guard extended down to within two feet of the ground. In addition, the area cited by the inspector was about a foot wide and was recessed about four feet. One side in the recessed area was protected by the side guard and the other side of the recessed area was protected by the body of the crusher.

Second, the witnesses agreed that the applicable pinch points were on the opposite side from the area cited by Inspector Julien. It would be almost impossible for anyone to contact the pinch points from the area cited. These pinch points were protected by existing guards.

Third, the cited opening was not very accessible. A miner would be required to walk over, under, and through various pieces of equipment to reach the area. Although I relied on the testimony in reaching this conclusion, the photographs illustrate these obstacles. (Exs. G-8, C & D). The crusher creates a great amount of dust so that travel through the area would be unpleasant. It is quite clear that no miner would voluntarily walk by the area to get from one place to another. A miner would only be in the area to clean and perform maintenance. The evidence establishes that miners perform these tasks before and after shift when the plant is shut down. Only three miners work at the plant. Inspector Julien's statement that Dennis Soulek told him that miners often clean up under the pulley while the plant is operating was not substantiated. The citation was abated without the installation of a guard under the pulley.

In conclusion, I find that the Secretary did not establish that there was "a reasonable possibility of contact and injury" at the cited location. *Thompson* at 2096. A reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not have recognized that a guard was required at the cited location, especially since no MSHA inspector has ever issued a citation for this condition. Consequently, I vacate Citation No. 7938238 and Order No. 7938257. Because I am vacating the citation and order on the merits, I have not considered the notice issues raised T.F. Luke.

If T.F. Luke changes the configuration of the conveyers and the crusher so that the cited area is more accessible, a guard would be required. In addition, if miners work or walk near the cited area while the plant is operating, a guard would be required. Work would include cleaning up accumulations while the plant is operating.

#### **F. Citation No. 7938239**

MSHA Inspector Julien issued Citation No. 7938239 under section 104(a) of the Mine Act alleging a violation of section 56.12008 as follows:

The 460 volt cable that powers the jaw crusher startup box is not bushed where it passes into the metal case. Approximately two inches of cable is pulled out exposing the inner conductors. The

box is used to start and stop the plant. Miners contact [the box] several times per shift.

Inspector Julien determined that an injury was reasonably likely and, if an accident did occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Julien testified that the wires entered the startup box at the bottom. There was no bushing where the wires entered the box. (Tr. 90; Ex. G-10). This box contains the start and stop switch for the jaw crusher. This box allows miners to operate the jaw crusher without having to go to the main disconnect panel in the generator trailer. If rock clogs the crusher, a miner can turn it off with this switch. This box hangs on a piece of wire and it is exposed to the elements. (Tr. 91, 143). If the insulation on one of the wires is scraped off due to the movement of the box, the metal frame of the box would become energized.

He determined that the violation was S&S because this box is used up to several times a day, which exposes miners to the hazard of electric shock. (Tr. 92-93). The fact that the electrical system was grounded does not eliminate the hazard of an electric shock. (Tr. 92, 141, 163).

Thomas Luke testified that all of the electrical equipment is tested for resistance and continuity. (Tr. 204). The cited control box was grounded. Miners can shut down the crusher at the box or shut down the entire plant at another location. Dennis Soulek testified that miners are not normally around the cited box and that a miner would usually shut down the entire plant if a clog developed in the system. (Tr. 251). At the time of the inspection, Soulek was not aware that the wires were not protected by a bushing where they entered the box. No bare conductors were exposed.

The Secretary argues that the citation should be affirmed because she met her burden of proof. The cited electrical box was next to a walkway and employees often turned the equipment on and off during the shift. The wires were hanging free so the insulation was subject to being cut by the metal frame of the box. If the bare conductors were exposed, the frame would become energized.

T.F. Luke contends that the citation should be vacated because the electrical equipment at the mine was fully grounded and the cited box was not often used to stop and start the plant. No bare conductors were exposed so no hazard was created.

For the reasons set forth with respect to Citation No. 7938237, above, I find that the Secretary established an S&S violation of the safety standard. The required bushing was not in place. It is undisputed that the box was grounded. I credit the testimony of T.F. Luke's witnesses that miners often shut down the entire plant at another location when a clog develops

in the system. I also accept their testimony that the crusher is powered by a separate V-12 Detroit engine. Nevertheless, insulated wires were protruding out of the cited electrical box. These wires were carrying 440 volts of electricity. The wires were not protected by a bushing or other device to keep them from rubbing against the metal frame of the box. It was reasonably likely that bare conductors would come into contact with the metal frame, assuming continued normal mining operations. It was also reasonably likely that a miner coming into contact with the metal parts would suffer a serious injury. T.F. Luke's negligence was moderate. A penalty of \$275.00 is appropriate.

**G. Citation No. 7938240**

MSHA Inspector Julien issued Citation No. 7938240 under section 104(a) of the Mine Act alleging a violation of section 56.4201(a)(1) as follows:

The 4.5 pound ABC fire extinguisher for the tool van has not had a monthly visual operability inspection. The last recorded inspection was dated July of 2003. The extinguisher was empty and the gauge showed that it [is] in need of recharging. The extinguisher is stored in an area with oil, sprays, and lubricants.

Inspector Julien determined that an injury was unlikely but, if an accident were to occur, the injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that T.F. Luke's negligence was moderate. The safety standard provides that "[f]ire extinguishers shall be inspected visually at least once a month to determine that they are fully charged and operable." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Julien testified that the fire extinguisher was empty and that it had not been inspected since 2003. (Tr. 94; Ex. G-11). The extinguisher was in a company van. He believed that if a miner were to try to fight a fire with the extinguisher, he could suffer smoke inhalation or burns. The inspector determined that the violation was not serious because two other extinguishers were located nearby, including one in the front of the truck. (Tr. 94, 144). Dennis Soulek told the inspector that the company had planned to discard the extinguisher. (Tr. 95).

Thomas Luke testified that the company had six other fire extinguishers in the area. (Tr. 205). He does not deny that the cited extinguisher was empty and that it has not been inspected since 2003. (Tr. 231). Dennis Soulek testified that every vehicle at the plant has at least one fire extinguisher. (Tr. 251-52). He believes that there were about six extinguishers at the plant.

The Secretary argues that the evidence established a violation. T.F. Luke admits that the facts alleged in the citation are accurate. I find that the Secretary established a non-S&S violation of the safety standard. T.F. Luke's negligence was moderate. A penalty of \$60.00 is appropriate.

## **H. Citation No. 7938241**

MSHA Inspector Julien issued Citation No. 7938241 under section 104(a) of the Mine Act alleging a violation of section 56.14132(b)(1) as follows:

The Chevrolet C50 fuel truck was not provided with an automatic reverse activated backup alarm. The truck is used at the beginning of every shift to fuel up the crusher drive motor. The truck has an obstructed rear view and travels across foot and mobile equipment paths.

Inspector Julien determined that an injury was reasonably likely and, if an accident were to occur, the injury could reasonably be expected to be fatal. He determined that the violation was S&S and that T.F. Luke's negligence was moderate. The safety standard provides that "[w]hen the operator has an obstructed view to the rear, self-propelled mobile equipment shall have an automatic, reverse-activated signal alarm." The Secretary proposes a penalty of \$247.00 for this citation.

Inspector Julien testified that Dennis Soulek told him that the truck is used to fuel the generator as needed and that a ground man is not used when the truck is in use. (Tr. 96). The back-up alarm did not work when the truck was put in reverse. The large tank on the truck totally obstructed the rear view. (Tr. 98). This violation created a hazard because anyone behind the truck would not know if the driver intended to back up. He determined that the violation was serious and S&S based on the fact that "if a miner was unaware of the backing motion of the truck, it would [result in] a fatal crushing injury." (Tr. 99). Inspector Julien admitted that he did not see the truck in operation and he did not have any specific knowledge as to how and when it is used. (Tr. 145-49).

Thomas Luke testified that the cited fuel truck never backs up. (Tr. 206). The dozers and loaders to be fueled are driven to the fuel truck when they need to be refueled. When the crusher is refueled, the fuel truck operator drives the fuel truck forward to the crusher, fills it up, and then drives forward, back to its parking spot. (Tr. 207). The fuel tank for the generator is filled by the company's fuel provider. No miner ever backs the fuel truck up. He has a fuel truck at another property that does not have an operating reverse gear because it never needs to travel in reverse. The cited truck is capable of backing up. (Tr. 231). Dennis Soulek testified that the fuel truck always goes forward in a circle. (Tr. 252). He admitted that the truck travels in reverse sometimes when necessary to "back it out of the hole." (Tr. 269). Jesse Soulek testified that the truck travels in a circle and that it does not back up. (Tr. 282).

The Secretary argues that the evidence established a violation. It argues that the violation was S&S because miners were regularly exposed to the hazard created by the violation. The truck was capable of backing up and employees did in fact back the truck up. T.F. Luke contends that the violation was not S&S because the truck never backs up. It has 30 feet of hose. All

mobile equipment is driven to the truck for refueling. The crusher is refilled at night and the truck is never put into reverse when performing this task.

I find that the Secretary established a violation. The rear view was totally obstructed and the back-up alarm was not working. I find, however, that it was not reasonably likely that the hazard contributed to by the violation would have resulted in an injury. Although I conclude that the fuel truck was put in reverse from time to time, it normally did not back up. Because only three individuals worked at the plant, the risk of an injury was very low. It was unlikely that the truck would back up while pedestrians were present. T.F. Luke’s negligence was moderate. A penalty of \$100.00 is appropriate.

**II. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that the Portable #1 Plant and Portable #2 Plant each had a history of nine paid violations in the 24 months preceding the inspections. T.F. Luke is a small mine operator. All of the violations that were affirmed in this decision were abated in good faith. The penalties assessed in this decision will not have an adverse effect on T.F. Luke’s ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

**III. ORDER**

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(I), I assess the following civil penalties:

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2005-71-M		
7938236	56.14108	Vacated
7938237	56.12008	\$275.00
7938238	56.14107(a)	Vacated
7938239	56.12008	275.00
7938240	56.4201(a)(1)	60.00
7938241	56.14132(b)(1)	100.00
CENT 2005-72-M		
7937754	56.12008	60.00
7937755	56.12025	60.00
	<b>TOTAL PENALTY</b>	<hr/> \$830.00

For the reasons set forth above, the citations and orders are **AFFIRMED, MODIFIED,** or **VACATED**, as set forth above. T.F. Luke & Sons, is **ORDERED TO PAY** the Secretary of Labor the sum of \$830.00 within 30 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

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RWM