

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3993/FAX 303-844-5268

July 6, 1999

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 98-172-M  
Petitioner : A. C.  
No. 10-01817-05515  
:  
v. :  
:  
:  
OWYHEE CALCIUM PRODUCTS : Owyhee Calcium Inc.  
INCORPORATED, :  
Respondent :

**DECISION**

Appearances: William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor,  
Seattle, Washington,  
for Petitioner;  
Charles L. Honsinger, Esq., Ringert Clark, Chartered,  
Boise, Idaho,  
for Respondent.

Before: Judge Cetti

This case is before me upon the petition for civil penalty filed by the Secretary of Labor against Owyhee Calcium Products, Inc., pursuant to Section 105(d) and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the "Act," alleging 14 violations of mandatory standards and seeking a civil penalty of \$6,580.00 for those violations. The general issue before me is whether Owyhee Calcium Products, Inc., committed the violations as alleged and, if so, what is the appropriate civil penalty to be assessed considering the criteria under Section 110(i) of the Act.

**Citation Nos. 7959803, 7959804, 7959805 and 7959806 - Guards Not in Place**

Four of the citations involve guards not in place. Citation No. 7959803 alleges a violation of 30 C.F.R. § 56.14107(a) and each of the other three citations, referenced above, allege a violation of 30 C.F.R. § 56.14112(b).

30 C.F.R. § 56.14107(a) cited in Citation No. 7959803 provides:

(a) Moving 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.

Citation No. 7959803 designates the operator's negligence as moderate and reads as follows:

The self cleaning tail pulley on the primary feed conveyor was not guarded. The pinch points were approximately one foot off of the ground and accessible to the employee.

The "employee" refers to the owner-operator, Mr. Melton, who is also the only employee of this very small ½ acre quarry. The evidence clearly established that the guard was missing on the sides of the tail pulley as shown in the photograph received as Exhibit G-3. There was no contrary evidence. Respondent's defense to all four of the guards not in place violations was that the machinery was not operating. This defense will be discussed later under the heading Respondent's Defense.

Citations 7959804, 7959805 and 7959806 each allege a violation of 30 C.F.R. § 56.14112 which reads as follows:

(b) Guards shall be securely in place while machinery is being operated, except when testing or making adjustments which cannot be performed without removal of the guard.

**Citation No. 7959804**

With respect to Citation No. 7959804 the inspector presented undisputed evidence that the guard for the Cedar Rapids roll crusher was not in place. It was lying closeby on the ground. The exposed pinch-points on the crusher's large diameter flywheel were approximately three feet above the ground and were accessible to Mr. Melton, the owner, operator and sole employee. The violation is established. The citation is affirmed.

**Citation No. 7959805**

With respect to Citation No. 7959805 the inspector presented undisputed evidence that the guard for the short conveyor located under the roll crusher was not in place. The pinch-points were accessible to the employee. The inspector observed the guard lying behind the tail pulley. The violation is established. The citation is affirmed.

**Citation No. 7959806**

With respect to Citation 7959806 the inspector presented undisputed evidence that the guard for the long conveyor to the sizing screen was not in place. It was sitting near the pulley. The pinch-points were at ground level and were accessible to Mr. Melton who was the only employee, as well as the only owner/operator of this very small quarry.

### **Respondent's Defense to Guarding Citations**

Respondent's defense to each of the four guarding citations discussed above was that the mine machinery was not operating on the day of inspection. Mr. Melton, the owner/operator/employee testified that he had shut the mine down about three days prior to the inspection to clean and maintain the mine machinery and equipment so as to protect it from the anticipated freezing cold winter weather. Mr. Melton testified he shuts down the mine to do the cleaning and maintenance work every fall. He testified that he never operates the mine machinery without the guard being in place.

Inspector Usselman testified that based upon the observations he made on arriving at the mine site, he determined that the mine machinery was operating when he arrived at the mine at 10:30 a.m. to make his October 8 inspection. The inspector observed a large cloud of dust going straight up into the air from where the crusher was located. It appeared to him the same as on the other occasions when he inspected the mine and observed the dust produced by the mine machinery in operation. The inspector also testified he heard some noise that sounded like machinery operating. Even though a shovel was observed lying behind the tail pulley, the inspector did not see any indication of any cleaning being done. There is no evidence that Mr. Melton, at the time of inspection, said anything to the inspector about the mine being shut down for cleaning or maintenance. I credit the inspector's testimony and based upon his testimony, find that the preponderance of the credible evidence established that the machinery was in operation without the guards in place and thus established a violation, as charged, in each of the four citations issued for guards not in place.

### **Citation No. 7959807**

Citation No. 7959807 alleges a violation of 30 C.F.R. § 56.12004. The citation reads as follows:

A black and yellow colored extension cord leading to the Michigan loader was in poor condition. The outer jacket was pulled back from the plug, exposing the conductors.

This exposure of the conductors is shown in the photograph received into evidence as Gov't Exhibit 7 and Resp. Exhibit 6. The inspector testified, the outer jacket protects the inner cables from being damaged. Thus, the pull back of the outer jacket from the plug exposed the conductors to mechanical damage. A non S&S violation of 30 C.F.R. § 12004, as charged in the citation, was established with respect to the extension cord to the Michigan loader. The citation is affirmed.

**Citation No. 7959809**

Citation No. 7959809 alleges a violation of the same safety standard quoted above, 30 C.F.R. § 56.12005, which mandates protection of electrical conductors exposed to mechanical damage. The Secretary presented undisputed evidence that a black and yellow extension cord, lying across a roadway, leading to a Caterpillar dozer was not bridged or protected. There were vehicular tire tracks showing that a vehicle passed directly over the cord. No protection was provided against damage that could result from a vehicle passing over the cord. The inspector testified the cord was in poor condition. He observed that in some places on the cord the conductors were sticking out of the cord's insulating jacket. The evidence clearly established a violation of 30 C.F.R. § 58.12005. The citation is affirmed.

**Citation No. 7959810**

This citation charges Respondent with the violation of 30 C.F.R. § 56.4201(a)(2) which provides in part as follows:

- (a) Firefighting equipment shall be inspected according to the following schedules: . . .
- (2) At least once every twelve months, maintenance checks shall be made of mechanical parts, the amount and condition of extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers will operate effectively.

The inspector, based on his observation and inspection of the fire extinguisher, determined that no 12-month maintenance check had been made on the mechanical parts, the amount and condition of the extinguishing agent and expellant, and the condition of the hose, nozzle, and vessel to determine that the fire extinguishers would operate effectively as required by part 2 of section (a) of the cited standard. There was no tag or any other indication that any maintenance check had been made. Respondent did not offer any contrary evidence. The violation of 30 C.F.R. § 56.4201(a)(2) was established. The citation is affirmed.

**Citation No. 7959811**

This citation charges Respondent with the violation of 30 C.F.R. § 56.12028 which requires continuity and resistance of grounding systems be tested immediately after installation, repair, or modification, and annually thereafter. The regulation specifically requires that a record of the resistance measured during the most recent tests shall be kept and made available to the mine inspector. The inspector, on checking the electrical system, determined that the required annual testing had not been done and instructed Mr. Melton about the need to do grounding and continuity testing on an annual basis, and the need to have records to show that this had been

done. The violation was timely abated a few days after the inspection by Respondent having a grounding test performed.

Respondent did not present any evidence contrary to the inspector's testimony and conclusion and did not produce any records or other evidence indicating the required testing had been done. The violation of the cited safety standard was established. The citation is affirmed.

**Citation No. 7959812**

This citation alleges a 104(a) S&S violation of 30 C.F.R. § 56.12041. That standard reads as follows:

Switches and starting boxes shall be of safe design and capacity.

The citation charges that the disconnect switch, also described as an electrical box, located in the No. 2 motor control van was not of safe design. The inspector testified that the switch did not protect an employee from contacting the connecting lugs. It is undisputed that Respondent did not construct or design the disconnect switch or the electrical box.

Mr. Melton testified the electrical box, for which the citation was issued, was an old unused electric box. It had not been used for a long time before the inspection. He testified that no electrical current had run through the box or the disconnect switch in question for a two-year period before the October 1997 inspection. There was no contrary evidence. After the inspector complained about the box, Respondent removed the box and "got rid" of it.

The inspector, on redirect examination by his attorney, testified he did not know whether there was or had been any electrical current running through the electrical box. In view of Mr. Melton's testimony and the inspector's testimony, on redirect examination, the preponderance of the evidence did not establish that the switch in question was in use or had any electric current running through it at any relevant time. The citation is vacated.

**Citation No. 7959813**

This citation charges the Respondent with the violation of 30 C.F.R. § 56.1101 which requires safe means of access to be provided and maintained to all working places.

The citation reads as follows:

The walkway leading up to the screw conveyor was not completed. Handrails and walkway did not continue over to the Quonset hut where a ladder way went into it. It was approximately 20 feet to the ground below. Apparently the employee walked the covered screw conveyor for approximately 10 feet to the hut.

It is clear from Mr. Melton's testimony, what the inspector thought was a ladder from the screw auger to the top of the Quonset hut was not a ladder. It was only a brace anchored on top of the Quonset hut to hold up the end of the screw conveyor on top of the Quonset hut.

The first part of the 20-foot walkway leading to the screw conveyor motor was 36 inches wide and had a 4-foot high handrail on both sides. Access to the screw conveyor's motor then continued from the 36-inch wide railed walkway along the 2-foot wide top cover of the enclosed screw conveyor. There were no handrails along that portion of the access to the screw conveyor motor that consisted of the 2-foot wide top cover for the enclosed screw conveyor. The only thing one could grasp to prevent a fall from this part of the access route was a 3/4 inch cable guy wire that slanted down from about a 4-foot height, where the handrail of the first part of the walkway ended to ankle height of the end of the screw conveyor cover, where the screw conveyor motor was located. Thus, the guy wire was too low to provide satisfactory safe access to a person who had to work on the motor located at the far end of the screw conveyor. This can be seen in the photograph received as Exhibit G-12. Clearly there was a hazard of an accidental fall to the top of the Quonset hut or possibly a 20-foot fall to the ground below to a person working on the motor.

Mr. Melton, the sole owner, operator and sole employee indicated he rarely had to access the screw conveyor motor but added that, just a few days before the inspection, he had to replace a burned-out motor with a new motor. He testified this only occurs about once in 10 years. He also testified that on a prior inspection, the MSHA inspector had okayed putting a 4-foot high cable across the walkway where the handrails ended. The purpose of this 4-foot high cross cable was to bar any further access along that part of the access-way that did not have a hand rail. This cross cable had been taken down at the time Mr. Melton replaced the old motor. Mr. Melton had neglected to re-secure the barring cross-cable. I found no merit in Mr. Melton's contention that there was no violation as the plant was not in operation at the time of inspection.

On evaluation of the evidence presented, I find the preponderance of the credible evidence established the violation of the safe access standard 30 C.F.R. § 56.1101. The citation is affirmed.

**Citation No. 7959814**

Citation No. 7959814 alleges a violation of 30 C.F.R. § 56.16005.

The citation reads as follows:

An oxygen cylinder had not been secured in a safe manner. The capped cylinder was lying on the ground at the quarry site.

Inspector Usselman testified that the oxygen cylinder was lying on the open ground at the quarry site as shown in the photograph received as Exhibit G-10. (Tr. 56). The cylinder was lying on its side within a couple of feet of a roadway. (Tr. 57). The cylinder was not secured in any way.

The safety regulation §56.16005 in its entirety simply states "Compressed and liquid gas cylinders shall be secured in a safe manner." The regulation makes no exception as to empty cylinders. An empty unsecured cylinder lying on its side near a roadway is a potential hazard. The evidence established a violation of 30 C.F.R. § 56.1101 as alleged. The citation is affirmed.

**Citation No. 7959815**

On October 8, 1997, at the conclusion of his inspection of the mine site at 1:15 p.m., the inspector issued this citation which is in effect a duplication of all the citations issued during the inspection of this very small half-acre quarry. The citation charges "The operator was not doing an examination of work places on a daily basis and then taking action to correct hazards on the mine property."

Asked by his counsel what led him to this conclusion, the inspector testified.

A. The violations that I had observed indicated that a daily inspection was not being conducted of the mine operation.

Q. How did your observations lead you to the conclusion?

A. Well, any time you have a number of violations that I find during my inspection, it indicates that the mining operator is not conducting a daily visit and looking at those objects and comparing those items during his visits and writing them in a logbook. (Tr. 58).

In this case, the owner/operator is the only employee so every time there is employee activity at the mine, he is that activity and presumably has to have his eyes open in each and every area where employee activity is going on. It is equally clear that the owner/operator/employee was not taking prompt or timely action to correct the hazards or violations he observed. However, as best can be determined from this record, Respondent was issued a citation for every violation that was observed on this half-acre mine site and, therefore, Citation No. 7959815 with its S&S finding and its \$903.00 proposed penalty is a duplication of all the "uncorrected" violations that are specifically cited in Citation Nos. 7959803 through

7959814. Citation No. 7959815 should be, therefore, vacated as it is a duplication of the all the citations issued and their related MSHA proposed penalties. The citation is vacated.

**Citation No. 7959802 - Berms**

The inspector testified the berms on the roadway leading up from the office to the quarry site was not being properly maintained. He observed some erosion of the berms and believed the eroded berms did not provide adequate protection for vehicles running “into” the berms or “off the side of the roadway.” He took two photographs of the berm in one area which were received into evidence as Gov’t. Exhibit 1 and Exhibit 2, the inspector testifies the berm in that area was 6 to 8 inches high and in some places was less than that.

The terrain between the upper and lower road was rough and rugged with potholes and sagebrush. The inspector was of the opinion that the drop-off was sufficient to cause a vehicle to overturn.

By way of mitigation, it is undisputed that the only vehicle that is ever driven on the road in question is a very small Yamaha ATV, All Terrain Vehicle, driven by the 64 year old owner, operator and sole employee, Mr. Melton. Evidence was presented that this ATV shown in the photograph, Resp. Exhibit 5, is four feet wide and approximately 36 inches high with 16 inch diameter wheels, that is 16 inches from the top of the tire to the bottom of the tire. It has a 4 wheel drive. The roadway is 16 to 20 feet wide and was constructed by Mr. Melton with a 16-foot blade dozer. Mr. Melton testified that in the 32 years he operated the quarry, he never had an accident and never had “as much as a cut finger.”

The inspector testified he was not good at estimating “distances” and on redirect examination was asked by counsel for the Secretary these somewhat leading questions:

Q. Now, you indicated that you’re not particularly good at estimating distances. How sure are you of your estimate at the height of the wheel on the all-terrain vehicle was 16 inches?

A. I’m not.

Q. Might it have been as much as 20 inches?

A. That’s correct.

Q. Isn’t it true there’s a substantial amount of foliage along the berms which you observed on the roadway leading up to the upper portion of the quarry?

A. That’s correct.

Q. What would the presence of foliage on the berms indicate to you?

A. That it had been a long time since anybody had done anything to the berms.

A violation of the cited safety standard was established. The preponderance of the evidence, however, did not establish the third element of the *Mathies* formula which is discussed in greater detail below under the heading S&S Violations.

### **Significant and Substantial Violations**

A number of citations issued as a result of the October 7<sup>th</sup> inspection are alleged to be S&S violations. A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984), the Commission explained.

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (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 in question will be of a reasonably serious nature.

*See also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988) *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury (*U.S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984)). The likelihood of such injury must be evaluated in terms of continued normal mining operations without any assumptions as to abatement. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); *See also Halfway, Inc.*, 8 FMSHRC 8,12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

**Citation Nos. 7959803, 7959804, 7959805 and 7959806 - Guards Not in Place, S&S Violations Affirmed**

Inspector Usselman designated the four violations charged the operator with operating mine machinery without the guard in place as significant and substantial. The guards were closeby but not secured in place. Mr. Melton testified that he never operated the machinery without the guards in place. This may well be true generally but based on the inspector's testimony, I find that on this one occasion, at least, he slipped up and had the machinery running without the guards in place. As stated above, the likelihood of injury must be evaluated in terms of continued mining operation without any assumption of abatement. With this in mind, I find the third and fourth elements of the *Mathies* formula have been met, as well as the more obvious first and second elements of the *Mathies* formula. The evidence established an S&S violation in all four of the guards not in place citations.

### **Citation No. 7959802 - Not S&S**

It is well established that in cases decided under *National Gypsum* and *Mathies*, S&S determinations are based upon the particular facts surrounding the violation in issue. E.g., *Texasgulf, Inc.*, 10 FMSHRC 498, 500-01 (April 1988).

In this case, the only vehicle to travel the roadway from the office to the upper quarry site was a small Yamaha ATV, an all terrain vehicle. This four-wheel drive vehicle is only four feet wide and the roadway is 16 to 20 feet wide. The vehicle was driven by the 64-year old owner, operator and sole employee, Mr. Melton, who has operated the quarry for 36 years without an accident. Under the particular facts of this case, I find that the evidence established only a possibility and not a reasonable likelihood that the hazard contributed to, will result in an injury. The S&S designation is deleted and the citation, thus modified, is affirmed.

### **Citation No. 7959813 - S&S Finding Affirmed**

Citation No. 7959813 alleges an S&S violation of the safety standard requiring that safe means of access be provided and maintained. In this case there was no safe access to the 20-foot high screw conveyor motor. Although access to the motor was very seldom required, the access was clearly not safe. The evidence presented established all four elements of the *Mathies* formula. I agree with the inspector that this violation is significant and substantial.

### **Appropriate Civil Penalty Assessment**

It is well established that while the Commission's judges are accorded broad discretion in assessing civil penalties under the Mine Act *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986), such discretion is not unbounded, however, and must reflect proper consideration of the six penalty criteria set forth in section 110(i),<sup>1</sup> as well as the deterrent purpose of the Act. I have

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<sup>1</sup> The six statutory criteria are:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the

considered the statutory criteria as well as the deterrent purpose of the Mine Act. Having done this, I conclude that the MSHA proposed penalties are the appropriate penalties for the violations set forth in Citation Nos. 7959807, 7959808, 7959809, 7959810 and 7959811.

I find the operator was moderately negligent in each of the affirmed violations and the gravity was moderate. With respect to all the citations, the operator demonstrated good faith in achieving rapid compliance after notification of the violation.

I place considerable weight, in this case, on the statutory criteria requiring the penalty to be appropriate to the size of the business. The mine is described by the inspector as a very small operation. The mine site covers approximately one-half acre located near Grandview, Idaho. It is a one-man operation. Mr. Melton is the owner, operator and sole employee. This small operation produces agricultural limestone for cattle feed. (Tr. 108).

**ORDER**

Having considered the statutory criteria in section 110(i) of the Act and the deterrent purpose of the Act, I assess the civil penalties for each of the affirmed citations as follows:

<u>Citation No.</u>	<u>Penalty</u>
7959802	\$ 100.00
7959803	400.00
7959804	400.00
7959805	400.00
7959806	400.00
7959807	50.00
7959808	50.00
7959809	50.00
7959810	50.00
7959811	50.00

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operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

7959813	400.00
7959814	<u>50.00</u>
<b>TOTAL</b>	<b>\$2,400.00</b>

It is **ORDERED** that within 30 days of the date of this decision, Owyhee Calcium Products, Inc., **PAY** to the Secretary of Labor the penalties set forth above totaling \$2,400.00. It is further **ORDERED** that Citation Nos. 7959812 and 7959815 be **VACATED** and that Citation No. 7959802 be modified by deleting the S&S designation. That citation is affirmed as so modified. Upon timely compliance with this Order, this case is dismissed.

August F. Cetti  
Administrative Law Judge

Distribution:

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

Charles L. Honsinger, Esq., Ringert Clark, Chartered, 455 South Third St., P.O. Box 2773, Boise, ID 83701-2773 (Certified Mail)

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