

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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March 21, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-65-M
Petitioner	:	A. C. No. 43-00196-05521
v.	:	
	:	Docket No. YORK 2000-66-M
VT UNFADING GREEN SLATE COMPANY,:	:	A.C. No. 43-00196-05522
INCORPORATED,	:	
Respondent	:	Blissville Quarry & Mill

## DECISION

Appearances: David L. Baskin, Esq., Office of the Solicitor, U.S. Department of Labor, Boston, Massachusetts, for Petitioner;  
Shawn Camara, *pro se*, Vermont Unfading Green Slate Co., Inc., Poultney, Vermont, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Petitions for Assessment of Civil Penalty brought by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Vermont Unfading Green Slate Company, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege 11 violations of the Secretary's mandatory health and safety standards and seek penalties of \$904.00. A hearing was held in Rutland, Vermont. For the reasons set forth below, I vacate four citations, modify and affirm two citations, affirm the five remaining citations and assess a penalty of \$470.00.

## Background

The Vermont Unfading Green Slate Company operates the Blissville Quarry and Mill in Rutland County, Vermont. On January 19, 2000, MSHA Inspector Bret Budd and MSHA Inspector-trainee Robert Tango arrived at the Blissville Mill to conduct a required semi-annual inspection. They contacted Shawn Camara, the supervisor at the mill, to have someone accompany them on the inspection. Camara said that he was busy and requested that the inspection be conducted at a later date. When the inspectors informed him that that could not be

done, he told them to conduct the inspection without him and if they found any violations the three of them could go over them when Camara was free.

It was apparent from the testimony at the hearing that once the inspectors began showing the violations to Mr. Camara, relations between the parties became contentious. It also appears that both sides overreacted. The inspectors issued numerous citations that day. Eleven of them were contested at the hearing and will be discussed in order.

### **Findings of Fact and Conclusions of Law**

#### Citation No. 7720767

This citation alleges a violation of section 56.4201(a)(2) of the regulations, 30 C.F.R. § 56.4201(a)(2), because:

The 12 month maintenance inspection of the fire extinguisher located in the garage building adjacent to the entrance door and mounted near the electrical switch panels was not done. The inspection is to assure the proper function of the extinguisher if needed. The last dated annual inspection was done in 1997.<sup>1</sup>

(Govt. Ex. 1.) Section 56.4201(a)(2) requires that:

(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.

There is no dispute that the fire extinguisher in question was found sitting, not “mounted,” on top of some panel boxes by the garage door. Nor is there any dispute that the extinguisher had not been inspected within the past twelve months. Mr. Camara testified that it had been discovered the day before, noted that it needed to be inspected, and had been placed where it was for one of the men to take to be inspected.

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<sup>1</sup> The citation was subsequently modified to replace the words “and mounted near” with the words “standing on top of.” (Govt. Ex. 1A.)

In view of the fact that the evidence indicates that the rest of the company's fire extinguishers were properly "mounted" and had been inspected, I conclude that the fire extinguisher in question had been removed from use so that it could be taken to be inspected. Since the company appears to have been in the process of complying with the regulation, I will vacate the citation.

Citation No. 7720768

This citation charges a violation of section 56.17001, 30 C.F.R. § 56.17001, because: "An area in the garage, adjacent to the entrance door, consisting of electrical switch panels, first aid kit, and other equipment had insufficient lighting. Proper lighting is necessary for a safe work area." (Govt. Ex. 2.) Section 56.17001 adjures that: "Illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas."

The evidence on this citation is that there was no artificial lighting provided in the area at all, the only light being natural light that came in through the garage door. The inspector testified that the switch boxes were hard to see and that the area got darker as one went into it. Mr. Camara testified that he did not have any trouble seeing in the area.

The regulation specifically provides that "switch panels" must be sufficiently illuminated. The evidence is that there was no artificial lighting at all in the area and that the natural lighting was meager. Accordingly, I conclude that the company violated this regulation.

Citation No. 7720769

This citation asserts a violation of section 56.12008, 30 C.F.R. § 56.12008, because: "The insulated wires providing 180V power to the trimmer in the garage building were not properly bushed where the[y] pass through the switch box. This condition is 5 feet above ground level located at the main electrical panel area adjacent to the entrance door. This exposes a person to a possible shock hazard." (Govt. Ex. 3.) Section 56.12008 provides, in pertinent part, that: "Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments. . . . When insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings."

The inspector testified that a wire that he believed went from an electrical box to a trimming machine was not bushed where it came out of the electrical box. Mr. Camara testified that the wire in question had at one time gone to a push table, but now did not go anywhere. He said that the fuses had been removed from the electrical box and the wire coming out of it was not energized. He further related that the trimmer was operated from a plug on the wall by the trimmer. He agreed, however, that the wire was not bushed.

Based on this evidence, I find that the electrical box and wire were not being used, and could not be used. Since the system was inoperable, I conclude that the Respondent did not violate this regulation and will vacate the citation.

Citation No. 7720770

This citation alleges a violation of section 56.12034, 30 C.F.R. § 56.12034, in that: “Two florescent [*sic*] lights were found to be unguarded in a light fixture mounted approximately 3 feet over a work bench in the garage building. This location presents a possible cut, shock or burn hazard to a person if the lights are broken.” (Govt. Ex. 4.) Section 56.12034 provides that: “Portable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.”

The inspector testified: “I don’t know if it actually was a workbench. I just assumed since they had parts lying on top of there, they do perform some kind of work at that spot.” (Tr. 61.) Mr. Camara testified that the area was not a workbench, but a counter with a telephone on it and that he put the light up so he could see to use the telephone when the main lights in the garage were out. Clearly, if this were a workbench, the unguarded light over it would present a shock or burn hazard. On the other hand, if this were just an area for using the telephone then it would not appear to come within the regulation.

Based on the evidence, I find that the Secretary has failed to prove that the light in question, by its location presented a shock or burn hazard and, therefore, had to be guarded. Accordingly, I conclude that the regulation was not violated and will vacate the citation.

Citation No. 7720771

This citation ascribes a violation of section 56.14107(a), 30 C.F.R. § 56.14107(a), because: “A machine guard was not provided to prevent accidental contact with the V-belt drive system, exposing the pinch points that are about 5 feet from ground level, located on the left side of the slate trimmer in the garage building and was not in use at the time of this inspection, but is used daily.” (Govt. Ex. 5.) Section 56.14107(a) states that: “Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades and similar moving parts that can cause injury.”

The slate trimmer was standing on a stack of pallets about five feet high. The trimmer blade is operated by an electric motor through a wheel and pulley system. The inspector testified that the small pulley was located down by the motor about even with the machine operator’s ankle and that the wheel was located between the waist and shoulder of the operator. He stated that neither the pinch point on the wheel nor the pinch point on the pulley were guarded to prevent the operator’s clothes or limbs from becoming caught in them.

The evidence presented by Mr. Camara on this citation addressed only whether someone standing on the ground would be susceptible to the pinch points. Since that was not at issue in this citation, I find the evidence irrelevant.

Hence, I find that the pinch points were not properly guarded and that the company violated the regulation.

*Significant and Substantial*

The Inspector found this violation to be “significant and substantial.” A “significant and substantial” (S&S) violation is described in Section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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.” A violation is properly designated S&S “if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out four criteria that have to be met for a violation to be S&S. *See also Buck Creek Coal, Inc. v. FMSHRC*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff’g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (December 1987)(approving *Mathies* criteria). Evaluation of the criteria is made in terms of “continued normal mining operations.” *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (December 1987).

In order to prove that a violation is S&S, the Secretary must establish: (1) the underlying violation of a safety standard; (2) a distinct 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 will be of a reasonably serious nature. *Mathies*, 6 FMSHRC at 3-4.

In Citation No. 7720772, which will be taken up next, MSHA charged that safe access was not provided to the trimmer and originally held that the violation was “S&S.” The citation was subsequently modified to non-S&S because “the amount of exposure to the trimmer is minimal.” (Govt Ex. 6A.) The inspector testified that the citation was modified because, “this was a temporary set-up, that really it wasn’t being used every single day. So you know, for someone to be up there would be just once in a — whenever they needed that product, the exposure would be a lesser degree than someone being there every single day operating it.” (Tr. 81-81.)

While it is not apparent how this rationale fits into the *Mathies* criteria, I find that if the failure to provide safe access to the trimmer was not a “significant and substantial” violation of the regulations because the amount exposure to the trimmer was minimal, then the failure to guard the pinch points should also not be “significant and substantial” for the same reason. In this connection, it is apparent that the statement in the citation that the trimmer “is used daily” is inaccurate. I will modify the citation accordingly.

Citation No. 7720772

This citation alleges a violation of section 56.11001, 30 C.F.R. § 56.11001, because: “Safe access was not provided to the working place on the slate trimmer located in the garage. The worker must climb up and over wooden pallets approximately 5 feet high that support the trimmer in order to access the trimming work station.” (Govt Ex. 6.) Section 56.11001 requires that: “Safe means of access shall be provided and maintained to all working places.”

Inspector Budd testified that when the inspectors asked Mr. Camara how the trimmer operator got up on the pallets to operate the trimmer, he told them that the operator climbed up the pallets. No steps, handholds or railings were provided for the ascent. Mr. Camara did not dispute, at the hearing, that this was how the trimmer was accessed.

Based on this, I find that a safe means of access was not provided to the trimmer. Accordingly, I conclude that the company violated the regulation as alleged.

Citation No. 7720773

This citation cites a violation of section 56.15004, 30 C.F.R. § 56.15004, because: “It was observed that the operator of the #2 slate saw in the mill was not wearing eye protection. This is an area of the mill where a hazard exists which can cause injury to unprotected eyes.” (Govt. Ex. 7.) Section 56.15004 provides that: “All persons shall wear safety glasses, goggles, or face shields or other suitable protective devices when in or around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.”

There is no dispute that the sawyer was not wearing eye protection. The issue with this citation is whether there was a hazard to unprotected eyes. Inspector Budd stated that the sawyer works at a control station with the saw in front of him. The slate is brought into the mill, placed between the sawyer’s station and the saw and positioned for the cut. The saw, a circular saw about 28 inches in diameter, has a half hood over it, and cuts down into the slate and moves toward the sawyer. Water sprays onto the saw and slate to keep the dust down.

The inspector testified that eye protection was needed from chips coming from the saw, from slippage in adjusting the slate and from pieces of slate being thrown into dumpsters behind the sawyer. Mr. Camara said that sawyers never wear safety glasses and that “[y]ou would have a better chance of your hand getting caught in that fan [in the courtroom] than something coming

off there.” (Tr. 179.) In response to my question as to whether any chips were caused by the sawing, he stated: “How is a chip going to — if you ever looked at it, what’s a chip going to be — what is going to be chipped of the block?” (*Id.*)

Based on this evidence, I find that the sawyer should have been wearing eye protection. Therefore, I conclude that the company violated section 56.15004 in this instance.

*Significant and Substantial*

The inspector found this violation to be “significant and substantial.” However, I find his evidence on this issue to be insufficient. While his testimony was barely adequate to establish that a hazard existed, he did not describe what he actually observed, speculating only as to what the hazard could be. Thus, there is no evidence that he actually observed chips flying, how frequently that occurred, the proximity of the chips to the sawyer or any of the other hazards that he opined could occur. I find his speculation too tenuous to establish that the violation was “significant and substantial” and will modify the citation accordingly.

*Citation No. 7720774*

A violation of section 56.12019, 30 C.F.R. § 56.12019, is charged in this citation, which relates that: “In the storage shed, a tire, cardboard boxes and wooden pallets were stacked in front of the electrical panel boxes. Service areas must be kept neat and orderly.” (Govt. Ex. 8.) Section 56.12019 requires that: “Where access is necessary, suitable clearance shall be provided at stationary electrical equipment or switchgear.”

The inspector testified that he observed a Euclid truck size tire, cardboard boxes and pallets which prevented access to electrical panel boxes located at the rear of the mill storage shed. Mr. Camara testified with regard to this citation: “I don’t think there was a tire in that mill. There might have been a tire in that mill. Was it near the electrical boxes? It could have been, I don’t know. I can’t even argue this citation.” (Tr. 183.)

Based on this evidence, I conclude that the Respondent violated the regulation as alleged.

*Citation No. 7720775*

This citation asserts a violation of section 56.13021, 30 C.F.R. § 56.13021, in that:

A 3/4 inch inside diameter, high pressure air hose used to supply air to the jack hammer located in the slate packing shed was not provided with safety chains or other suitable locking devices at the connection of the jack hammer. This presents a possible “whipping” hazard that could cause injuries from an uncontrollable

air hose if the connections break. The air line was charged indicating the jackhammer has currently been used.

(Govt. Exs. 9 & 9A.)<sup>2</sup> Section 56.13021 stipulates that:

Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

Inspector Budd testified that the jack hammer was observed lying in the door-way of the packing shed. While no one was operating the jack hammer at that time, it appeared that the air hose was pressurized so that it could be operated. Budd further testified that activities were being conducted at the mill which would have necessitated the use of the jack hammer. The inspector stated that, “at the jack hammer connections there were no safety pins and/or like a whip check device, to prevent the connection at the jack hammer to the hose from coming apart and causing a whipping action of a pressurized air hose.” (Tr. 104.)

Based on this evidence, I conclude that the company was in violation of section 56.13021.

*Significant and Substantial*

This violation is alleged to have been “significant and substantial.” Inspector Budd testified that the jack hammer is used to break up pieces of slate which are too large to take into the mill. Therefore, although the jack hammer was not actually being used at the time the citation was issued, it could reasonably be expected to be used during continued normal milling operations. Accordingly, I conclude that it was reasonably likely that someone would use the jack hammer, that the pressurized air hose would become disconnected resulting in a whipping action which would result in a reasonably serious injury. Thus, I conclude that the violation was “significant and substantial.”

*Citation No. 7720776*

This citation charges a violation of section 56.12008 because: “Exposed and energized 110V wires with uninsulated [*sic*] ends were observed extending from the roof of the slate packing shed, to approximately 8 feet from the floor level. This presents a possible shock hazard to a person.” (Govt. Ex. 10.) For the purposes of this violation, the regulation specifies that:

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<sup>2</sup> The narrative is the language of the citation after it was modified. (Govt. Ex. 9A.)

“Power wires and cables shall be insulated adequately where they pass into or out of electrical compartments.”<sup>3</sup>

The inspector testified that the wires came out of a junction box on the ceiling, about 15 feet off of the ground, and that the ends of the wires, which were about eight feet off of the ground, were not insulated. The only issue contested at the hearing was whether the wires were electrified or not.

Since there is no evidence concerning whether the wires were adequately insulated *where they passed into or out of* the junction box, it is not necessary to determine whether or not the wires were “live.” Section 56.12008 clearly does not cover the facts alleged in this citation. Consequently, I will vacate it.

Citation No. 7720778

This final citation alleges a violation of section 56.18010, 30 C.F.R. § 56.18010, because: “A person was not trained in first aid, to be able to provide medical assistance in the event a person is injured at the mine site. At least one such person is to be available on all shifts.” (Govt. Ex. 11.) Section 56.18010 requires that: “An individual capable of providing first aid shall be available on all shifts. The individual shall be currently trained and have the skills to perform patient assessment and artificial respiration; control bleeding; and treat shock, wounds, burns, and musculo-skeletal injuries.”

The evidence on this citation is undisputed. The individual capable of providing first aid had been sent to another site. Mr. Camara argued that this did not make any difference because the medical center was only 1.3 miles from the mill. That, however, misses the point. The purpose of first aid is exactly what it says — “first” aid, performed before trained medical personnel arrive. Accordingly, I conclude that the Respondent violated section 56.18010.

**Civil Penalty Assessment**

The Secretary has proposed penalties of \$684.00 for the seven violations being affirmed in this decision. However, it is the judge’s independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7<sup>th</sup> Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (April 1996).

In connection with the penalty criteria, the Assessed Violation History Report shows that the Blissville Quarry and Mill was assessed only 11 violations during the two years preceding

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<sup>3</sup> For the full text of section 56.12008 see the discussion under Citation No. 7720769, *supra*.

these violations. (Govt. Ex. 12.) Based on this, I find that the operator has a relatively good history of previous violations.

The information furnished by the Secretary in the pleadings indicates that the Blissville Quarry and Mill is a small operation and the slate company is a small company. Accordingly, I will consider that this is a small business in arriving at an appropriate penalty.

The inspector found the operator's negligence with regard to these violations to be either "low" or "moderate." I concur in those findings.

The Respondent did not claim that payment of the assessed penalties in these cases would adversely affect its ability to remain in business. Nor is there any evidence in the record which would support such a claim. Therefore, I find that the company's ability to continue in business will not be affected by the penalties assessed.

With the exception of Citation No. 7720775, none of the violations in these cases were serious violations. I find that the violation in Citation No. 7720775 was moderately serious.

The Secretary did not present any evidence that the operator failed to demonstrate good faith in attempting to achieve rapid compliance after notification of the violations. Accordingly, I find that the Respondent did demonstrate good faith.

Taking all of these factors into consideration, I assess the following penalties for the violations in these cases:

**Docket No. YORK 2000-65-M**

<u>Citation No.</u>	<u>Penalty</u>
7720767	Vacated
7720768	\$ 55.00
7720770	Vacated
7720774	\$ 55.00
7720776	Vacated

**Docket No. YORK 2000-66-M**

7720769	Vacated
7720771	\$ 55.00
7720772	\$ 55.00
7720773	\$ 55.00
7720775	\$140.00
7720778	<u>\$ 55.00</u>
Total	\$470.00

**Order**

Citation Nos. 7720767, 7720770 and 7720776 in Docket No. YORK 2000-65-M and Citation No. 7720769 in Docket No. YORK 2000-66-M are **VACATED**. Citation Nos. 7720771 and 7720773 in Docket No. YORK 2000-66-M are **MODIFIED** by deleting the “significant and substantial” designations and are **AFFIRMED** as modified. Citation Nos. 7720768 and 7720774 in Docket No. YORK 2000-65-M and Citation Nos. 7720772, 7720775 and 7720778 in Docket No. YORK 2000-66-M are **AFFIRMED**.

Vermont Unfading Green Slate Co., Inc., is **ORDERED TO PAY** a civil penalty of **\$470.00** within 30 days of the date of this decision.

T. Todd Hodgdon  
Administrative Law Judge

Distribution: (Certified Mail)

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