FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

April 7, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-178-M
Petitioner	:	A.C. No. 14-01477-87956
	:	
	:	Docket No. CENT 2006-202-M
	:	A.C. No. 14-01477-80283
	:	
	:	Plant 1
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	:	Docket No. CENT 2006-203-M
	:	A.C. No. 14-01478-77337
	:	
	:	Docket No. CENT 2006-204-M
v.	:	A.C. No. 14-01478-82614
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	:	Docket No. CENT 2006-228-M
	:	A.C. No. 14-01478-87955
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	:	Plant 2
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	:	Docket No. CENT 2006-207-M
	:	A.C. No. 14-01277-74668
	:	
	:	Docket No. CENT 2006-208-M
	:	A.C. No. 14-01277-82615
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NELSON QUARRIES, INC.,	:	Docket No. CENT 2006-229-M
Respondent	:	A.C. No. 14-01277-87965
	:	
	:	Docket No. CENT 2006-231-M
	:	A.C. No. 14-01277-93224
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	:	Plant 3
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	:	Docket No. CENT 2006-151-M
	:	A.C. No. 14-01597-85132
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	:	Docket No. CENT 2006-206-M
	:	A.C. No. 14-10597-80316

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:	Docket No. CENT 2006-230-M
:	A.C. No. 14-01597-90759
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:	Docket No. CENT 2006-233-M
:	A.C. No. 14-01597-93238
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:	Docket No. CENT 2006-237-M
:	A.C. No. 14-01597-77364-02
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:	Plant 4
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:	Docket No. CENT 2006-200-M
:	A.C. No. 14-01635-74774
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:	Docket No. CENT 2006-201-M
:	A.C. No. 14-01635-80401
:	
:	Plant 5

DECISION

Appearances: Jennifer Casey, Esq, and Kristi Henes, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, and Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, Denver, Colorado, for Petitioner;
Paul M. Nelson, Nelson Quarries Inc., Gas, Kansas, for Respondent.

Before: Judge Manning

These cases are before me on 16 petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Nelson Quarries, Inc., 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 100 citations and orders issued by MSHA under sections 104(a) and 104(d)(1) of the Mine Act at five plants operated by Nelson Quarries. The parties presented testimony and documentary evidence at the hearing held in Topeka, Kansas, and filed post-hearing briefs on a few of the citations.

At all pertinent times, Nelson Quarries operated five quarries in Allen and Crawford Counties, Kansas. The quarries mine limestone and then crush and screen the material for sale. The operations are portable. Three of these facilities operate intermittently and the other two operate full-time. The oldest quarry has been operating since 1985 and the newest quarry was opened in 2004. Most of the citations at issue in these cases were issued after a hazard complaint

was filed by a former employee of Nelson Quarries. The complaint listed 14 alleged hazards. Some of the hazards complained of were general, such as the ones that stated "Nelson Quarries' properties are unsafe to everyone who works in them" and "electricity is bad [at] all plants." (Tr. 35-36; Exs. G-1, G-11). Others were more specific, such as one that stated that "explosives are left unguarded and hid around the plant to save time and money." *Id.* This complaint was with respect to Plant 4. As a result of this complaint, inspectors from MSHA's Topeka, Kansas, office conducted a comprehensive inspection of all five quarries. Because MSHA's Topeka office did not have an electrical inspector, an electrical inspector was brought in from Salt Lake City, Utah, to inspect the electrical systems at all five plants. (Tr. 138). MSHA determined that about half of the hazards complained of had some validity. Nelson Quarries received more citations during these inspections than it had ever received. All of the citations discussed below were issued under section 104(a) of the Mine Act unless otherwise noted.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Discussion of General Issues Raised by Nelson Quarries

Nelson Quarries raised a number of general issues that are applicable to all or most of the citations at issue. First, it argues that the Secretary failed to demonstrate that accidents could result from many of the cited conditions. For example, it contends that an injury could only result from an employee's intentional misconduct in many of the conditions cited under the Secretary's guarding standard. It maintains that the Secretary failed to establish any likelihood of an injury to employees as a result of the cited conditions.

The Federal Mine Safety and Health Review 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 (10th 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. In addition, 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 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great. The risk of injury and the appropriate penalty for each citation is discussed below.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Nelson Quarries' operations is not a defense because there is a history of such injuries at 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). For example, fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ).

Nelson Quarries also contends that many of the conditions cited by the MSHA inspectors existed during previous MSHA inspections. It states that MSHA did not issue citations for these conditions until the present inspections when the company came under tougher scrutiny, especially with respect to the guarding citations that were issued. Thus, it contends that it did not receive fair notice of MSHA's new interpretation of the safety standard.

The Secretary must provide fair notice of the requirements of broadly written safety standards. Such standards are "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application' " *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976). I discuss the application of this "fair notice" issue to particular citations in more detail below.

Finally, Nelson Quarries contends that the individual at each quarry who functioned as a lead man was not an agent of the company despite the fact that at the time of the subject inspections each of these individuals had the title "foreman." It maintains that these employees were rank and file miners who were only given a few ministerial functions.

As a general matter, a mine operator can be held liable for the acts of its agents. An agent is defined at section 3(e) of the Mine Act as "any person charged with responsibility for the operation of all or part of a . . . mine or the supervision of miners in a . . . mine." The Commission has held that the negligence of an agent of a mine operator must be considered when determining the operator's negligence in assessing a civil penalty under section 110(i) of the Mine Act and when evaluating an unwarrantable failure allegation. *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463-64 (Aug. 1982); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194-97 (Feb. 1991).

> When deciding whether a miner is an agent of an operator, the Commission has focused on the miner's function and not his job title. It has examined whether the miner's function involved responsibilities normally delegated to management personnel and whether his responsibilities were crucial to the mine's operation. It has also considered whether the miner exercised managerial responsibilities at the time of his negligent conduct.

Martin Marietta Aggregates, 22 FMSHRC 633, 637 (May 2000) (citations omitted). The conduct of a rank-and-file miner, "may *not*, absent agency, be imputed to the operator." *Whayne Supply Co.*, 19 FMSHRC 447, 454 (Mar. 1997) (emphasis in original). I discuss the application of these agency issues to particular citations in more detail below.

B. <u>CENT 2006-151-M, Plant 4.</u>

1. On November 15, 2005, Inspector Dustan Crelly issued Citation No. 6291250 under section 104(d)(1) of the Mine Act alleging a violation of section 56.6130(a). (Ex. G-13). The citation alleges that two partial rolls of primer (shock tube) were stored in the parts trailer. The citation states that the "rolls of explosive material were under the shelves" in the trailer. The citation also states that Foreman Gene Andres told the inspector that this material had been in the trailer since at least June 2005. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was significant and substantial ("S&S") and that the negligence was high. The safety standard provides that

"[d]etonators and explosives shall be kept in magazines." The Secretary proposes a penalty of $1,000.00 for this citation.

Inspector Crelly testified that the legal identity report for Plant 4 lists Gene Andres as the foreman. (Tr. 185; Ex. G-10). Mr. Andres also confirmed this fact during the inspection. (Tr. 189-90). Inspector Crelly was looking for improperly stored explosives because of the allegations in the hazard complaint. (Tr. 190). Shock tube is a low explosive that is used as the lead line to detonate high explosives. (Tr. 191). The shock tube was an explosive and it was not stored in a magazine. The inspector testified that Mr. Andres told him that he knew that the shock tube was being stored in the parts trailer. (Tr. 194, 216). Inspector Crelly determined that the citation was S&S because shock tube is classified as an explosive, it was not stored in an isolated area, and there were cigarette butts in and around the trailer. (Tr. 198-99). The shock tube was not in the original manufacturer's packaging or any other container. As a consequence, it could be contaminated by grit and sand, which would render it more sensitive to detonation. (Tr. 200). If something were to fall off a shelf and strike the shock tube, it could easily detonate. Miners enter the trailer every day.

Inspector Crelly determined that the violation was the result of the operator's unwarrantable failure to comply with the safety standard. He based this determination on the fact that Foreman Andres knew that the shock tube was present and he did not take any action to remove it from the parts trailer. (Tr. 202). The shock tube was in plain view. The condition was abated when the shock tube was moved to the magazine. (Tr. 203).

Thomas E. Lobb, a physical scientist with MSHA in Triadelphia, West Virginia, testified on behalf of the Secretary by telephone. He conducts investigations into accidents that involves explosives. (Tr. 222; Ex. G-14). He also provides training in blasting safety and provides technical assistance to industry. He testified that shock tube is an explosive material, but its strength is limited so that it is relatively safe to anyone standing more than 25 meters away. (Tr. 225- 38; Ex. G-14b). He testified that this product presents a fire hazard. In addition, improper storage or mishandling can cause misfires when the shock tube is used. (Tr. 239-41). Misfires are one of the top five causes of blasting accidents. *Id.*

Jon Bruner, who is in charge of product management for Dyno-Nobel, Inc., testified on behalf of Nelson Quarries by telephone. He does not have a technical or scientific background. (Tr. 257). He testified that shock tube is not a high explosive. (Tr. 246-49). If the shock tube were ignited, it could cause burning injuries if it were in your hand, but it would not explode and it would not cause a fatal injury. (Tr. 251). He stated that if a spool of shock tube were accidently shot, an injury would be unlikely. (Tr. 253). He admitted that shock tube is a low explosive and must be stored in a magazine under MSHA's regulations. (Tr. 256-57). He also admitted that the presence of dirt, sand, and grit could make the shock tube more sensitive to detonation. (Tr. 264).

Patrick Clift, a foreman at Plant 4 for Nelson Quarries, testified that he was not aware that the shock tube was in the parts trailer. He stated that he was the only foreman at plant 4. (Tr. 274, 276). When he was interviewed by MSHA on February 2, 2006, he stated that Gene Andres was also a plant foreman. (Tr. 280-81; Ex. G-137h, p. 4). The mine's legal identity report lists Mr. Andres as the foreman and the person in charge of safety. (Tr. 281-83). Nelson Quarries has now given Mr. Andres the title of "lead man." (Tr. 284).

Gene Andres testified that he was not really a foreman at the time of the MSHA inspection, but he was the person in charge at Plant 4. (Tr. 293). He was not a foreman because he did not have the power to hire and fire employees or to discipline them. (Tr. 294). He can always call the foreman when important decisions need to be made. He testified that the parts trailer was not lighted. He was not aware that the shock tube was present until the inspector found it. (Tr. 295). Although he performs the daily workplace examinations, he does not walk all the way to the back of the trailer. He just makes sure that there is a clear walkway to the back of the trailer. He made sure that there was access to the back of the trailer, but he did not notice the shock tube when he performed his examination that Monday. (Tr. 309-10). He denies that he admitted to Inspector Crelly that he knew that the shock tube was in the trailer. He said that after June 2005, Buckley Powder Company did all of the blasting at the mine and that, therefore, the shock tube must have been present since that date. (Tr. 296).

During his interview with an MSHA inspector in February 2006, Andres referred to himself as the "plant foreman," he said that he "direct[ed] the work force," and he had the authority to tell "the workers what to do." (Tr. 307; Ex. G-137g, p. 2). He also stated that although he did not have the authority to hire or fire anyone or to discipline anyone, he could "recommend that they be disciplined or maybe talk to them if they do something wrong." *Id.* In this same interview with MSHA, Andres further stated that he does not inspect the parts trailer "because no one works in the parts trailer." (Tr. 310; Ex. G-137g, p. 4).

In its brief, Nelson Quarries makes two arguments. First, it argues that the inspector was confused about the nature of the material in the parts trailer. Shock tubing, by itself, cannot set off explosives because it is not strong enough. It contains 15 milligrams of HMX/aluminum powder per meter. Any combustion would have been contained within the plastic tubing. Without a detonator present, the shock tube did not pose a hazard to miners. The accidents cited by MSHA occurred after the shock tubing had been inserted into a detonator. Second, Nelson Quarries argues that Gene Andres was not its agent but was simply a lead man. The only foremen were Mike Peres and Patrick Clift and only their actions can be imputed to Nelson Quarries. It relies on the Commission's decision in *Martin Marietta Aggregates* and on the unpublished decision of the 9th Circuit in *Original Sixteen to One Mine, Inc. v. FMSHRC*, 175 Fed. Appx. 825, 2006 WL 897570.

I find that the shock tube is an explosive as that term is used in the safety standard. Thomas Lobb testified that shock cord is classified as an explosive and is required to be stored in a magazine. (Tr. 225-37; Ex. G-14b). While it is not likely that the shock tube would create a

serious explosion hazard, it could help propagate a fire. In addition, he testified that shock tube can misfire when handled or stored improperly. I credit the testimony of Mr. Lobb. As a consequence, the Secretary established a violation because the shock tube was not stored in a magazine.

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).

The Secretary established a violation and that a discrete safety hazard was created. I also find that it was reasonably likely that the hazard contributed to would result in an injury assuming continued mining operations. Smoking was not prohibited in the area, cigarette butts were found in and around the trailer, and the shock tube would vigorously burn in the event of a fire. (Tr. 199). Anyone in the trailer was exposed to the hazard. In addition, if the shock tube were used, it could misfire because it had not been properly stored. Any injury would be of a reasonably serious nature. I find that the Secretary established that the violation was S&S.

Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id.* 2004-04; *Rochester & Pittsburgh Coal Co*., 13 FMSHRC at 193-94. A number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, whether an operator has been placed on notice that greater efforts are necessary for compliance, the operator's knowledge of the existence of the violation, and whether the violation is obvious or poses a high degree of danger. *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001).

It is clear that the shock tube had been in the parts trailer for some time. Inspector Crelly testified that Mr. Andres told him that he knew it was there. (Tr. 194, 216). The inspector wrote

the following in his citation notes: "Gene Andres, foreman, stated that he knew this explosive material should not have been stored in this parts trailer and it had been since at least 6/2005" (Ex. G-13b). The shock tube was in plain view and the inspector saw it upon entering the trailer. Andres testified that he did not know that the shock tube was present and that, when he conducted his daily examinations, he did not walk to the back of the trailer where the shock tube was stored. He admitted that it is likely that the shock tube had been in the parts trailer since June because that is when Nelson Quarries stopped performing its own blasting.

I find that the Secretary established that the violation was the result of the operator's unwarrantable failure. Inspector Crelly testified that the condition was obvious and that he observed the shock tube when he entered the trailer. The record also establishes that the condition had existed for some time. I credit Crelly's testimony and inspection notes on this issue and find that Andres was aware that it was present.

I find that Mr. Andres was an agent of Nelson Quarries in this instance. Andres accompanied MSHA inspectors during inspections as the company's representative and he acted in that capacity during the instant inspection. (Tr. 188). When Inspector Crelly started his inspection, Mr. Andres told him that he was the foreman. Andres was listed as a foreman and as a person in charge of health and safety in MSHA's legal identity report. (Tr. 185; Ex. G-4). Andres was responsible for conducting the daily workplace examinations at the plant. The Commission has held that a miner is the agent of a mine operator when carrying out the required examinations entrusted to him by the operator. *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189 ,194 (February 1991). Andres was compensated at a higher rate of pay than other employees. When interviewed on February 1, 2006, by an MSHA special investigator, Andres stated that he was a foreman and that he had the authority to direct the workforce, assign tasks, shut down equipment for safety conditions, and recommend that an employee be disciplined or terminated. (Tr. Ex. G-137g). Peres and Clift travel from plant to plant with the result that Andres was in charge of Plant 4 when neither Peres nor Clift was around. Although Andres could not hire or terminate an employee, he made recommendations to Peres and Clift. I find that Mr. Andres sufficiently meets the Commission's multi-factor test for the imputation of an agent's negligence to a mine operator for purposes of penalty assessments and unwarrantable failure findings as set forth in *Martin Marietta Aggregates*, 22 FMSHRC 633, 636-40 (May 2000). The fact that only Nelson family members could make the ultimate decision on disciplinary issues does not negate the fact that other individuals, including Andres, were given responsibilities that are normally delegated to management personnel. (Tr. 274).[1]

I also find that the court's decision in *Original Sixteen to One* does not support the position of Nelson Quarries. That case was factually driven and the court specifically determined that there was "no evidence in the record that [the lead man's] function 'involved responsibilities normally delegated to management personnel,' or that he 'exercised managerial responsibilities at the time of his negligent conduct.' " (quoting *Martin Marietta Aggregates*). The court found

[1] Both Peres and Clift are related to the Nelson family by marriage.

that the lead man's authority to assign tasks to the other miners with whom he was working that day is not by itself sufficient to support a finding that he is an agent. It is clear to me that Andres had more authority at the plant than the lead man at the Sixteen to One Mine.

For the reasons set forth above, the citation is affirmed as written. I find that the Secretary's proposed penalty of $1,000.00 is appropriate taking into consideration the penalty criteria set forth in section 110(i) of the Mine Act.

2. On November 16, 2005, Inspector Crelly issued Order No. 6291251 under section 104(d)(1) of the Mine Act alleging a violation of section 56.6300(b). (Ex. G-15). The citation alleges that the crusher operator shot oversized material out of the hopper at the crusher and he was neither trained nor experienced with the handling and use of explosive material. The citation states that Mr. Andres told the inspector that the "hopper has to be shot whenever an oversized rock is sent to the crusher and the crusher operator is not qualified to handle explosives and he was aware of this." (Ex. G-15). Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was high. The safety standard provides that "[t]rainees and inexperienced persons shall work only in the immediate presence of persons trained and experienced in the handling and use of explosive material." The Secretary proposes a penalty of $1,300.00 for this order of withdrawal.

The inspector testified that the crusher operator, who was not trained or experienced in the use of explosives, was shooting material out of the hopper without a trained miner being present. (Tr. 204, 208). Inspector Crelly testified that when he went into the crusher shack he saw a stick of high explosive (Boostrite) sitting in the shack. When he asked why it was there, the crusher operator told him that he shot oversized rock in the hopper the previous Monday and, because he did not use all of the explosive material he had removed from the magazine, he put it in the crusher shack. (Tr. 204-05, 207; Ex. G-74c). It was in a tray next to what the inspector called "shotgun primers." (Tr. 206). Shotgun primers are initiation devices used to set off a high explosive. *Id.* Thus, the inspector testified that he observed a high explosive stored next to detonators in the crusher shack. (Tr. 207). The crusher operator had been smoking in the crusher shack. (Tr. 209-10).

Inspector Crelly determined that the violation was S&S because if the cited practice continued it was reasonably likely that someone would be seriously injured or killed. (Tr. 212-13). The inspector saw the crusher operator smoking in the crusher shack. Inspector Crelly determined that the violation was caused by the operator's unwarrantable failure to comply with the standard because the violation was obvious and it appeared to be a standard practice at the mine. (Tr. 214-15). The inspector admitted that the crusher operator had been told by management not to smoke in or around the crusher shack. (Tr. 219).

Mr. Clift testified that the crusher operator was Travis Tomlinson and Tomlinson had been trained to handle and use explosives. (Tr. 275). He testified that other Nelson Quarries

employees had shown Tomlinson how to shoot out crushers at other plants owned by the company and that Tomlinson had helped other more experienced miners perform that task before he did so on his own. He further testified that an untrained employee can seriously damage the crusher if he improperly uses explosives. (Tr. 276). The order was terminated after Mr. Andres instructed employees that he was the only experienced and trained person who was authorized to use explosives, and he took possession of the keys to the magazine. (Tr. 288; Ex. G-15).

Gene Andres denied that he ever told Inspector Crelly that the crusher operator was not qualified to handle and use explosives. (Tr. 296-97). He merely told Crelly that he had not personally trained Tomlinson. An untrained person could seriously damage the equipment if he shoot explosives inside the crusher. (Tr. 298). He testified that he previously observed Tomlinson shoot a rock in the crusher but he could not remember when that was. (Tr. 300, 317). He also stated that he was at the plant when Tomlinson shot the rock in the crusher in November 2005 and that he observed him doing so. Andres testified that he did not notice that Tomlinson stored the second stick of Boostrite in the crusher shack or that shotshell primers were being stored there as well. (Tr. 300-01). Andres also said that he did not know where Tomlinson got the cap for the blast that day.

In his interview with an MSHA inspector in February 2006, Andres said "I normally go with the crusher operator to shoot, but I didn't know that [Tomlinson] was shooting that day and he forgot to take the explosives back and left a stick of Boostrite in the crusher booth the day before the MSHA inspection." (Tr. 305-06; Ex. G-137g, p. 5). He further stated that when he saw the Boostrite during the MSHA inspection, "I liked to have had a heart attack when I saw the explosives in there . . . I didn't know that he was shooting that Monday." *Id.*

In its brief, Nelson Quarries argues that Inspector Crelly did not listen to the answer of Andres when he asked if Tomlinson was trained in the use of explosives. Andres merely stated that he had not trained him. The record establishes that Tomlinson came to Plant 4 already trained by company employees at another plant. The record also shows that an untrained miner could injure himself and seriously damage or destroy a very expensive primary crusher. Nelson Quarries argues that it would never take such a risk. Indeed, when Crelly asked Tomlinson if he knew that he should not be smoking around explosive materials, he answered in the affirmative by stating he had been taught that smoking was prohibited during his training. (Ex. G-12 p. 19). Mr. Clift testified that Tomlinson had been trained by two company blasters and that the company does not allow untrained miners to use explosives. Clift also testified that the method of abatement was actually chosen by the inspector and the company agreed to the abatement to finish the inspection. To abate, the company agreed that Andres will be the experienced and trained miner who can handle explosives. Nelson Quarries and Mr. Andres felt intimidated by MSHA because the agency had multiple inspectors at the plant and at the other plants during the same period of time. They felt that they were under the gun and ask that the order be vacated.

In her brief, the Secretary argues that the record does not support the company's arguments. The record demonstrates that Andres "was neither intimidated nor confused when he

told Inspector Crelly that Travis Tomlinson had not received training in the handling and use of explosive materials." (S. Br. 7). The Secretary argues that Andres testimony should not be credited because he said contradictory things during the investigation and at the hearing. At the hearing, Andres testified that he watched Tomlinson shoot out the hopper for the crusher. (Tr. 300-01). Mr. Andres previously told MSHA's special investigator that he was running a loader that day and was not aware that Tomlinson was shooting the crusher. (Tr. 304-06; Ex. G-137g, p. 5). The Secretary states that the inspector recorded his conversation with Andres in his field notes and that Andres signed these notes. (Tr. 195-96, 313; Ex. G-12 p. 11). In addition, Tomlinson told Inspector Crelly that he was "uncomfortable" handling explosives. (Tr. 207-08). Finally, the Secretary argues that the fact that Tomlinson stored boostrite in the crusher shack next to the shotgun primers and that he smoked in the area demonstrates that he had not been properly trained in the handling of explosives.

The resolution of this order depends almost entirely on credibility determinations. I credit the testimony of Inspector Crelly and the exhibits presented by the Secretary. The company's evidence was both conflicting and unpersuasive. First, although I have no doubt that Nelson Quarries did not want inexperienced persons handling and shooting explosives, the preponderance of the evidence establishes that Tomlinson was neither sufficiently trained nor experienced to be shooting the hopper of the crusher without direct supervision. I find that Mr. Andres was operating a loader at the time Tomlinson shot the hopper for the crusher. Mr. Clift testified that he talked to Russ and James Caudill and Chris Eagle and they told him that they trained Tomlinson on the use of explosives at another plant. (Tr. 275). Specifically, he stated that Tomlinson "helped Chris Eagle shoot out a crusher, I believe, its been a long time ago when we worked at Gas [Kansas], I believe I saw him help Chris Eagle at one point, but that was a long time ago, so [testimony interrupted]" *Id.* This testimony is so weak that I cannot give it much weight. No credible evidence was presented by the company to show that Tomlinson had actually been trained or was sufficiently experienced. Consequently, I find that the Secretary established a violation. Mr. Tomlinson, who was not sufficiently trained or experienced, shot a rock in the hopper when he was not in the immediate presence of someone trained and experienced in the handling and use of explosive material.

It is clear that the violation was S&S because it was reasonably likely that the hazard contributed to by the violation would result in death or serious injury assuming continued mining operations. Inexperienced and untrained miners pose a hazard to themselves when handling explosives.

Inspector Crelly determined that this violation was obvious by talking to Messrs. Andres and Tomlinson. It appeared to Crelly that the company did not have in place appropriate procedures for the handling and use of explosives. Tomlinson did not return the unused Boostrite to the magazine but stored it in the crusher shack. Mr. Andres left blasting caps in his truck so that anyone could get them. There was little or no security for explosives at the plant, shock tube was stored in a parts trailer, and Tomlinson smoked around explosives. The inspector testified that "the way they handled the explosives or stored the explosives showed me that they

did not have respect for it." (Tr. 215). I find that a preponderance of the evidence supports the Secretary's determination that the violation was the result of the company's unwarrantable failure to comply with the safety standard. The violation was obvious and it appears that there was little to no supervision of the use and storage of explosives at the site. Tomlinson apparently was uncomfortable handling and using explosives yet he was permitted to shoot the crusher. No effort had been made to properly train Tomlinson. Nothing in the record suggests that this was an isolated or unusual event. The operator's attitude toward the storage and use of explosive material was rather casual given the serious hazard that was posed. I find that Nelson Quarries was rather indifferent toward the hazard and that their conduct exhibited a serious lack of reasonable care. A penalty of $1,500.00 is appropriate for this violation.

C. CENT 2006-178-M, Plant 1.

1. On November 16, 2005, Inspector Chrystal Dye issued Citation No. 6291644 alleging a violation of section 56.20003, as modified. (Ex. G-3). The citation alleges that there was about four inches of material on the walkway of the Cedar Rapid screen #620 and that material covered an area that was about four by six feet. Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that "[w]orkplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The Secretary proposes a penalty of $614.00 for this citation.

Inspector Dye testified that the cited area is both a passageway and a potential workplace when maintenance is being performed. (Tr. 46; Ex. G-3). The material was up to the height of the four inch toe boards. (Tr. 47). The walkway is rarely used, but there was a fixed ladder used for access to the area. (Tr. 48, 83). It was most likely used for maintenance and repair. The area was 10 to 12 feet above the ground and the accumulated material created a tripping and stumbling hazard. There was a substantial railing along the walkway. (Tr. 83). Inspector Dye estimated that it would take at least one day of production for this amount of material to accumulate. (Tr. 50). Kenneth Nelson, the president of Nelson Quarries, testified that the only time anyone would be up on the walkway would be to change screens about once every two months when the screen is operating. (Tr. 97-99). Because material often falls off the screen, onto the walkway, miners clean the area when they need to access the walkway. *Id.*

I find that the Secretary did not establish a violation. It is clear that the cited area was a workplace or a passageway. The key factor here is that miners travel to the cited walkway for the screen only when the screen is changed. I credit Mr. Nelson's testimony in this regard. The screen is changed about once every two months assuming that the Cedar Rapids screen is being used on a continuous basis. The plant operates intermittently. Under the Secretary's interpretation of the safety standard, miners would have to regularly travel to the walkway for the sole purpose of cleaning it even though miners would not be working or walking on the walkway for days or weeks. If it only takes a day or two for material to accumulate, miners would be required to clean the walkway repeatedly even though it was not being used. This repeated

cleaning would needlessly expose miners to the very slipping and tripping hazards that the safety standard was designed to prevent. There has been no showing that miners have ever walked or worked on the cited walkway without first cleaning it off. This citation is vacated.

2. On November 16, 2005, Inspector Dye issued Citation No. 6291646 alleging a violation of section 56.18012. (Ex. G-4). The citation alleges that there were no emergency phone numbers posted at the mine. Inspector Dye determined that an injury was unlikely and that any injury would not result in any lost work days. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[e]mergency phone numbers shall be posted at appropriate telephones." The Secretary proposes a penalty of $614.00 for this citation.

MSHA requires that phone numbers for the fire department, hospitals, poison control, and the like be posted at every mine. (Tr. 53-54). These numbers are typically posted at the scale house at small surface mines. Inspector Dye stated that this requirement is not obviated by the use of cell phones. Programming a cell phone with these numbers is not sufficient. (Tr. 55). A person who may need to make an emergency call, such as truck drivers for customers, may not have access to the programmed cell phone. No telephone had been installed at the scale house. (Tr. 85, 93). Foremen keep cell phones in their pickup trucks. (Tr. 117). The county has "911 Service" so a miner or a truck driver can call 911 to obtain emergency assistance. (Tr. 94). Sometimes customers are at the site loading material into trucks when employees of Nelson Quarries are not present. (Tr. 117-18).

I find that the Secretary established a violation. The gravity is obviated by the prevalence of cell phones and the fact that the county has 911 service. A penalty of $40.00 is appropriate.

3. On November 16, 2005, Inspector Dye issued Citation No. 6291647 alleging a violation of section 109(a) of the Mine Act. (Ex. G-5). The citation alleges that there was no bulletin board at the mine for posting documents required by law to be posted. Inspector Dye determined that an injury was unlikely and that any injury would not result in any lost work days. She determined that the violation was not S&S and that the negligence was moderate. The Mine Act provides that there "shall be a bulletin board at . . . a conspicuous place near an entrance of [the] mine" for use is posting "orders, citations, notices and decisions required by law or regulation to be posted. . . ." The Secretary proposes a penalty of $203.00 for this citation. Dye testified that most small mines do not have an office so they place a bulletin board at the scale house. (Tr. 56). This plant did not have a bulletin board anywhere on the site. Kenneth Nelson testified that the company keeps employees informed of their rights. (Tr. 97).

I find that the Secretary established a violation. The requirement for a bulletin board is set forth in the Mine Act itself. A penalty of $60.00 is appropriate.

4. On November 16, 2005, Inspector Dye issued Citation No. 6291645 alleging a violation of section 56.14107(a). (Ex. G-6). The citation alleges that the head pulley for belt 712

was not guarded to prevent persons from becoming entangled in moving machine parts. The citation states that the head pulley was 4½ feet above the ground. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, and takeup pulleys, flywheels, coupling, shafts fan blades; and similar moving parts that can cause injury." The Secretary proposes a penalty of $614.00 for this citation.

Inspector Dye testified that the violation was obvious. (Tr. 73-74). She said that someone could come into contact with the head pulley while cleaning under it or while walking in the area. Employees shovel out accumulations because they do not have Bobcat or other scoop at the quarry. (Tr. 76). She stated that it would be easy for a miner's clothing to become entangled in the pulley.

Kenneth L. Nelson testified that he had only been issued three citations alleging inadequate guards on moving machine parts at all the company's plants since 2003. (Tr. 94). The company has up to 100 guards at each plant. Nelson testified that the MSHA inspectors were "a lot more aggressive" during the inspections at issue in these cases. (Tr. 95). He believed that MSHA was "judging us differently on our guards than they ever have in the past." *Id.* Nelson objected to the fact that MSHA changed its guarding requirements but then inspected all of its plants at the same time so that it could not meet these new requirements before citations were issued. He said that he believes that MSHA previously inspected the head pulley in the same condition without issuing a citation. (Tr. 100-01). These inspections occurred when the unit was at a different location. (Tr. 107). The sides of the pulley, which protect the pinch points, have always been guarded. *Id.*

In addition, Nelson testified that there is another conveyor right in front of the cited conveyor that is directly in front of the cited head pulley and that this conveyor restricts access to the cited area. (Tr. 100; Ex. R-178). Although he did not measure the height of the head pulley, he estimates that it was over six feet above the ground. (Tr. 111).

The Commission addressed the issue of reasonable notice with respect to the Secretary's guarding standard in *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001). The Secretary has been enforcing this standard for about 23 years. In *Good Construction*, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Good Construction* at 1002. The moving machine parts were guarded in that case, but the MSHA inspector determined that the guarding was insufficient.

The Commission's decision was split on the issue of how that particular case should be handled. Nevertheless, when put in the context of previous Commission decisions, I believe that the holding is essentially the same in both opinions with respect to how this issue should be analyzed in future cases, as summarized in the opinion of Commissioners Jordan and Beatty.

> In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnote omitted).

The language of the standard states that moving machine parts that can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. 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.

The Secretary's Program Policy Manual ("PPM") provides additional information to the public about the Secretary's interpretation of safety standards. The PPM provides, in part, as follows:

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.

(Ex. G-6d; IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57.14107 (2000) ("PPM")). Although the PPM is not binding on the Secretary, it does provide the mining community with notice of MSHA's interpretation of her safety standards.

Finally, the Secretary published *MSHA's Guide to Equipment Guarding*. (Ex. G-6c). Although this booklet is again not binding on the Secretary, it includes text and illustrative drawings to show what the agency considers to be adequate guarding under the safety standard.

At the hearing, I ruled that the Nelson Quarries had adequate notice of the requirements of the standard because the violation was patently obvious. (Tr. 121, 790-92). Quite simply, a reasonably prudent person would recognize that the existing guarding did not protect persons from coming into contact with hazardous moving machine parts. A miner could approach the head pulley from the side and come in contact with moving parts that could injure a miner. Although Nelson Quarries correctly stated that material on this belt dumps onto another belt, there were accumulations in the area under the belt which would require shoveling from time to time. (Ex. R-178b).[2] Access was limited from the front but not from the side. I credit the testimony of Inspector Dye as to the accessibility of moving machine parts.

This plant is moved from location to location as the need arises. Although the plant is set up in the same basic configuration at each location, access to moving machine parts may be more limited at some locations and other MSHA inspectors may have overlooked the condition as a

[2] This photograph was taken after the condition had been abated.

result. The interpretive material issued by MSHA, including its guide to equipment guarding, makes clear that the guards present at the time of the inspection were inadequate to protect miners. Nelson Quarries did not sustain its burden of showing that the lack of previous citations led it to believe that additional guarding was not required. I find that the Secretary provided adequate notice to the mining community that the guard provided at the head pulley was inadequate to meet the requirements of the standard.[3]

For these reasons, I affirm this citation as a non-S&S citation with moderate negligence. A penalty of $100.00 is appropriate.

5. On November 21, 2005, Inspector Thomas Barrington, an electrical inspector from Salt Lake City, issued Citation No. 6317464 alleging a violation of section 56.12025. (Ex. G-8). The citation alleges that the grounding system on the 527 conveyor was not being maintained in that a ground resistance test measured 200 ohms to ground. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[a]ll metal enclosing or encasing electrical circuits shall be grounded . . . ." The Secretary proposes a penalty of $963.00 for this citation.

Inspector Barrington testified that the grounding system on the conveyor was not effective because the resistance in the grounding circuit was too high to effectively open the circuit protective device. (Tr. 143). He used an analog volt/ohm meter to test the grounding system. There was a grounding wire present. When he tested the system, he stayed in the motor control center (MCC) with the meter and a lead was taken by a Nelson Quarries employee or another inspector to each motor at the plant. (Tr. 165-6). He tested the system several times to make sure that his readings were accurate. (Tr. 157). A grounding system must provide a continuous grounding medium back to the source and it must have low impedance. (Tr. 144). The phase-to-phase voltage on the conveyor was 480 volts while phase-to-ground was 277 volts. Any miner working in around the plant was exposed to the hazard and he could receive burns or could be electrocuted. (Tr. 155). The inspector determined that an injury is reasonably likely because the components at the plant are made of metal and the resistance is high. (Tr. 155, 158).

Kenneth Nelson testified that it has performed the resistance and continuity test annually and whenever equipment is moved as required by MSHA. (Tr. 173). If the resistance is higher

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[3] I vacated a guarding citation for lack of notice in my decision in *Higman Sand & Gravel*, 24 FMSHRC 87 (Jan. 2002) , for a number of reasons that do not apply here. First, the plant at issue in that case was not moved around. Second, the guard that was present was quite substantial and the cited opening in the guard was quite small. In addition, cleanup was not performed with shovels in that instance. MSHA had previously cited the same pulley because the guard had been removed but the inspector accepted the guard as adequate when it was replaced to abate that citation.

than expected, it can usually be corrected by cleaning corrosion from around the area where the grounding wire is attached to the equipment.

I find that the Secretary established an S&S violation of the safety standard. I credit the inspector's testimony that he correctly tested the grounding system. Although corrosion may have created the problem, the hazard was still present and serious. It was reasonably likely that someone would be injured or electrocuted if the condition were not corrected. A penalty of $500.00 is appropriate taking into consideration the penalty criteria.

6. On November 21, 2005, Inspector Barrington issued Citation No. 6317465 alleging a violation of section 56.12025. (Ex. G-9). The citation alleges that the grounding system on the 614 conveyor was not being maintained in that a ground resistance test measured 2.5 ohms to ground. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $614.00 for this citation.

As with the previous citation, Inspector Barrington testified that the grounding system on the conveyor was not effective because the resistance in the grounding circuit was too high to effectively open the circuit protective device. (Tr. 159-60). He used an analog volt/ohm meter to test the grounding system. There was a grounding wire present. He tested the system several times to make sure that his readings were accurate. Because of the level of impedance on the grounding wire, the circuit breaker would not immediately trip. (Tr. 161). It would take several seconds before the breaker would trip. (Tr. 169). The metal components of the conveyor would become energized in the event of a fault and expose miners to an electrocution hazard. He testified that such an event was reasonably likely.

My findings with respect to this citation are the same as with Citation No. 6317464. A penalty of $500.00 is appropriate.

7. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6291635, 6291637, 6291642, and 6291648.

D. <u>CENT 2006-200-M, Plant 5.</u>

1. On October 26, 2005, Inspector Dye issued Citation No. 6291576 alleging a violation of section 56.14107(a). (Ex. G-16). The citation alleges that there was inadequate guarding on the smooth head pulley on the #226 conveyor. The top of the belt was about 6 feet above the ground. The bottom of the pulley was adequately guarded, but the top was not. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that although an unguarded smooth pulley is not as dangerous as an unguarded self-cleaning pulley, it still presents a hazard. (Tr. 324). There was a gap in the guarding for this pulley "where someone could reach in and make contact with the smooth head pulley." (Tr. 325, 430). She measured the distance to the open area as six feet off the ground. (Tr. 327, 432). She believes that it was possible for someone cleaning up accumulations to get the shovel handle or their shirt caught in the pulley if it were operating. Plant 5 had been in operation since December 2004. There were between 40 and 60 machine guards at this plant. (Tr. 323). The plant is cleaned up after it is shut down. (Tr. 432).

Michael Peres, a superintendent and safety director for Nelson Quarries, testified that the opening cited by Inspector Dye was about three inches wide and that the pulley was recessed about six inches. (Tr. 475-76). The pinch point for the pulley was further away from the opening. Mr. Peres has worked for Nelson Quarries for about 15 years and he has held about every position at the quarries. (Tr. 498).

It is significant that the cited opening was about six feet above the ground. Nevertheless, the opening was large enough to pose a hazard. The pulley was recessed about six inches. Accumulations at the plant are generally cleaned up after it is shut down. I find that the Secretary established a violation but that the negligence was low. A penalty of $50.00 is appropriate. (Tr. 794).

2. On October 26, 2005, Inspector Dye issued Citation No. 6291584 alleging a violation of section 56.14107(a). (Ex. G-17). The citation alleges that the tail pulley on the Thor radial stacker was not adequately guarded. The citation states that the tail pulley was guarded on the sides but not on the bottom. The pulley was a little under six feet above the ground. Grease fittings were within six inches of the pulley. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that the smooth pulley was not guarded on the bottom. (Tr. 331). An employee could get under the pulley during cleanup operations or while greasing and his clothing could become entangled in the pulley. (Tr. 334). She does not know whether employees grease fittings around the pulley while the plant is operating. (Tr. 435-36).

Mr. Peres testified that a miner would have to climb up on a concrete structure to be under the cited pulley. (Tr. 478; Ex. R-200k). Grease hoses were hanging down. The pulley was recessed within the structure of the radial stacker. (Tr. 480; Ex. R-200k).

Although the possibility of an accident is low, there were exposed moving machine parts that posed a hazard to miners. I find that the Secretary established a violation but that the operator's negligence was low. A penalty of $50.00 is appropriate. (Tr. 795).

3. On October 26, 2005, Inspector Dye issued Citation No. 6291592 alleging a violation of section 56.14107(a). (Ex. G-18). The citation alleges that there was no guard on the alternator belt and pulley on the Dresser Haul truck No. 1008. The cited area is only accessed for maintenance or to check fluid levels. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that the fan blades were guarded but that the belts and pulleys were not guarded. Miners may come in contact with the moving machine parts while checking fluid levels and performing maintenance. (Tr. 339-40). She stated that some fluids need to be checked while the engine is running. Often trucks are running when the operator conducts his pre-shift examination. At least two other citations had been previously issued to Nelson Quarries for failure to guard moving machine parts for a motor on a haul truck. (Tr. 342-43; Ex. G-18d). MSHA's guarding manual covers the guarding of belts and pulleys in engine compartments on mobile equipment. (Tr. 345; Ex. G-6c, p. 25). Dye testified that hands and fingers could be severely injured as a result of this violation. (Tr. 347-48). She does not know whether employees check fluid levels while the truck is running, but there would be nothing to stop anyone from doing so. (Tr. 437). The belts and pulleys are recessed within the frame. The guards installed at the factory for the radiator fan were in place.

Mr. Peres testified that fluid levels are checked with the engine off. (Tr. 481). Checking fluid levels while the engine is running will give inaccurate readings. In addition, oil cannot be added to the engine while it is running. The cited pulleys and belts were recessed in the engine compartment. (Tr. 482).

Although the cited belt and pulley were recessed, they were required to be guarded under the safety standard. The chance of injury is not great, but the guarding standard is designed to prevent accidental injury. As stated above, the standard takes into account ordinary human carelessness. The violation was not serious. The citation is affirmed and a penalty of $60.00 is appropriate. (Tr. 797).

4. On October 26, 2005, Inspector Dye issued Citation No. 6291593 alleging a violation of section 56.14107(a). (Ex. G-19). The citation alleges that there were no guards on the alternator or the fuel injector drive pulley on the Euclid haul truck No. 1017. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation. Inspector Dye testified that the conditions cited in this citation were quite similar to those in the previous citation. (Tr. 348-52). Mr. Peres testified that fluids are neither checked nor added while the engine is running. (Tr. 483-84).

The cited pulleys were required to be guarded under the standard. As in the previous citation, the chance of an injury is not great but the standard was put into place to prevent

accidental injuries. The violation was not serious. A penalty of $60.00 is appropriate. (Tr. 797).

5. On October 26, 2005, Inspector Dye issued Citation No. 6291569 alleging a violation of section 56.14112(b). (Ex. G-20). The citation alleges that the guard for the tail pulley on the impactor belt was not secured on one side. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides "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." The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that vibration can cause a guard to become loose and fall from place. (Tr. 353). Because the guard was loose, there was an opening and, if someone were to trip and fall in the area, he could become entangled in the moving machine parts. (Tr. 354-59) No miners were testing or making adjustments to the machinery. (Tr. 358-59). The area of concern to the inspector was the area around the wire mesh. (Tr. 444).

Peres testified that the pulley was guarded by a piece of solid metal that surrounded it. (Tr. 485; Ex. G-20c). That guard was provided by the manufacturer. The guard cited by the inspector was added by Nelson Quarries as an enhancement. *Id.* The mesh guard was added by Nelson Quarries because "we didn't feel like the factory guard was adequate." (Tr. 516). The part cited by MSHA, however, did not need additional guarding. The only reason the mesh was there was because the person who installed it neglected to cut it off. (Tr. 518).

As I stated at the hearing, I find that the Secretary did not establish a violation. (Tr. 797-98). The solid metal guard covered the moving machine parts. I credit the testimony of Peres on this citation that the expanded metal guard was attached to protect other areas and it simply overlapped the solid metal guard. The cited guard was not loose. Consequently, I vacate this citation.

6. On October 26, 2005, Inspector Dye issued Citation No. 6291578 alleging a violation of section 56.14112(b). (Ex. G-21). The citation alleges that the guard on the self-cleaning tail pulley for conveyor No. 534 was hanging down in the area of the rollers, that the top and end guards were damaged, that the drive belt guard was missing on the top and back, and that the lower guard was not securely in place. Inspector Dye determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that there were a number of conditions on the conveyor that concerned her. The guard on the side had come loose at the top and had fallen down. (Tr. 361; Ex. G-21c). This exposed several rollers under the belt. In addition, the openings in the top guard were too large to be effective. (Tr. 363, Ex. G-21d). The openings were about two to three

inches wide. (Tr. 446). The drive guard belt was also missing. (Ex. G-21e). This area is not very high off the ground. (Tr. 364). She testified that no testing or repairs were being conducted at the time of the inspection. (Tr. 366). She was concerned that miners could get their fingers or hands entangled in the moving machine parts. She admitted that the tail pulley itself was adequately guarded. (Tr. 444). She also stated that the "troughing rollers" shown on Ex. G-21c are exempted under the guarding standard. (Tr. 446).

Peres believes that the guard that was loose was still protecting the tail pulley. (Tr. 487; Ex. G-21c). The only exposed moving machine parts are the troughing rollers, which are not required to be guarded. He also testified that the pulley was about ten inches from the guard at the top. As a consequence, he does not believe that anyone could get caught in the pulley. (Tr. 488; Ex. G-21d). Finally, the drive belt was normally about six to seven feet above the ground. (Tr. 489). The inspector was able to reach the area because she was standing on top of accumulations.

For the reasons set forth at the hearing, I affirm this citation. (Tr. 798-800). I find that the conditions cited by Inspector Dye violated the safety standard. The area was accessible. Although she had to stand on accumulations to see the drive belt, miners would be able to do so too. A penalty of $60.00 is appropriate.

7. On October 26, 2005, Inspector Dye issued Citation No. 6291579 alleging a violation of section 56.14112(b). (Ex. G-22). The citation alleges that the guarding material on the tail pulley for conveyor No. 516 was not secured at the bottom and that this condition could allow miners to come into contact with moving machine parts on the belt. The inspector determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that there was a gap in the belting material that was being used as a guard. (Tr. 367; Ex. G-22c). The gap was present because the belting was not securely in place. (Tr. 368). As a consequence, Inspector Dye believed that someone could come into contact with the moving machine parts. (Tr. 370). The inspector could not remember how far back into the frame the tail pulley was recessed. (Tr. 450). Peres testified that the pulley was recessed inside the frame of the conveyor about six to eight inches. (Tr. 490).

As I stated at the hearing, the Secretary established a violation because the gap presented a hazard to employees as illustrated in the photograph. (Tr. 800; Ex. G-22c). Because the pulley was recessed, the chance of an injury was not very great. A penalty of $60.00 is appropriate.

8. On October 26, 2005, Inspector Dye issued Citation No. 6291572 alleging a violation of section 56.12004. (Ex. G-23). The citation alleges that the 480 volt overhead power cable for the 547 belt had four separate areas where damage had been done to the outer jacket, exposing the inner wires to mechanical damage. The cable was about 12 feet in the air and the inspector

believes the copper wire was showing in one location. The inspector determined that an injury was unlikely but that any injury could result in a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that "electrical conductors exposed to mechanical damage shall be protected." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that the outer jacket on the cable was damaged. (Tr. 386; Ex. G-23c & 23d). The plant was shut down so that cited conditions could be corrected as they were cited, but the plant had been running the previous day. (Tr. 389). She believes that copper wire was showing and she testified that employees of Nelson Quarries agreed with her. (Tr. 390, 454). The hazard created was that if a short developed as a result of this damage, anyone touching the metal frame of the conveyor could receive a fatal electric shock. (Tr. 391). Peres testified that he offered to take the cable down so that Inspector Dye could examine it more closely, but she said she could tell that bare wires were exposed. (Tr. 491). He stated that when he took the cable down to repair it, none of the copper wires were exposed.

I reject the idea that the inspector could positively determine that copper wire was exposed in a small area of the suspended cable while she was standing on the ground. Nevertheless, the standard requires that electrical conductors exposed to mechanical damage be protected. Because the outer jacket protecting the electrical conductors had been damaged, the cable was required to be repaired. There was a potential for a short in the circuit because the damaged outer jacket would allow rain and snow to enter the cable. A penalty of $60.00 is appropriate.

9. On October 26, 2005, Inspector Dye issued Citation No. 6291573 alleging a violation of section 47.41(a). (Ex. G-24). The citation alleges that the large diesel storage tank was not labeled for its contents so that employees would know what the tank contained. The inspector determined that an injury was unlikely but that any injury would result in a disabling injury. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that a mine "operator must ensure that each container of a hazardous chemical has a label . . . with the appropriate information." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that a container is any "bag, barrel, bottle . . . storage tank, or the like." (Tr. 392). She said that fuel tanks are included in this definition unless the tank is on mobile equipment. The cited tank was next to the parts trailer and it held about 7,500 to 8,000 gallons. (Tr. 394). The tank supplied fuel to the plant. Diesel fuel is a hazardous chemical because it can have adversely affect a person's health. The MSDS for diesel fuel states that it is hazardous. (Tr. 397-98 ; Ex. G-24c). She believes that the health hazards could lead to "long-term damage." *Id.*

The Secretary established a non-S&S violation. This standard is important so that anyone on the property will know what is stored there without have to think about it. This provision is

especially important for emergency responders who have never been to the plant. (Tr. 801–02). The cited standard has only been applied to small quarries relatively recently so I have reduced the negligence. I find that A penalty of $40.00 is appropriate.

10. On October 26, 2005, Inspector Dye issued Citation No. 6291580 alleging a violation of section 56.4501. (Ex. G-25). The citation alleges that there was no valve on the bottom of the 500 gallon diesel fuel tank on the Spokane crusher to stop the flow of fuel at the source. The inspector determined that an injury was unlikely but that it could lead to a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "fuel lines shall be equipped with valves capable of stopping the flow of fuel at the source. . . ." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye testified that Nelson Quarries should have installed a valve to control the flow of fuel. (Tr. 399). There was no valve on the cited fuel line. The purpose of the standard is to allow the operator to shut off the tank if a leak develops. If the fuel keeps flowing, a fire hazard is presented which can result in a fatal accident. (Tr. 401-02). There was no berm around the tank to contain any leaking diesel fuel.

I find that the Secretary established a violation. It is clear that there was no valve present. A penalty of $60.00 is appropriate.

11. On October 26, 2005, Inspector Dye issued Citation No. 6291587 alleging a violation of section 56.6101(a). (Ex. G-26). The citation alleges that the area to the north and east of the cap storage magazine had dry grass and brush within nine feet of the magazine. The inspector determined that an injury was unlikely but that the violation could contribute to a fatal accident. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "areas surrounding storage facilities for explosive materials shall be clear of rubbish, brush, [and] dry grass . . . for 25 feet in all directions . . . ." The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the cap magazine qualifies as "storage facility for explosive materials." (Tr. 403). The brush and grass was within nine feet of the magazine. (Tr. 404-05; Ex. G-26c, 26d & 26e). If a fire were to start in the brush or grass, the flames could get into the magazine through the air vents and cause an explosion. (Tr. 406). Peres testified that most of the growth cited by Inspector Dye was green, but he does not deny that dry grass was present. (Tr. 493, 522; Ex. G-26).

This citation is affirmed as written. Although some of the brush was green, it is beyond dispute that brush and dry grass was present within 25 feet of the magazine. A penalty of $60.00 is appropriate.

12. On October 26, 2005, Inspector Dye issued Citation No. 6291588 alleging a violation of section 56.4101. (Ex. G-27). The citation alleges that the storage area for explosive materials

did not have a sign warning against smoking or open flames. There was a sign identifying it as an explosive storage area. The inspector determined that an injury was unlikely but that any injury could be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "readily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that an explosion hazard existed around the storage area. (Tr. 407). There were two magazines, one for explosives and the other for ANFO (Ammonium Nitrate/Fuel Oil). She was concerned about a fire starting and entering the magazines. (Tr. 408). Kenneth Nelson testified that there used to be no smoking/open flames signs on magazines but that the Kansas State Fire Marshall ordered the signs removed in 1994 to be replaced with a sign with black letters on a white background that said, "Explosives. Keep Off." (Tr. 527). He stated that MSHA has inspected these magazines numerous times since then without issuing citations. He admitted that he may have been able to post both signs. (Tr. 528-29). Some of Nelson's employees smoke while at work.

The safety standard is clear on its face. Although the plant must comply with state regulations, it could also have included a no smoking sign. Because of the actions of the Fire Marshall and the fact that previous MSHA inspections had not identified the violation, I reduce the negligence to low. A penalty of $40.00 is appropriate.

13. On October 26, 2005, Inspector Dye issued Citation No. 6291590 alleging a violation of section 56.14100(b). (Ex. G-28). The citation alleges that there were a number of defects affecting safety on Dresser haul truck No. 1008. The tether strap for the operator's door was missing. The inner door handle was missing. The glass on the door would not stay up exposing the operator to dust and noise. One of the tether straps for the operator's seat was broken off. The tail lights did not work. The inspector determined that an injury was reasonably likely and that any injury could be fatal. She determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "defects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." The Secretary proposes a penalty of $135.00 for this citation.

Inspector Dye testified that the door tether keeps the door from opening all the way. Because there is no handrail on the walkway, the door is tethered to help keep the operator from falling when getting out of the haul truck. (Tr. 410). The truck is used to haul material from the pit to the plant. The tether straps are a safety feature because they keep the door from opening beyond the point where it should be opened. (Tr. 411-12, 460). The tether strap for the seat helps keeps the seat inside the cab of the truck. The haul truck sometimes travels over rough terrain and the seat tether helps keep the seat in place. Inspector Dye believes that the inside door handle is an important safety feature because the operator may need to exit the truck quickly in an emergency. (Tr. 415-16). She was also concerned that the truck operator was being constantly exposed to noise and dust because the door window would not stay up. She admitted

that MSHA's standards do not require that windows be installed on trucks. (Tr. 462-64). She also said that tail lights are important so that any vehicles behind the haul truck would know where it is and where it is going. It is often windy and dusty in Kansas, which obscures the vision of equipment operators. (Tr. 413-14). Although Inspector Dye admitted that she did not know exactly how long these conditions existed on the truck, it was apparent that the conditions had existed for some time. (Tr. 418-19).

Inspector Dye testified that, given the number of defective conditions on the truck, it was reasonably likely that the violation would contribute to a fatal injury. (Tr. 419). The truck operator could fall from the cab, he could be trapped inside the cab in the event of an accident, and he could be thrown around inside the cab in the event another vehicle collided with the truck. For this reason, she determined that the violation was S&S.

Mr. Peres testified that the leather strap for the door on the haul truck is not a safety item. (Tr. 494). It is there to keep the door from slamming back against the side of the cab and the bed. The company had ordered a new handle for the door but it had not yet arrived. He did not explain this to the MSHA inspector. (Tr. 521).

For the reasons set forth in Inspector Dye's testimony, I affirm this citation. Taken together, the safety defects cited by the inspector created a significant hazard to the truck operator. I credit the inspector's conclusion that these defects were not corrected in a timely manner. I also find that the violation was S&S because it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. A penalty of $135.00 is appropriate.

14. On October 26, 2005, Inspector Dye issued Citation No. 6291594 alleging a violation of section 56.14100(b). (Ex. G-29). The citation alleges that there was only one operable backup light and no operating tail lights on the Euclid haul truck No. 1017. The inspector determined that an injury was unlikely but that any injury could be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that tail lights are necessary in dusty environments and in the dark so that the truck can be seen from behind. (Tr. 423-24). In addition, when the back up light comes on, anyone behind the truck will know that the truck will be backing up. The truck backs up when it dumps at the crusher.

I find that inadequate backup lights and tail lights are defects that affect safety. I also find that these defects were not corrected in a timely manner. A penalty of $60.00 is appropriate.

15. On October 26, 2005, Inspector Dye issued Citation No. 6291591 alleging a violation of section 56.14132(a). (Ex. G-30). The citation alleges that the backup alarm on the Dresser haul truck No. 1008 was not working. The truck is regularly used to haul material from the pit to

the crusher. The inspector determined that an injury was reasonably likely and that any injury could be fatal. She determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "manually operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety device shall be maintained in a functional condition." The Secretary proposes a penalty of $135.00 for this citation.

The inspector testified that a backup alarm is considered to be an audible warning device as that term is used in the safety standard. (Tr. 425). A backup alarm lets people in the area know that the vehicle will be backing up. Nelson Quarries did not offer any explanation for this condition. She believes that it was reasonably likely that someone would be fatally injured if the cited condition were not corrected. (Tr. 427-28).

Peres testified that pedestrians are never on the ground while haul trucks are operating. (Tr. 495-96). In addition, over-the-road trucks are never in the area where the haul truck operates. Only one haul truck is operating at any given time.

It is clear that a backup alarm is a safety device and that it was not maintained in a functional condition. Many people have been killed or injured at mines because of faulty backup alarms. Because there are no pedestrians at this mine while haul trucks are operating, I find that the violation was not S&S. A penalty of $60.00 is appropriate.

16. Prior to the hearing, the Secretary agreed to vacate Citation No. 6291581 and Nelson Quarries agreed to withdraw it contest of Citation Nos. 6291574, 6291582, and 6291585.

E. <u>CENT 2006-201-M, Plant 5.</u>

1. On October 26, 2005, Inspector Dye issued Citation No. 6291583 alleging a violation of section 56.14107(a). (Ex. G-31). The citation alleges that the head pulley on the No. 546 conveyor was not adequately guarded. The head pulley was guarded on the side but not on the front. The inspector determined that an injury was reasonably likely and that any injury was likely to be permanently disabling. She determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $72.00 for this citation.

Inspector Dye testified that there is a platform that the operator uses for taking grab samples of the material coming off the belt. (Tr. 532). Employees reach over the railing with a bucket or some other vessel to take a sample of the product. She believes that someone could be severely injured if their clothing got caught in the moving pulley as he was trying to get a product sample. (Tr. 534). Inspector Dye designated the citation as S&S because she believes that a serious injury is reasonably likely assuming continued normal mining operations. (Tr. 535-36). The head pulley was partially guarded. (Tr. 568-69). She admitted that if the guard were extended, the mine operator would not be able to obtain grab samples at that location. (Tr. 570-71).

Mr. Peres testified that the existing guard extended an inch or two in front of the head pulley. (Tr. 588). The existing mesh guard was about the height of a person's arm pit. The pinch point was behind the mesh guard. A grab sample was taken about once a week. (Tr. 589).

I affirmed this citation at the hearing. (Tr. 802-04). I held that the condition created a hazard because grab samples were taken at this location. A person's jacket or clothing could easily become entangled in the moving machine parts. A penalty of $70.00 is appropriate.

2. On October 26, 2005, Inspector Dye issued Citation No. 6291586 alleging a violation of section 56.9300(a). (Ex. G-32). The citation alleges that the approaches to the elevated scale were not bermed to prevent over-travel of mobile equipment. The inspector determined that an injury was unlikely but that any injury was likely to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "berms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Dye stated that the scale was used to weigh trucks entering and leaving the property. (Tr. 537). The cited roadway is mostly used by over-the-road trucks. She testified that the west approach was 25 feet long and had a drop-off of three feet on both sides. (Tr. 539). The east approach had a drop-off of three and a half feet on the south and about six to seven feet on the north. (Tr. 539, 575). There were no berms or guardrails present. (Tr. 540). She was concerned that if a truck were to go over the edge, its load could shift and the vehicle could turn over. (Tr. 542).

Peres testified that the drop-offs on both sides of the road through the scale were sloped. (Tr. 590). He further disagreed with the inspector and said that the drop-off was not six or seven feet on one side. (Tr. 592). The slope along the side of the road was not steep enough to cause a truck to overturn of it went off the road. (Tr. 594). Truck drivers are instructed to not exceed five miles per hour over the scale because the scale can be damaged by higher speeds. (Tr. 593-94).

I find that the Secretary established a violation. I credit the testimony of Inspector Dye. I find that the violation was not serious and the operator's negligence was low because the hazard was not obvious and drivers proceed over the scale house at a low rate of speed. A penalty of $40.00 is appropriate.

3. On October 26, 2005, Inspector Dye issued Citation No. 6291589 alleging a violation of section 56.14101(a)(2). (Ex. G-33). The citation alleges that the park brake on the Dresser haul truck No. 1008 would not hold the truck when it was tested on a slight downgrade. The inspector determined that an injury was unlikely but that any injury was likely to be fatal. She determined that the violation was not S&S and that the negligence was low. The safety standard

provides, in part, that "parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." The Secretary proposes a penalty of $60.00.

Inspector Dye testified that the truck was equipped with a parking brake. (Tr. 546). The parking brake worked when the key for the haul truck was in the on position but the parking brake would not work if the key was in the off position. (Tr. 547). This condition violated the safety standard because fatal accidents have occurred because of defective parking brakes. (Tr. 552). The truck cannot be operated without the key. (Tr. 578).

Mr. Peres testified that when the driver does his preshift examination of the truck, it is parked against an embankment so it cannot roll. (Tr. 595). The park brake cannot be checked without moving the vehicle, so the truck is running when the check is performed.

I find that the Secretary established a violation but that the operator's negligence was low. When the truck driver performed the preshift examination of the parking brake, the truck was running. As a consequence, it appeared that the parking brake was properly functioning. A penalty of $40.00 is appropriate.

4. On October 26, 2005, Inspector Dye issued Citation No. 6291595 under section 104(d)(1) of the Mine Act alleging a violation of section 56.14101(a)(2). (Ex. G-34). The citation alleges that the park brake on the Euclid haul truck No. 1017 did not hold the truck when it was tested on a slight grade. The citation states that pre-shift reports establish that the park brake had not been working since September 29, 2005, and that the foreman knew of this defect. The inspector determined that an injury was reasonably likely and that any injury was likely to be fatal. She determined that the violation was S&S and that the negligence was high. The Secretary proposes a penalty of $625.00 for this citation.

Inspector Dye testified that the preshift checklist filled out by the truck operator shows that the park brake had not been working since late September. (Tr. 554-55). Three different truck operators reported the problem on the preshift checklist. The foreman, Ronnie Head, told the inspector that he knew that the park brake was not working and that he had called the mechanic to repair the brake. Apparently, the mechanic told him that the park brake did not need to work. (Tr. 555, 557). Mr. Head told the inspector that he advised Mr. Peres of this problem. (Tr. 557-58). Peres told the inspector that he did not know that the park brake was not working properly. (Tr. 558). This truck was used while the park brake was inoperative and it was not taken out of service. (Tr. 561). It was possible that the truck was idle for long periods of time. (Tr. 582). The service brakes were working.

The inspector designated the citation as S&S because the company had been using the truck in a defective condition for almost a month. (Tr. 562). The truck has to travel over grades of up to nine to twelve percent. She tested the brake with the bed empty, but it often travels with a load of rock. With other trucks around, it would be impossible to hold the truck on a steep grade. She believed that it was reasonably likely that the violation would contribute to an injury

of a reasonably serious nature. In addition, she noted that there had been an accident at another plant of Nelson Quarries in 2005 in which the equipment operator lost control of his vehicle and his service brakes were not operating.

Mr. Peres testified that this truck was used on an intermittent basis. (Tr. 599). Mr. Head told him, after this inspection, that he had called a mechanic to fix the problem after it was noted. (Tr. 600). He stated that he talks to the foremen at the plant about any preshift problems, but he does not usually examine the records that are kept in the trucks. (Tr. 603). He further testified that he first learned that the park break was not working moments before MSHA arrived to perform its inspection. (Tr. 610). Mr. Head had known about this problem for about 30 days. Peres stated that he immediately tagged the truck out of service.

In its brief, Nelson Quarries argues that this citation should not have been issued under section 104(d)(1). The inspector issued the unwarrantable failure citation based on statements of Mr. Head, who was a lead man at the plant. Mr. Head was not an agent of Nelson Quarries because he was paid on an hourly basis and he did not have management authority. He was "able to contact" Mr. Peres "any time anything came up" that "needed management input." (N.Q. Br. 12). He did not have the authority to hire, fire, discipline, or assign equipment to miners." *Id.* Mr. Head did not follow company procedures when he failed to notify Peres that the park brake did not work. Nelson Quarries seeks to have this citation modified to a non-S&S, low negligence section 104(a) citation.

In response, the Secretary contends that it is not disputed that the park brake was not functioning and that this condition had been consistently reported on prior pre-shift reports. She notes that the company acknowledges that Mr. Head had the responsibility to report the defect to appropriate officials. It is undisputed that Mr. Head was responsible for conducting workplace examinations at Plant 5. Dye testified that Mr. Head directed the workforce while she was at the plant for the inspection and that he ordered employees to correct conditions that had been cited during the inspection. Dye also testified that Mr. Head told her that he had received supervisory training from the company under Part 46 of the Secretary's regulations. (Tr. 560-61). As stated above, the Secretary also noted that all of the forms submitted by the company to MSHA indicated that Mr. Head was the foreman in charge of the plant. The Secretary also argues that Mr. Peres had knowledge that the park brake was not working well before the inspection.

I find that the violation was S&S. The condition had existed for almost a month and it was reasonably likely that the hazard contributed to by the violation would lead to a serious accident. I credit the testimony of Inspector Dye in this regard.

I also find that the violation was the result of the operator's unwarrantable failure to comply with the standard. As with Mr. Andres in Citation No. 6291250, discussed above, I find that Mr. Head functioned as an agent of Nelson Quarries for the purposes of the Mine Act. He presented himself to Inspector Dye as the company's representative and the company had given him the title "foreman." He conducted the workplace examinations and he had the authority to

direct the workforce at the plant. The only management function he did not possess was the ability to hire, fire, and discipline employees but he made recommendations as the need arose. Although Mr. Head reported to Mr. Peres, it is clear that Mr. Head was the onsite manager when Mr. Peres was not at the plant. As with Mr. Andres, he had the authority to assign job duties, direct the use of equipment, represent the company during safety and health inspections, and direct the abatement of citations. He was aware that the park brake on the truck did not work and he permitted its continued operation. He made several attempts to get the company's mechanic to come to the plant to fix the brakes without success. Inspector Dye testified that Mr. Head told her that he advised Mr. Peres that the park brake was not working. (Tr. 557).

The violative condition existed for over a month, at least one of the operator's agents knew of the condition, and the condition posed a significant risk to employees. A penalty of $625.00 is appropriate for this citation.

F. CENT 2006-202-M, Plant 1.

1. On November 16, 2005, Inspector Dye issued Citation No. 6291636 alleging a violation of section 47.41(a). (Ex. G-35). The citation alleges that the diesel tank by the oil storage trailer was not labeled for its contents to ensure that everyone knew what chemical was present. Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $375.00 for this citation.

Inspector Dye testified that when she arrived at Plant 1, the gate was locked. (Tr. 615). The plant had not produced for a few months. After a mechanic arrived and unlocked the gate, she conducted her inspection. She testified that the cited diesel tank was large. (Ex. 35c). There was diesel spillage on the ground near the nozzle. (Tr. 617). The words "Flammable No Smoking" was written on the tank in large letters. All employees knew that the tank was for the storage of diesel fuel. (Tr. 630).

Mr. Peres testified that Plant No. 1 was not operating at the time the citation was issued. (Tr. 640). The pit was full of water and there were only a few pieces of mobile equipment present. There were no haul trucks present to haul material to the crusher.

For the reasons set forth above with respect to Citation No. 6291573, I affirm the citation. Although the plant was not operating at this time, the company had not notified MSHA that the plant was closed. I am reducing the negligence to low because the plant was not operating and this relatively new safety standard was only now being applied to the company's quarries. A penalty of $40.00 is appropriate.

2. On November 16, 2005, Inspector Dye issued Citation No. 6291639 alleging a violation of section 47.41(a). (Ex. G-36). The citation alleges that the diesel tank inside the

electrical trailer was not labeled for its contents to ensure that everyone knew what chemical was present. Inspector Dye determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $375.00 for this citation.

Inspector Dye testified that the tank supplied fuel to the generator. (Tr. 621). She had previously observed at least one diesel tank at a Nelson Quarries plant that was properly labeled. (Tr. 622-23). She did not check to see if there was any fuel in the tank. (Tr. 632). Employees knew that the tank was for the storage of diesel fuel. (Tr. 633). Peres testified that the tank was empty and it was not plumbed in. (Tr. 642, 652). The 1,000 gallon diesel tank for the generator was outside. (Tr. 643).

If the tank was empty and not plumbed in, it need not be labeled for its contents. Given that the inspector did not check to see if there was fuel in the tank, I credit the testimony of Mr. Peres and vacate this citation.

3. On November 16, 2005, Inspector Dye issued Citation No. 6291638 alleging a violation of section 56.4104(b). (Ex. G-37). The citation alleges that a five gallon bucket containing used oil and rags was sitting inside the oil storage trailer. Inspector Dye determined that an injury was unlikely but that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "waste or rags containing flammable or combustible material that could create a fire hazard shall be placed in covered metal containers or other equivalent containers with flame containment characteristics." The Secretary proposes a penalty of $614.00 for this citation.

Inspector Dye testified that she saw the oil and rags in an ordinary plastic bucket. (Tr. 625). If there were an ignition source, a fire could be started. She did not observe any ignition sources. A fire extinguisher was in the area.

I find that the Secretary established a violation. Because the violation was not serious, a penalty of $60.00 is appropriate.

4. On November 16, 2005, Inspector Dye issued Citation No. 6291641 alleging a violation of section 56.14107(a). (Ex. G-38). The citation alleges that the alternator and fan v-belts were not guarded on the generator in the electrical trailer. Inspector Dye determined that an injury was unlikely but that any injury would likely be permanently disabling. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $375.00 for this citation.

The inspector testified that the cited belts were not guarded. (Tr. 628; Ex. G-38c). The fan blades were properly guarded. Someone might be in the area to check any fluids or to check the belts. The area is narrow. If someone were to slip, he could get his hand caught in the

moving machine parts. (Tr. 629). The dipstick was not near the unguarded v-belts. Peres testified that it would be very difficult to come into contact with the cited belts. (Tr. 644). The generator is controlled from a computer panel at the back of the trailer. He believes that the belts were guarded by location.

At the hearing, I upheld the citation because the cited area was not guarded. (Tr. 804-05). The belts for the fan were required to be guarded. Because the violation was not S&S, a penalty of $60.00 is appropriate.

5. Prior to the hearing, the Secretary agreed to vacate Citation No. 6291640.

G. CENT 2006-203-M, Plant 2.

1. On October 5, 2005, Inspector James W. Timmons issued Citation No. 6321288 under section 104(d)(1) of the Mine Act alleging a violation of section 56.14100(c). (Ex. G-42). The citation alleges that on September 23, 2005, foreman J. Benedict instructed T. Larson to move a lime pile with the IH 530 front-end loader. The service brakes on the loader were not functional and when the engine failed the loader rolled down a ramp, hit the guard rail at the creek crossing and dropped about six feet on its side into the creek. The citation alleges that Mr. Benedict knew that the brakes were not working and that Mr. Clift had told him to take the loader out of service. The inspector determined that an injury was highly likely and that any injury was likely to be fatal. He determined that the violation was S&S and that the negligence was high. The safety standard provides that "when defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area . . . or [tagged out]." The Secretary proposes a penalty of $1,500.00 for this citation.

Inspector Timmons testified that he inspected Plant 2 because of a hazard complaint that was filed with MSHA. (Tr. 660; Ex. G-39). The hazard complaint stated that there had been a loader accident at the mine on September 23. Kenneth Nelson handed the inspector its accident investigation report after he showed him the hazard complaint. (Ex. G-40). This accident report listed Jeff Benedict as the foreman. Apparently, Mr. Larson raised the loader's bucket into the air while he was on the ramp, the motor failed, and the loader ran down the ramp, over the guardrail, and into a dry creek bed because the service brakes were not working. Larson was taken to the hospital and was diagnosed with severe bruises. (Tr. 665). The company's accident report states that Benedict ordered Larson to operate the loader. As stated above, the mine superintendent had ordered Benedict to take this loader out of service prior to the accident. Richard Andres, a company mechanic, told Inspector Timmons that there was no brake fluid in the brake fluid reservoir, the main air tank was full of water, and there was an air leak in the compressor. (Tr. 669). Larson had worked as a haul truck driver at the quarry for about 30 days. (Tr. 676).

For the reasons set forth above, Inspector Timmons testified that the violation was S&S. (Tr. 676-78). He designated the violation as an unwarrantable failure because the company knew that the brakes were defective and, through Mr. Benedict, allowed it to be operated by an inexperienced loader operator. (Tr. 678-80). Mr. Benedict told Inspector Timmons that he was the foreman at the plant. (Tr. 721).

Kenneth Nelson testified that he prepared the company's accident report. (Tr. 825; Ex. G-40). Jeff Benedict had given Larson some informal training on the loader prior to the accident. (Tr. 828). Foreman Patrick Clift testified that he was not aware that Lawson was going to operate the loader on the day of the accident. (Tr. 839). Jeff Benedict, in the presence of Clift, asked the mechanic, Jason Schmidt, if he had time to look at the loader because the brakes on the loader were not working properly. Schmidt had to work on some equipment at another plant so Clift told Benedict not to use the loader. (Tr. 840-41, 872-74). When Clift heard about the accident he was surprised Larson had been operating the loader because he had told Benedict not to use it. Clift had not given Benedict authority to assign Larson to the loader. (Tr. 842). Larson had not been task trained on the loader. (Tr. 876). Clift testified that he was the foreman of Plants 2 and 4 at the time of the accident. He is always available to employees at the plants on the company's cell phone, which he carries at all times.

Nelson Quarries argues that Mr. Benedict did not meet the Commission's multi-factor test used to determine whether someone is an agent of a mine operator. Its arguments are similar to the arguments it made concerning Messrs. Andres and Head. Benedict was an hourly employee who could not hire, fire, discipline or assign equipment to employees. Mr. Nelson states that he was not well versed on the legal implications of using the term foreman for a person who functions as a lead man. In addition, Mr. Clift testified that he specifically instructed Benedict to remove the loader from service and keep it parked until the brakes could be repaired by the mechanic. Thus, Nelson Quarries complied with the regulation but the lead man, acting on his own, ignored the instructions of his supervisor and placed the loader into service. As a consequence, Mr. Benedict is responsible for the accident, not the company. The company did all that it could to prevent the accident. It asks that the citation be modified to a section 104(a) citation with low negligence.

The Secretary makes the same arguments that she did with respect to the previous unwarrantable failure citations. She notes that Mr. Benedict represented himself as a representative of management during the inspection and no person in a more senior position with Nelson Quarries disputed Benedict's authority with MSHA inspectors. Indeed, the company had previously designated Benedict as the person in charge on the legal identity form it filed with MSHA. In the accident report drafted by Kenneth Nelson, Mr. Benedict is identified as the foreman who "had [Larson] run the loader to move the lime pile on the north side of the plant to the stockpile." (Ex. G-40). Regardless of the title used for Mr. Benedict, it is clear that he told Larson to operate the loader that day, which indicates that Benedict had the authority to direct the workforce.

I find that Benedict was the agent of Nelson Quarries when he directed Larson to operate the front-end loader on the day of the accident. Benedict had been delegated authority to direct the workforce. There is no dispute that the safety standard was violated. I find that the Secretary established that the violation was S&S. Unwarrantable failure is characterized by "intentional misconduct," "reckless disregard," "indifference," or "a serious lack of reasonable care." Although Benedict functioned as the company's agent, it is clear that Benedict's supervisor told him not to use the loader. I credit the testimony of Mr. Clift that he was with company mechanic Schmidt, who was at the quarry to work on another piece of equipment the day before the accident, when Benedict came up to tell them that he had "parked the loader because the brakes had not been working." (Tr. 840, 873-74). Because Schmidt did not have time to work on the loader at that time, Clift instructed Benedict not to use the loader until Schmidt had a chance to work on it. Clift was an agent of Nelson Quarries too, of course. Nevertheless, Nelson Quarries, acting through Mr. Benedict, directed Larson to operate the subject loader. This action demonstrated a serious lack of reasonable care. As a consequence, I find that the Secretary established that the violation was a result of the company's unwarrantable failure to comply with the safety standard.

Given that the company's agent disregarded the instruction of his supervisor, I find that its negligence was not as high as it would have otherwise been. Benedict was disciplined for ordering Larson to operate the loader. (Tr. 860). A penalty of $800.00 is appropriate.

2. On February 24, 2005, Inspector Timmons issued Citation No. 6290517 alleging a violation of section 56.14109. (Ex. G-43). The citation alleges that there was no guard along the impact belt and that the belt rollers were exposed next to the stairs to the crusher cab. Inspector Timmons determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that unguarded conveyors next to travelways shall be equipped with a stop cord or with railings that are positioned to prevent persons from falling against the conveyor. The Secretary proposes a penalty of $177.00 for this citation.

Inspector Timmons testified that stairs leading to the cab for the crusher were right next to the conveyor. The railing on the stairs only guarded part of the conveyor. (Tr. 682-86). A railing must be positioned to prevent a person from falling onto or against the conveyor. (Tr. 723). There was no stop cord present and there was nothing present to prevent accidental contact with the conveyor. He determined that the violation was S&S because the crusher operator or anyone else entering or exiting the cab for the crusher was exposed to the hazard. If anyone were to trip or stumble and fall into the conveyor structure, they would be seriously injured. (Tr. 687-88).

Mr. Clift testified that the stairway into the crusher cab had been in the same location from the beginning. The same configuration is used whenever the plant is moved to a new location. (Tr. 845). The plant has been inspected by MSHA many times and the condition cited by Inspector Timmons had never been cited in the past.

Section 56.14109 contains two requirements which must be satisfied before the standard applies. The belt must be next to a "travelway" and the belt must be "unguarded." A travelway is defined in 56.14000 as a "passage, walk, or way regularly used or designated for persons to go from one place to another." The stairway to the crusher cab was immediately adjacent to the belt. The handrails for these stairs acted as a railing when a miner was on the stairs. In approaching this stairway, a miner would need to momentarily walk alongside a small portion of the impact belt to reach the first step. (Ex. G-43d). As a consequence, I find that the belt was next to the travelway at that location. In this instance, it was clear that the impact belt was unguarded at the bottom of the stairway to the crusher cab. (*Compare, Nolichuckey Sand Company, Inc.*, 22 FMSHRC 1057 (Sept. 2000)). The belt was at a level that posed a hazard to miners. There was no rail or stop cord for the belt. There were rocks and tripping hazards in the area. There was nothing to keep miners from falling into the moving belt.

I find that the Secretary established an S&S violation of the safety standard. Miners walk up into the crusher cab on a regular basis while the belt is running. The tripping and stumbling hazards were obvious. A miner's arm or clothing could become entangled in the belt rollers and pull the miner into the pinch point. (*See, for example, Asphalt Paving*, 27 FMSHRC 123 (Feb. 2005) (ALJ)). It is reasonably likely that this violation would contribute to an injury of a reasonably serious nature.

Nelson Quarries argues that the citation should be vacated because the plant has been inspected by MSHA many times and the condition cited by Inspector Timmons had never been cited in the past. I reject this argument. The standard is clear on its face as it applies to the facts in this case. The cited conveyor belt was not guarded where it was next to a travelway. As a consequence it was required to be equipped with a stop cord or railings. As a consequence, the reasonable prudent test does not apply. In addition, the Secretary has published notices informing the regulated community of its interpretation of the standard. In its *Guide to Equipment Guarding*, MSHA advised the mining community that conveyors located at the level of a miner's torso must be provided with a guard or stop cord. (Tr. 683; Ex. G-6c, pp. 12-13). The fact that the condition had never been cited does not change that fact. A penalty of $100.00 is appropriate for this violation.

3. On February 24, 2005, Inspector Timmons issued Citation No. 6290516 alleging a violation of section 56.14107(a). (Ex. G-44). The citation alleges that there was no guard on the back side of the V-belt and pulley for the surge hopper. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the exposed opening was about five feet above the ground. (Tr. 688-92). Although the surge hopper was not in operation at the time of the inspection it had been operating earlier in the week and would always be operating when the

crusher was in use. The "oil filling spout or plug" was near the unguarded area. (Tr. 691). He determined that the violation was not S&S.

Clift testified that the cited area has never been guarded by the company and has never been cited. (Tr. 846). It has been in this condition for many years. There are no grease fittings near the moving parts. (Tr. 848). The oil plug mentioned by the inspector cannot be opened while the equipment is operating because oil would fly out all over the miner who opened it. *Id.*

I find that the Secretary established a violation. The unguarded opening presents an obvious hazard. I take into consideration the fact that the area had never been cited when considering the negligence criterion. Although MSHA may have never cited this particular V-belt and pulley, the agency has consistently required such belts and pulleys to be guarded. It clearly fits within the scope of the safety standard. I find that the operator's negligence and the gravity to be low. A penalty of $40.00 is appropriate.

4. On February 24, 2005, Inspector Timmons issued Citation No. 6290520 alleging a violation of section 56.14132(a). (Ex. G-45). The citation alleges that the manually operated horn on the Caterpillar haul truck was not working. Inspector Timmons determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the cited truck would be used when the plant was in operation. (Tr. 693). The horn would be needed to give a warning. The truck would be used to haul material from the pit to the plant. (Tr. 695). The plant was not operating at the time of the inspection because it was being set up. (Tr. 728-29). At the time of the inspection, only part of the plant was operating. Clift testified that he truck was only used occasionally. (Tr. 850).

The Secretary established a violation. The gravity was low because the truck was only used occasionally and the negligence was low because the plant was being set up in a new location. A penalty of $40.00 is appropriate.

5. On February 24, 2005, Inspector Timmons issued Citation No. 6290521 alleging a violation of section 56.14100(b). (Ex. G-46). The citation alleges that the outriggers on the Drott-2500 crane were not maintained in a proper condition in that the electrical system in the cab was not functional. A person must crawl under the crane when it is running to manually push the valves that operate the outriggers. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the outriggers could not be extended from the cab of the crane. (Tr. 697). The crane had last been used two days before the citation was written. The

outriggers must be extended before the crane can be used. Going under the crane to extend the outriggers while the crane is turned on creates a hazard in the event the crane were to roll. (Tr. 699-703, 739). The inspector did not see any wheel chocks in the area. He considered the cited condition to be a defect that affected safety and it was not corrected in a timely manner. The parking brakes and service brakes on the crane were working. (Tr. 732).

Clift testified that the crane was not used very frequently. It was used for heavy work, such as setting a secondary crusher. (Tr. 851). The operator was instructed to never leave the cab of the crane while the outriggers were being extended. Two men would be on the ground, one under the crane to operate the hydraulics and another at the corner, in plain view of the operator in the cab, to direct the work. Clift said that he was always present when the crane was used. (Tr. 853).

The Secretary established a violation. The operator was aware of this safety defect. The fact that the operator used other methods to ensure the safety of miners mitigates the gravity to a certain degree. A penalty of $60.00 is appropriate.

6. On February 24, 2005, Inspector Timmons issued Citation No. 6290522 alleging a violation of section 56.14132(a). (Ex. G-47). The citation alleges that backup alarm on the Michigan L-320 front-end loader was not working. Inspector Timmons determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the loader was equipped with a backup alarm but it was not working. (Tr. 705-07). When he asked an employee to back up the loader, the alarm did not work. The loader was used on a regular basis at the plant to load haul trucks at the pit and also to load customers' trucks. The loader had an obstructed view to the rear.

Clift testified that this loader is never used to load customer trucks because it is too big. (Tr. 854). In addition, the loader is rarely used and is subjected to a pre-shift examination before it is used. Another similar loader was used more frequently. (Tr. 855).

This loader was parked and ready for use. It would have been subjected to a pre-shift examination before it was used. I credit Mr. Clift's testimony that it was never used to load customer trucks and that it is not used as often as the other loader. The backup alarm was not maintained in a functional condition. I find that the Secretary established a violation but that the gravity and negligence was low. A penalty of $40.00 is appropriate.

7. On February 24, 2005, Inspector Timmons issued Citation No. 6290523 alleging a violation of section 56.14100(b). (Ex. G-48). The citation alleges that the windshield wipers on the Michigan L320 front-end loader were not working. Inspector Timmons determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He

determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the wipers were not working on the loader. (Tr. 708-11). He considers wipers to be safety equipment because in inclement weather and dusty conditions, wipers improve the visibility for the equipment operator. The condition was not corrected in a timely manner because the loader had been used with inoperable wipers. The operator's visibility would especially be impaired in fog, rain, and snow. This is the same loader cited above. Clift's testimony with respect to this citation is the same. The loader had been parked for month. (Tr. 856).

I affirm this citation but find that the gravity and negligence was low. A penalty of $40.00 is appropriate.

8. On February 24, 2005, Inspector Timmons issued Citation No. 6290524 alleging a violation of section 56.6132(a)(4). (Ex. G-49). The citation alleges that the lid of the high explosives magazine had exposed steel on the inside because the wood liner was missing. High explosives were in the magazine. Inspector Timmons determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that magazines shall be "made of non-sparking material on the inside." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the wood liner had been removed and was sitting off to the side. (Tr. 711-15). The liner was dirty and dusty, which led the inspector to conclude that the violative condition had existed for at least a few days. He found about eight sticks of Torpex, which is a high explosive, in the magazine.

Mr. Clift testified that the magazine was for the storage of detonators, not high explosives. (Tr. 856-57). At the time the citation was issued, an independent contractor was performing blasting work at the plant.

I affirm the citation and find that a penalty of $60.00 is appropriate.

9. On October 5, 2005, Inspector Timmons issued Citation No. 6321289 alleging a violation of section 56.14100(b). (Ex. G-50). The citation alleges that the headlights on the Komatsu 210-M haul truck were not working. The truck was in use hauling rock. Inspector Timmons determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the truck is used to transport rock at the plant. (Tr. 716-19). Headlights affect safety because the plant operates when it is still dark. Clift testified that,

although the company fixes broken headlights, he does not consider a broken light to be a "safety defect." (Tr. 859).

I find that broken lights are a defect that affects safety. The citation is affirmed and a penalty of $60.00 is appropriate.

10. On November 22, 2005, Inspector Dye issued Citation No. 6291667 alleging a violation of section 46.7(a). (Ex. G-51). The citation alleges that Travis Larson was not given adequate task training on the International Huff payloader (front-end loader) in which he had no previous work experience. Inspector Dye determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that task training must be provided to any miner who is assigned to a new task in which he has no previous work experience. The Secretary proposes a penalty of $165.00 for this citation.

Inspector Dye was at the plant to determine if Mr. Larson had been adequately trained to operate the front-end loader at the time of his accident, as discussed above. (Tr. 744). Larson had been hired by Nelson Quarries as a haul truck driver. He had not held any other positions at the plant. (Tr. 745). The controls for a truck and payloader are different and the operator performs a different type of work on each. (Tr. 747). When Inspector Dye interviewed management and hourly employees at the plant, nobody suggested that Larson had been task-trained on the loader. (Tr. 749). Larson's new miner training record shows that he was trained for haul truck operations. (Tr. 753-54; Ex. G-51d, p. 1). A letter dated December 7, 2005 from Patrick Clift to Inspector Dye also states that Larson had not been task trained to operate a loader. (Tr.750-51, 762-63 ; Ex. G-51c). Inspector Dye believed that it was reasonably likely that a serious injury would result because Larson had not been trained to operate the loader before he used it.

Clift testified that Mr. Benedict did not have the authority to assign Larson to operate the loader. Benedict was disciplined for ordering Larson to operate the loader. (Tr. 860). I affirm this citation. I have already determined that Mr. Benedict was the agent of Nelson Quarries when he ordered Mr. Larson to operate the loader. It is clear that Larson had not been task- trained. There is no evidence that Larson had ever operated a loader before. The violation is S&S because it was reasonably likely that the hazard contributed to by the violation would have resulted in an injury of a reasonably serious nature. Because Benedict ordered Larson to operate the loader against the instructions of his supervisor, I find that the negligence should be reduced. A penalty of $100.00 is appropriate.

11. On November 15, 2005, Inspector Barrington issued Citation No. 6317446 alleging a violation of section 56.12040. (Ex. G-52). The citation alleges that operating controls in the distribution boxes in the motor control center were installed in such a way that they could not be operated without the danger of contact with energized conductors and terminals. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be

fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that operating controls be installed so that they can be operated without the danger of contact with energized conductors. The Secretary proposes a penalty of $165.00 for this citation.

Inspector Barrington testified that the electrical system was not energized at the time of his inspection. The electrical system was 480-volt phase-to-phase applied with 277-volt phase-to-ground that was furnished by a diesel generator. (Tr. 765). When the distribution box was opened, the circuit breakers and other components of the electrical circuits were fully exposed. (Tr. 766-72; Exs. G-52c through Ex. G-52i). The violation presented a significant burn, shock, and electrocution hazard to anyone who entered the motor control center. The crusher is operated from a stop-start button at a different location. (Tr. 815). All of the electrical controls were inside cabinets, which were all closed at the time of the inspection. Management advised Inspector Barrington that power to the motor control trailer is cut off before any work is performed in the trailer. (Tr. 816).

Mr. Clift testified that all of the electrical components were inside of cabinets in the motor control room. This control room is off limits to employees and they are trained not to enter the area. (Tr. 860). The control room is usually kept locked, but it was not locked on the day of the inspection because the generator had not been started. (Tr. 889). The motor control room has been in use for about 15 years in the same condition and it has never been cited by MSHA. Indeed, another inspector required the company to improve the grounding system, so he was aware of the condition of the electrical cabinets. The crusher is not operated from this control room. (Tr. 862). The plant is shut down and locked out whenever any work is performed in the control room.

It is important to understand that Nelson Quarries' facilities had never been inspected by an MSHA electrical inspector because the Topeka, Kansas, office is not staffed with an electrical inspector. The hazard complaint filed with MSHA alleged that the "electricity is bad on all plants." (Ex. G-11). As a consequence, MSHA brought in a electrical inspector from its Salt Lake City office to inspect all the plants for compliance with the Secretary's electrical standards. This citation is one of many that Inspector Barrington issued. The photographs he took show that when the doors to the electrical cabinets were opened, all of the electrical components were exposed. (Exs. G-52c - 52i). Typically, electrical components are protected from accidental contact within the cabinet.

I find that the Secretary established a violation. Anyone who opened the cabinets faced a risk of an electric shock hazard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that fact that its plants had never been subject to an electrical inspection.

I find that the Secretary did not establish that the violation was S&S. The crusher is not operated from this trailer as the start-stop button is at a different location. The trailer is kept locked when the plant is operating and only authorized persons may enter the trailer. The plant is shut down and locked out whenever any work is performed in the control room. A penalty of $100.00 is appropriate.

12. On November 15, 2005, Inspector Barrington issued Citation No. 6317432 alleging a violation of section 56.14107(a). (Ex. G-53). The citation alleges that the alternator and drive belt on the Caterpillar 769C haul truck were not guarded to prevent contact. Inspector Barrington determined that an injury was unlikely and that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that the violation was on the left side of the engine compartment on the truck near the cooling fan. If anyone were to check the area looking for oil leaks or air leaks on the compressor when the engine was running could become entangled in the moving parts. (Tr. 778). The cited pulleys were near the middle of the engine. (Tr. 818).

The truck is serviced at the front from the top. (Tr. 864). Clift testified that the truck has been previously inspected by MSHA. Michael Peres testified that on previous inspections, one MSHA inspector (Dustin Crelly) told him that recessed alternator belts need not be guarded on trucks where the fluids are checked from the top as miners were not exposed to the hazard. (Tr. 891). Truck engines are too loud to hang around them when they are running unless you have a specific reason to be there. (Tr. 894). Inspector Crelly denied making such statements. (Tr. 920).

I find that the Secretary established a violation. Alternator and drive belts on haul trucks are required to be guarded. I agree with Peres that the violation was not very serious because the chance of accidental contact was not very great. I credit Inspector Crelly's testimony that he never advised the company that recessed belts are not required to be guarded. A penalty of $60.00 is appropriate.

13. On November 16, 2005, Inspector Barrington issued Citation No. 6317440 alleging a violation of section 56.11002. (Ex. G-54). The citation alleges that safe access was not provided to the fuel check port on the 7200 gallon fuel tank. Inspector Barrington determined that an injury was unlikely and that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides "crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition." The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that there were stairs to the top of the horizontal tank but that a miner would have to walk along the top of the tank to check the fuel level. (Tr. 807-10;

Exs. G-54c and 54d). There were no handrails along the top of the tank, which was a rounded surface. A miner went to the top of the tank monthly to check the fuel level. It was ten feet to the ground from the top of the fuel tank.

I find that the Secretary established a violation. The Secretary has not defined the term "walkway." Nevertheless, it can be defined as a "passage for walking." *See, Summit, Inc.*, 13 FMSHRC 1511, 1517 (Sept. 1991) (ALJ). It was not disputed that a miner walks on top of the fuel tank once a month to check the fuel level. The top of a fuel tank has been construed as a "walkway" under similar circumstances. *Thor Mining Co.*, 2 FMSHRC 1592, 1598 (June 1980) (ALJ). Handrails were not provided. A penalty of $60.00 is appropriate.

14. On November 16, 2005, Inspector Barrington issued Citation No. 6317442 alleging a violation of section 56.11002. (Ex. G-55). The citation alleges that the handrails on the stairway leading up into the generator trailer were not being properly maintained. Inspector Barrington determined that an injury was unlikely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that once per shift someone would enter the generator trailer to start the generator. Barrington testified that he was with MSHA Inspector Tedesco during this inspection. When Tedesco walked up the cited stairway the handrail came apart in his hand and he stumbled off the stairs. (Tr. 812-13, 819). The coupler holding the metal parts together had pieces missing. Mr. Clift testified that the condition was not obvious because the pieces were still together.

This citation is affirmed. I find that the negligence should be reduced because the defect was hidden. A penalty of $40.00 is appropriate.

15. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6317429, 4317430, 6317436, 6317437, and 6317438. Nelson Quarries agreed to withdraw its contest of Citation No. 6317441.

H. CENT 2006-204-M, Plant 2.

1. On February 24, 2005, Inspector Timmons issued Citation No. 6290519 alleging a violation of section 56.14101(a)(3). (Ex. G-56). The citation alleges that the park brake on the Dresser Haul pack truck was not maintained in working condition. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that braking systems installed on equipment shall be maintained in functional condition. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Timmons testified that the truck rolled when he had a miner test the park brake. (Tr. 904). The truck was empty. The truck had been used on the previous day and the driver told the inspector that the park brake had been working. The service brakes were working on this truck. (Tr. 907). Michael Peres testified that, because the park brake had worked the day before, it must have become inoperable the morning of the inspection. (Tr. 1023).

There is no dispute that the park brake was not working when tested. It is apparent, however, that the brake had been functioning the previous day and it is likely that it became inoperable during the shift. The operator's negligence is quite low. *See, Higman Sand & Gravel*, 25 FMSHRC 175, 181 (April 2003) (ALJ). A penalty of $10.00 is appropriate.

2. Prior to the hearing, the Secretary agreed to vacate Citation Nos. 6317431 and 6317433.

I. CENT 2006-206-M, Plant 4.

1. On November 15, 2005, Inspector Crelly issued Citation No. 6291248 alleging a violation of section 56.6130(a). (Ex. G-74). The citation alleges that there was a stick of Boostrite stored on the shelf in the crusher shack, which is occupied by the crusher operator about ten hours a day. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Crelly testified that Travis Tomlinson, the crusher operator, stored the explosive material in the crusher shack. (Tr. 951). Shotshell primers were on the same shelf. *Id.* Shotshell primers are a type of detonator that initiates a blasting cap to detonate explosives. Primers should never be stored with explosives. Inspector Crelly observed Tomlinson smoking in the area. Crelly concluded that if these conditions were to continue it was reasonably likely that a fatal accident would occur. (Tr. 953-54). The crusher shack was about five feet wide and six feet long. No shock tube was in the crusher shack. (Tr. 1017).

Peres testified that the shotshell primers are not detonators. (Tr. 1045). He said that a blasting cap or other detonator would be required to shoot off the Boostrite. Shot shells are not required to be stored in an explosives magazine. People store them in their homes. (Tr. 1073). At the quarry, shot shells are sometimes put in the dynamite magazine.

The inspector cited the company for having the Boostrite stored in the crusher shack. Although the presence of the Shotshell primers may have added to the danger, it was the presence of the explosive material that created the safety hazard. In addition, the manufacturer of shotshell primers warns that they are subject to mass detonation and that they are sensitive to "impact, friction, heat, flame, static electricity and mishandling abuses." (Ex. G-140 p. 4. The manufacturer also advises that smoking should not be permitted around primers. *Id.* I find that the Secretary established a violation because the Boostrite was not stored in a magazine. The

violation was S&S and serious. I find that a violation of $500.00 is appropriate for this violation because of the serious nature of the cited condition.

2. On November 17, 2005, Inspector Barrington issued Citation No. 6317458 alleging a violation of section 56.12001. (Ex. G-75). The citation alleges that the power cords attached to the load side of the Cutler Hammer line starter were not properly protected against excessive overload by the heater coils. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Barrington testified that the three heater coils were not of the type specified by the manufacturer. (Tr. 1086-88). The amperage on the coils was oversized for the conditions. If there were to be an overload in a circuit, there would be a potential for arcing at the overload relay. The components could melt due to the high temperatures. Miners working at the plant were exposed to the hazard. The circuit would not open quickly enough to prevent the current from traveling to other areas in the plant along metal components. (Tr. 1090, 1097-98, 1104-05). Fuses and circuit breakers are designed for overcurrent conditions and thermal protection devices are for overload. (Tr. 1100).

I affirm this citation in all respects. A penalty of $250.00 is appropriate.

3. On November 16, 2005, Inspector Barrington issued Citation No. 6317453 alleging a violation of section 56.12001. (Ex. G-76). The citation alleges that the phase wires between the 90 amp breaker and the Siemens line starter was not of the proper size and current carrying capacity. The citation further states that the No. 1 phase had "two wires in between the terminals of the breaker to the line starter estimated to be number 12 AWG." Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

During his inspection, the inspector noticed that the phase conductors between the breaker and a line starter were not all of the same size. The subject line starter is in the motor control center. It is 480 volts phase-to-phase and 277 volts phase-to-ground. (Tr. 1091). All of the wires should have been 6 AWG under the National Electrical Code and other reference materials. (Tr. 1094-97; Ex. G-75d). At the hearing, he testified that the two wires that were of concern to him appeared to be about a size 10 and together they did not match up to the "same value in wiring as the size 6 would have." (Tr. 1092). If there were a short circuit or a ground fault, it would bypass the overload protection in the line starter would likely burn up two wires before the breaker tripped. Ken Nelson testified that the company never buys AWG Gage No. 12 wire. (Tr. 1111). The inspector assumed that the mine was using that size wire and based his citation on that assumption.

In the citation, the inspector stated that the cited wiring appeared to be size 12, but at the hearing he referenced size 10. The company contends that it does not purchase size 12, but it admitted that it buys No. 10 wire. (Tr. 1111). The inspector calculated that the cited wires were too small to provide adequate protection and that AWG 6 wire would have been appropriate.[4] (Tr. 1094-99). I credit Inspector Barrington's testimony because of his electrical expertise. I affirm the citation and the proposed penalty of $60.00.

4. Prior to the hearing, Nelson Quarries agreed to withdraw its contest of Citation No. 6291249.

J. CENT 2006-207-M, Plant 3.

1. On June 28, 2005, Inspector Timmons issued Citation No. 6290611 alleging a violation of section 56.14132(a). (Ex. G-77). The citation alleges that the horn on the Caterpillar haul truck No. 36 was not maintained in working condition. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6290520. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard with low negligence. A penalty of $40.00 is appropriate.

2. On June 28, 2005, Inspector Timmons issued Citation No. 6290612 alleging a violation of section 56.14132(a). (Ex. G-78). The citation alleges that the horn on the Volvo 330-D front-end loader was not maintained in working condition. The loader was in use at the time of the inspection. Inspector Timmons determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6290520. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. A penalty of $60.00 is appropriate.

3. Prior to the hearing, Nelson Quarries withdrew its contest of Citation No. 6290614 and it agreed to pay the proposed penalty for Citation No. 6290615 at the hearing. (Tr. 1145).

K. CENT 2006-208-M, Plant 3.

[4] The smaller the AWG number, the larger the wire.

1. On June 28, 2005, Inspector Timmons issued Citation No. 6290622 alleging a violation of section 56.5001(a)/5005. (Ex. G-80). The citation alleges that Caterpillar haul truck operator J. Hillbrand was exposed to a shift-weighted average of 1.40 mg/m^3 of respirable silica bearing dust. This reading exceeded the Threshold Limit Value of 1.25 mg/m^3 times the error factor. Respiratory protection was not being used and a respiratory protection program was not in place. Inspector Timmons determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The health standard provides, in part, that "exposure to airborne contaminates shall not exceed, on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists. . . ." Section 56.5005 provides, in part, that when "engineering control measures have not been developed or when necessary by the nature of the work involved . . . , employees may work for reasonable periods of time in concentrations of airborne contaminates exceeding permissible levels if they are protected by appropriate respiratory protective equipment." The Secretary proposes a penalty of $749.00 for this citation.

Inspector Timmons testified that a silica dust survey had not been conducted at the plant for at least five years. (Tr. 1115). He sampled five miners. He used his normal sampling protocol. The samples were analyzed at MSHA's laboratory using its normal testing protocol. The results showed that Mr. Hillbrand was overexposed (Tr. 1130-31; Ex. G-80d). The company violated both safety standards because the test results showed that Hillbrand was overexposed and there were no administrative or engineering controls in place to deal with situations where miners were overexposed. (Tr. 1133-34). The truck that Hillbrand was driving did not have air-conditioning and the windows were down. Nelson Quarries had not conducted their own dust sampling at the quarry. He designated the citation as S&S because whenever there is an overexposure of silica-bearing dust and the employee is not subject to any administrative or engineering controls, such as wearing a fit-tested respirator, it is reasonably likely that the employee will develop a respirable illness of a reasonably serious nature. Inspector Timmons also testified that it was his understanding that Hillbrand was in the development area hauling dirt from the top of the highwall. (Tr. 1138). He was driving in dirty dusty areas.

Ken Nelson testified that he had no knowledge that anyone working at his quarries were overexposed to silica-bearing dust. (Tr. 1142). Dust sampling had never been performed at the plant. When this citation was issued, he took the truck out of service until air-conditioning was installed. Air-conditioning was installed in other trucks as well. He also immediately assigned Mr. Hillbrand to work in areas that, based on MSHA testing, were not as dusty.

MSHA is permitted to issue citations based on a single-shift silica dust survey. I reach this conclusion based on the Commission's decision in *Asarco, Inc.*, 17 FMSHRC 1 (1995), and former Commission Administrative Law Judge Maurer's subsequent analysis in *Asarco, Inc.*, 19 FMSHRC 1097, 1130-1136 (1997). Based on the evidence presented, Judge Maurer concluded that "MSHA's use of single-shift sampling is a reasonable means of ascertaining, to the requisite degree of accuracy, whether the enforcement concentration level standard in section 57.5001(a)

has been exceeded." *Id.* at 1136. *See Excel Mining, LLC.,* 22 FMSHRC 318, 319-20 (Mar. 2000) ("We have held that the legal basis for rejecting the use of single-shift sampling in coal mines does not apply to metal/non-metal mines."). *See also Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1 (DC Cir. 2003).

I find that the Secretary established a violation. It is important to note that the company had not been doing its own silica-dust sampling. Nelson Quarries was not using any administrative or engineering controls to protect the truck driver from the dust.

The violation contributed to a discrete health hazard. I also find that the evidence establishes that there was a reasonable likelihood that the hazard contributed to by the violation would result in an illness of a reasonably serious nature. As stated above, Hillbrand was overexposed to silica dust. The roadways were not being watered, the windows on the truck were down, Hillbrand was not wearing a respirator, and administrative controls were not being used. Nelson Quarries did not have in place a program for monitoring the exposure to silica dust so it had no way of knowing whether anyone was being overexposed. Taking into consideration continuing mining operations, I find that the violation was S&S and serious. A penalty of $750.00 is appropriate.

2. On November 2, 2005, Inspector Dye issued Citation No. 6291604 alleging a violation of section 56.14107(a). (Ex. G-81). The citation alleges that the alternator belt on the Caterpillar 96B loader was not guarded to prevent persons from becoming entangled in the moving machine parts. Inspector Dye determined that an injury was unlikely and that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317432. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. Alternator belts on loaders are required to be guarded, but the violation was not serious because the chance of accidental contact was not very great. A penalty of $60.00 is appropriate.

3. On November 2, 2005, Inspector Dye issued Citation No. 6291611 alleging a violation of section 56.12006. (Ex. G-82). The citation alleges that the motor control center "controlling 35 motors from 14 distribution boxes in the electrical trailer was not provided with separate disconnecting devices for each branch circuit." Inspector Dye determined that an injury was unlikely and that any injury would likely be fatal. She determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317445. Based on that evidence, set forth below, I find that the Secretary established a non-S&S violation of the safety standard. As stated below, it is

clear from the regulation that each branch circuit is required to have its own disconnecting device. Circuit breakers or plugs are typically used as disconnecting devices. A penalty of $60.00 is appropriate.

L. CENT 2006-228-M, Plant 2.

1. On November 15, 2005, Inspector Barrington issued Citation No. 6317444 alleging a violation of section 56.12001. (Ex. G-104). The citation alleges that the 10/4 AWG, SO-type power cord was not properly protected against overload by the Square D circuit breaker. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Barrington testified the No. 10 AWG wire of a four conductor cable coming off the bottom of a 70-amp breaker did not meet the requirements of the safety standard. (Tr. 1148). The circuit was 480 volts phase-to-phase and 227 volts phase-to-ground. The power was not on. The wire was rated for 30 amps but the breaker was rated for 70 amps. Thus, there was insufficient overload protection on the circuit. A 70-amp breaker is not of the correct type and capacity for a No. 10 wire. The wiring would overheat and fault out before the breaker would trip. (Tr. 1152). The fault would likely travel through metal components of the equipment at the quarry. (Tr. 1152-53). The installation did not meet the requirements of the National Electrical Code. (Tr. 1228-30).

I find that the Secretary established a violation and that the violation was S&S. The circuit was not adequately protected. It was reasonably likely that the hazard contributed to by the violation would result in a serious injury given continued mining operations. A penalty of $250.00 is appropriate.

2. On November 15, 2005, Inspector Barrington issued Citation No. 6317445 alleging a violation of section 56.12006. (Ex. G-105). The citation alleges that the distribution box mounted in the motor control center for the screening and crushing plant was not provided with a disconnecting device for each branch circuit. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that distribution boxes be provided with a disconnecting device for each branch circuit and that the disconnecting devices be designed so that it can be determined by visual observation whether the circuit is energized. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Barrington testified that there were two circuits coming off the distribution box from one breaker. (Tr. 1184-86, Ex. G-105c). He stated that the violation was obvious. The standard required that each circuit be isolated with its own disconnecting device. There were separate thermal protection devices for each circuit, each with its own starting buttons. (Tr. 1231). Miners were exposed to the hazard because the circuits could not be isolated.

Mr. Peres testified that the National Electrical Code allowed the configuration of circuits that were present at the quarry. (Tr. 1256). The two pieces of equipment (the cone return and the 521 conveyor) could be run independently and they each had their own start button.

It is clear from the regulation that each branch circuit is required to have its own disconnecting device. Circuit breakers or plugs are typically used as disconnecting devices. The circuit breaker in question controlled two branch circuits. (*See,* PPM Part 56/57.12006). The fact that the piece of equipment on each circuit had their own stop/start button does not obviate this requirement. Each circuit must have its own visible disconnecting device. This violation was obvious. (Ex. G-105c). I find that the Secretary established a violation. I also credit Inspector Barrington's testimony concerning the hazards created by this violation and I find that the violation was S&S. A penalty of $250.00 is appropriate.

3. On November 15, 2005, Inspector Barrington issued Citation No. 6317443 alleging a violation of section 56.12018. (Ex. G-106). The citation alleges that the principal power switches were not all labeled to show which units they controlled. Inspector Barrington determined that an injury was not reasonably likely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard required that principal power switches be labeled to show which units they control unless identification can be made readily by location. The Secretary proposes a penalty of $60.00 for this citation.

Barrington testified that the company had numbers posted on the covers for the distribution boxes but they did not all match up with what was in the field. (Tr. 1190, 1236, 1251). The labels were not on or near the breakers but were on the outside of the doors for the distribution boxes. It would have been easy to open the incorrect breaker when attempting to perform repairs on a piece of electrical equipment. Proper identification is especially important in an emergency situation. (Tr. 1192, 1196). Mr. Peres testified that the labels on the outside of the panels are kept up to date. (Tr. 1258).

I credit the testimony of Inspector Barrington. The citation is affirmed and a penalty of $60.00 is assessed.

4. On November 15, 2005, Inspector Barrington issued Citation No. 6317447 alleging a violation of section 56.12008. (Ex. G-107). The citation alleges that the cable for the 503 short belt was pulled from the electrical enclosure through the entrance gland exposing the phase and ground conductors. Inspector Barrington determined that an injury was not reasonably likely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that cables shall enter metal frames of electrical components only through proper fittings. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the cables for one of the conveyors had pulled through the bushing and was hanging by the phase conductors. (Tr. 1196-98; Ex. G-107c). The outer jacket had pulled out of the fitting. The inspector did not know how long the condition existed. (Tr. 1240). The insulation around the conductors had not yet been damaged.

This citation is affirmed as a non-S&S violation. A penalty of $60.00 is appropriate.

5. On November 16, 2005, Inspector Barrington issued Citation No. 6317450 alleging a violation of section 56.12008. (Ex. G-108). The citation alleges that the three wires entering the top of the power bus box were not adequately insulated. Inspector Barrington determined that an injury was not reasonably likely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the metal openings were bushed but the wires entering the box through the bushings did not have outer jackets. (Tr. 1202; Ex. G-108d). The jacket had been stripped back so that the wires could fit through the openings. Because the bushings were not insulated, but were metal, the installation did not meet the requirements of the standard. The insulation on the wires had not been damaged. Mr. Peres testified that the mine wraps electrical tape around the wires where they pass through the bushing to provide the required insulation. (Tr. 1260).

Electrical tape is no substitute for an adequate bushing and there is no proof that electrical tape was present in this installation. The Secretary established a violation and the proposed penalty of $60.00 is appropriate.

6. On November 16, 2005, Inspector Barrington issued Citation No. 6317449 alleging a violation of section 56.12025. (Ex. G-102). The citation alleges that the grounding system on the IC bin conveyor was not maintained as required. When tested, the grounding system measured 75 ohms to ground. Inspector Barrington determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Barrington testified that when he tested the ground for the conveyor using a Triplett analog meter, he determined that the resistance in the grounding wire was sufficiently high that it would not trip the breakers it was serving. (Tr. 1208, 1210). He used his standard procedure when testing the grounding system. (Tr. 1246-48). Richard Tedesco helped him perform the test. (Tr. 1234). The impedance was too high given the size of the grounding wire to carry the current back to the breaker. The company's testing records did not indicate that there was any problem with the grounding system. (Tr. 1232). The violation was S&S because the likelihood of someone getting injured was high. (Tr. 1216).

Mr. Peres testified that he performs the annual continuity and earth ground tests at all five plants. (Tr. 1261). When a ground wire shows resistance, it is usually because of dirt or corrosion at a connection point. Testing the ground wire can be tricky and he sometimes gets false readings. When he gets a better connection with the meter, the ground wire has always passed the annual test. If the test is performed by someone who lacks experience, a false reading can easily be obtained. (Tr. 1263). He is not aware of any problems that Inspector Barrington had when he checked the grounding systems at the plant. (Tr. 1169). A reading of 73 ohms, if the test were performed correctly, would show a problem with the grounding wire.

I find that the Secretary established an S&S violation of the safety standard. I credit the inspector's testimony that he correctly tested the grounding system. Although corrosion may have created the problem, the hazard was still present and serious. It was reasonably likely that someone would be injured or electrocuted if the condition were not corrected. A penalty of $250.00 is appropriate taking into consideration the penalty criteria.

7. On November 16, 2005, Inspector Barrington issued Citation No. 6317448 alleging a violation of section 56.12025. (Ex. G-103). The citation alleges that the grounding system on the El Jay screen conveyor was not maintained as required. When tested, the grounding system measured 9 ohms to ground. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The circumstances that led Inspector Barrington to issue this citation were similar to those in the previous citation. (Tr. 1222-23). For the same reasons, I affirm the citation and assess a penalty of $60.00.

8. The Secretary agreed to vacate Citation No. 6317428.

M. CENT 2006-229-M, Plants 1 and 3.

1. On November 21, 2005, Inspector Barrington issued Citation No. 6317462 alleging a violation of section 56.12008. (Ex. G-109). The citation alleges that the cables entering the bottom metal frame of the motor control enclosure were not provided with proper fittings. There were 16 cables entering the enclosure and 4 of them were not properly bushed. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that four of the 480-volt cables were not properly bushed. (Tr. 1303). The motor control center was subject to vibration because it was in the same trailer as the generator. The sharp edges of the box could have cut into the cables and the cables could otherwise loosen. (Tr. 1306). Mr. Peres testified that this citation was actually issued at Plant 1, as was Citation No. 6317463.

I affirm this citation based on Inspector Barrington's testimony. A penalty of $60.00 is appropriate.

2. On November 21, 2005, Inspector Barrington issued Citation No. 6317463 alleging a violation of section 56.12032. (Ex. G-110). The citation alleges that the inspection plates on the 110 volt breaker were not secured as required. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that inspection and cover plates on electrical equipment and junction boxes shall be kept in place except for testing or repairs. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that as he was inspecting the area he bumped the breaker box and the cover fell off. (Tr. 1311). Mr. Peres testified that the plant had not been in operation for three months. (Tr. 1368).

I find that the Secretary established a violation. The violation was not serious and the company's negligence was low. A penalty of $40.00 is appropriate.

3. On November 2, 2005, Inspector Dye issued Citation No. 6291597 alleging a violation of section 56.9315. (Ex. G-111). The citation alleges that there was visible dust coming from the plant, exposing persons to low visibility hazards. Inspector Dye determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. She determined that the violation was S&S and that the negligence was moderate. The safety standard provides that dust must be controlled at muck piles, material transfer piles, crushers and on haulage roads where hazards to persons could be created by impaired visibility. The Secretary proposes a penalty of $165.00 for this citation.

Inspector Dye testified that as she was driving down the county road, she could see dust coming off the plant. (Tr. 1278). The plant was "engulfed in dust." (Exs. G-111c and 111d). The wind was blowing 25 miles per hour that day. The company did not have a water truck at the plant and water sprays were not installed at the crusher or along the conveyors. The haulage trucks did not have their headlights on. The company shut down the plant soon after the MSHA inspectors arrived and the dusty conditions abated. Mine operators that use dust control measures are able to greatly reduce the amount of dust produced in windy conditions. (Tr. 1185). The inspector believes that the dusty conditions created visibility hazards as well as a potential health hazard to employees. She determined that the violation was S&S because it was reasonably likely that trucks operating at the plant would be involved in an accident. The company submitted and implemented a dust control plan to abate the citation.

Mr. Peres testified that the plant was shut down soon after the inspectors arrived because the wind had picked up. (Tr. 1361). He had previously called Mr. Nelson to ask him about the weather forecast and to tell him that the plant may need to shut down. Peres said that he did not

know that MSHA was onsite when he made the decision to shut down the plant. He understands that the wind had picked up to a sustained speed of 35 mph with gusts even higher. It was not as windy earlier in the day and there were no visibility problems. (Tr. 1363). The plant is frequently shut down when it gets too windy. Peres said that the roadways are normally kept wet by using haul trucks and loaders to spread water along the roads.

I credit the testimony of Mr. Peres and I vacate this citation. He testified that he shuts down a plant if it becomes too windy and dusty.

N. CENT 2006-230-M, Plant 4.

1. On November 16, 2005, Inspector Crelly issued Citation No. 6291253 alleging a violation of section 56.3200. (Ex. G-112). The citation alleges that the faces in the pit had not been scaled. The faces were about 30 to 35 feet high on the north side and 40 feet high on the south side. There was loose and unconsolidated material on both sides of the pit. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. The citation was subsequently amended to show that an accident was unlikely and that the violation was not S&S. The negligence was moderate. The standard provides that ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the area. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Crelly testified that he observed loose, unconsolidated material on the pit faces. The pit was about 75 yards wide. (Tr. 956, 360; Ex. G-112d). He observed tire tracks eight feet from the edge of the face. The area at the base of the face had been cleaned up. (Tr. 959). If any of the loose material were to fall, it could strike someone under highwall. There was a sump pump in the area. Foreman Gene Andres told the inspector that the company does not have any equipment that can scale the highwall. Inspector Crelly believed it was too dangerous to get too close to the face to take any measurements. (Tr. 1001).

Mr. Peres testified that other MSHA inspectors had advised the company that the higher the face the further back from the face miners are prohibited from entering. (Tr. 1048-49). He called it the 25 percent rule because you must stay back a quarter of the distance of the height. Peres estimated that loose rock around the base of the face protruded out about 12 feet. (Tr. 1075). He further testified that there were no loose rocks along the face in the areas where rocks at the base had been removed with a loader. Nelson Quarries admitted during discovery that there was loose and unconsolidated material on the north side of the pit and that no scaling had been performed. (Tr. 1078-79; Ex. G-138). Scaling is not required if access to the area below the face is limited or blocked. (Tr. 1081).

Mr. Andres testified that the loader tracks that the inspector observed were at least 13 feet away from the toe of the highwall. (Tr. 1162). The water pump was at least 40 feet from the highwall. Andres also testified that there was a trackhoe that was large enough to reach 30 feet up the wall but that the mine does not rely on scaling. Scaling would put the operator of the

equipment in the zone of danger from falling rock. (Tr. 1170). Instead, barriers or berms are used to keep people away. (Tr. 1167, 1172). The company leaves some of the rock at the face to be removed during the next cycle.

I agree with Nelson Quarries that the safety standard does not require scaling. The standard requires that ground conditions that create a hazard to persons be taken down before work is performed in the affected area. During discovery, Nelson Quarries admitted that there was "loose and unconsolidated material on the north face of" its pit. (Ex. G-138). The issue is whether the loose, unconsolidated material presented a hazard to persons. The company contends that rock at the base of the highwall blocked entry to anyone below this loose material. The MSHA's photographs are consistent with the testimony of Andres and Peres. I credit the testimony of Andres and Peres with respect to this citation. Rock at the base of the highwall provided a sufficient barrier and the loose material did not pose a hazard to the workers at the time of the inspection. Under the PPM, a mine operator is permitted to use piles of muck or large boulders to keep miners out from under highwalls. As a consequence, I vacate this citation. It bears noting that Nelson Quarries must ensure that there are berms or sufficient rock under any loose or unconsolidated material on the highwall to keep miners out of the zone of danger. It must comply with the requirements of sections 56.3130, 56.3131, and 56. 3200 at all times. Scaling must be performed if miners must work or travel under unconsolidated material on highwalls.

2. On November 16, 2005, Inspector Crelly issued Citation No. 6291257 alleging a violation of section 56.14100(b). (Ex. G-113). The citation alleges that the bottom step on the Caterpillar 988F front end loader was missing. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be permanently disabling. The citation was later modified to show that an accident was unlikely and that the citation was not S&S. The negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Crelly testified that the bottom step was missing. (Tr. 966). The existing bottom step was 37 inches above the ground. The loader operator could slip and fall either ascending or descending the steps. The condition had existed for some time and the loader is used on a regular basis. Mr. Andres estimated that, with the missing step, the bottom step was about 31 or 32 inches from the ground. (Tr. 1164).

I find that the missing ladder rung did not present a safety hazard. Anyone entering the loader could use the handrails for support. The chance of an injury is remote at best. This citation is vacated.

3. On November 16, 2005, Inspector Crelly issued Citation No. 6291259 alleging a violation of section 56.11001. (Ex. G-114). The citation alleges that safe access was not provided to the walkway on the 615 screen. A wire stand was being used to climb up to the walkway and over the handrail. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. The citation was later modified to show that an

accident was unlikely and that the citation was not S&S. The negligence was moderate. The safety standard provides that safe access must be provided to all working places. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the company was using a metal stand, which was not intended to be used as a ladder, to climb up onto the 615 screen. (Tr. 970; Ex. G-114c). Employees had to climb over the handrail once they were at the top, which was about ten feet above the ground. He estimated that employees accessed the walkway a few times a week. The walkway is a working place because miners must stand on the walkway while performing maintenance and inspecting the screen. Mr. Andres told the inspector that employees got to the walkway via the metal stand, but the inspector did not see anyone using this metal stand. (Tr. 973, 1004).

Peres testified that there was a ladder for employees to use to gain access to the screen. This ladder is shown in exhibit G-130c. (Tr. 1050-51). There are also other portable ladders on the property that are used to go up on the screen. He was not aware that anyone used the wire stand to get up onto the screen. Mr Andres testified that there were ladders available to access the screen. (Tr. 116).

The ladder referred to by Mr. Peres was tied to the frame of the screen and would not be easy to move. Although there may have been other ladders available, I credit Inspector Crelly's testimony that Mr. Andres told him employees use the wire stand. As stated above, I find that Mr. Andres was an agent of the operator. He had knowledge that miners were using the wire stand to get onto the screen. The citation is affirmed and a penalty of $60.00 is assessed.

O. CENT 2006-231-M, Plant 3.

On November 21, 2005, Inspector Barrington issued Citation No. 6317461 alleging a violation of section 56.12040. (Ex. G-115). The citation alleges, in part, that the operating controls inside the motor distribution box were installed so that they could not be operated without danger of contact with energized conductors and related terminals. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317446. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that fact that its plants had never been subject to an electrical inspection. The violation was not S&S because the plant is shut down and locked out whenever any work is performed. A penalty of $60.00 is appropriate.

P. CENT 2006-233-M, Plant 4.

1. On November 17, 2005, Inspector Barrington issued Citation No. 6317455 alleging a violation of section 56.12025. (Ex. G-116). The citation alleges that the grounding system on the 540 conveyor was not properly maintained. The grounding system measured 2.5 ohms to ground. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that one of the company's employees helped with the testing. (Tr. 1315). His testimony with respect to this citation was the same as with other citations alleging a problem with a grounding system. It would take the breaker seconds or maybe minutes to trip in these circumstances. (Tr. 1344). Someone would have to be touching the metal framework of the equipment for an injury to occur. The previous testimony of Mr. Peres also applies to this citation. He testified that it would only take about a half a second for the breaker to trip with a resistance of only 2.5 ohms. (Tr. 1371).

For the reasons discussed above with respect to the other grounding citations issued under section 56.12025, this citation is affirmed. A penalty of $60.00 is assessed.

2. On November 17, 2005, Inspector Barrington issued Citation No. 6317457 alleging a violation of section 56.12025. (Ex. G-117). The citation alleges that the grounding system on the 509 conveyor was not properly maintained. The grounding system measured 1.5 ohms to ground. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington's testimony with respect to this citation was the same as with other citations alleging a problem with a grounding system. (Tr. 1317, 1345-46). As a general matter corrosion often causes grounding systems to fail the continuity test. Mr. Peres testified that he performs the annual continuity and earth ground tests. (Tr. 1368). He also retests the grounding systems anytime the plant is moved, a motor is replaced, or any equipment is moved. A reading of 2.5 ohms is a very low resistance to ground. The condition was corrected by cleaning the terminals to remove corrosion. (Tr. 1370).

For the reasons discussed above with respect to the other grounding citations issued under section 56.12025, this citation is affirmed. A penalty of $60.00 is assessed.

3. On November 16, 2005, Inspector Barrington issued Citation No. 6317452 alleging a violation of section 56.12002. (Ex. G-118). The citation alleges that the control breakers mounted in the distribution boxes in the motor control center were not properly installed in that vibration from the generator had backed the mounting screws out, making it difficult to reset the breaker. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The safety standard provides, in part, that

switches and controls for electric circuits shall be properly installed. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the condition was obvious. (Tr. 1322-23; Ex. G-118c). The breaker assembly was secured by only one screw so it would move if anyone were required to reset the breaker. A miner would have to hold it with one hand while resetting the switch, which would expose the miner to an electric shock hazard. (Tr. 1325-26). Miners do not use the breakers to turn the equipment on and off. (Tr. 1349). He does not know how often the breaker must be reset.

Mr. Peres testified that access to the motor control centers at the plants of Nelson Quarries is restricted. Padlocks are often placed on the doors when a plant is in operation. (Tr. 1371). The only people allowed in the motor control trailer when the plant is operating are the leadman and himself. Repairs are performed when the generator is shut down. Breakers rarely kick off.

I find that the Secretary established a violation. The gravity was low because the breakers are infrequently used and access to the trailer was limited. I find that a penalty of $40.00 is appropriate.

4. On November 21, 2005, Inspector Barrington issued Citation No. 6317454 alleging a violation of section 56.12040. (Ex. G-119). The citation alleges, in part, that the operating controls inside the distribution boxes in the motor control room were installed so that they could not be operated without danger of contact with energized conductors and related terminals. After a conference, it was determined that an injury was unlikely but that any injury would likely be fatal. The negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation No. 6317446. Based on that evidence, I find that the Secretary established a non-S&S violation of the safety standard. The wires and terminals for the circuit breakers were totally exposed. Circuit breakers are operating controls. The fact that the company had never been cited for this condition simply reflects that fact that its plants had never been subject to an electrical inspection. A penalty of $60.00 is appropriate.

Q. <u>CENT 2006-237-M, Plant 4.</u>

1. On November 16, 2005, Inspector Crelly issued Citation No. 6291254 alleging a violation of section 56.3130. (Ex. G-129). The citation alleges that the mining methods used in the pit were not compatible with the type and size of the equipment used. The face was about 30 to 35 feet high on the north side of the pit and about 40 high on the south side. None of the equipment at the mine could reach more that 25 feet up the face. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in

part, that mining methods shall be used that will maintain wall, bank, and slope stability in places were people work or travel. The Secretary proposes a penalty of $247.00 for this citation.

Inspector Crelly testified that Mr. Andres told him that the company did not have any equipment that could be used to scale the rock face. (Tr. 974). There were no benches along the highwall. The inspector said that, to comply with the standard, the company must bench the area or barricade the area around the foot of the highwall so that any falling rock would not hit anyone. (Tr. 975). The company could also scale the face, but they did not have any equipment that could be used for such purposes. Instead, the company drilled and then shot the area. The inspector admitted that scaling is not mandatory. (Tr.1007-08). He designated this citation as S&S because miners are in the pit every day operating the loader and other equipment. These miners are frequently within a few feet of the face. Although pedestrians were not common, someone could be out of a vehicle checking the water pump.

Mr. Peres testified that there was a Hitachi trackhoe that can reach up to 40 feet to scale a face. (Tr. 1054-55). A rammer can be attached to use for scaling. The quarry also keeps men and machinery back from the toe of the face. The company's evidence with respect to this citation is the same as it was for the related citation (No. 6291253) alleging a violation of section 56.3200.

I vacate this citation for the same reasons I vacated Citation No. 6291253. I find that the Secretary did not establish that miners worked or traveled under unstable highwalls. I note, however, that the company must either scale down loose and unconsolidated material or it must ensure that berms or rock are present to keep miners out of the zone of danger.

2. On November 16, 2005, Inspector Crelly issued Citation No. 6291260 alleging a violation of section 56.11003. (Ex. G-130). The citation alleges that the ladder on the southwest side of the 615 screen was not maintained in safe condition. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that ladders shall be of substantial construction and maintained in good condition. The Secretary proposes a penalty of $247.00 for this citation.

The inspector testified that the ladder was about eight feet tall and had holes in the rail that were about two by two inches. The ladder is used to access the second layer of screens. (Tr. 979). The hole is where a rung used to be. The ladder was of substantial construction but it was not maintained in good condition because it was bent and it had a hole in it. Inspector Crelly testified that if the ladder continued to be used, it was reasonably likely that someone would suffer a serious or fatal injury. (Tr. 981). The ladder was tied off in place. (Tr. 982, 1015).

Peres testified that the ladder was strong enough to hold a man. (Tr. 1056-57). The holes in the sides of the ladder were above the last rung used by miners so the holes were not subjected to the weight of miners using the ladder. Andres agreed with Peres. (Tr. 1182).

I find that the citation should be vacated. The holes were where a rung used to be and they were not as large as the inspector believed. The holes were above any area where miners would put their weight. (Ex. G-130c). The ladder was of substantial construction and was in good enough condition for its intended use. It was secured in place and it did not present a safety hazard.

3. On November 16, 2005, Inspector Crelly issued Citation No. 6291266 alleging a violation of section 56.11001. (Ex. G-131). The citation alleges that safe access was not provided to the south side of the main generator trailer in that a piece of sheet metal that was 21 inches wide was being used as a walkway into the trailer that was about 4 feet above the ground. Inspector Crelly determined that an injury was reasonably likely and that any injury would likely be permanently disabling. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $203.00 for this citation.

The inspector testified that the sheet metal was a quarter of an inch thick, about 21 inches wide, and six feet long. (Tr. 983; Ex. G-131c). This piece of metal was not designed for this purpose and it did not provide safe access. He testified that he did not know why people would be entering the trailer at this location because there was another door provided. That door had stairs with handrails. He saw Mr. Andres use the cited entrance. He believes that the violation was S&S because someone could stumble and fall while walking on the sheet metal. The cited door was the back door to the trailer near the radiator of the generator.

Peres testified that the entrance to the generator trailer is on the side. That entrance has a stairway with handrails. The piece of metal cited by the inspector was there because two employees at the quarry had a pet cat at the mine site. (Tr. 1061-62). The cat slept near the generator because it was warm. These employees put the sheet metal by the generator to make it easier for the cat to get into the trailer. He never saw anybody using this "catwalk." (Tr. 1080). Mr. Andres denied that he ever walked or stepped on the sheet metal. (Tr. 1168). It was very muddy the day of the inspection with the result that mud would have been on the sheet metal if anyone had walked on it.

I credit the witnesses of Nelson Quarries on this citation. The photograph shows that the piece of sheet metal was not a means of access for miners to enter the trailer. (Ex. G-131c). The company provided safe access via the stairs. I vacate this citation.

4. On November 17, 2005, Inspector Barrington issued Citation No. 6317459 alleging a violation of section 56.12025. (Ex. G-132). The citation alleges that the grounding system on the 509 conveyor was not properly maintained. The grounding circuit was open when tested with an ohmmeter. Inspector Barrington determined that an injury was reasonably likely and that any injury would be fatal. The citation was designated as S&S and the negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

The inspector testified that the grounding circuit was open (disconnected) so that there was no ground at all. (Tr. 1319). He determined that the violation was S&S because it was reasonably likely that someone would be seriously injured in the event of a fault in the 480 volt system.

For the reasons discussed above with respect to the other grounding citations issued under section 56.12025, this citation is affirmed. A penalty of $250.00 is appropriate.

5. On November 17, 2005, Inspector Barrington issued Citation No. 6317460 alleging a violation of section 56.12004. (Ex. G-133). The citation alleges that the insulation on the feeder cable to the 30 amp Westinghouse breaker and Cutler Hammer line starter was damaged from excessive heat. The copper conductor was exposed in places. Inspector Barrington determined that an injury was unlikely but that any injury would be fatal. The citation was designated as non-S&S and the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that it appeared that the insulation had been damaged by excessive heat. (Tr. 1329; Ex. G-133e). Mr. Peres believes that the insulation was chipped when the wire was moved at some point. (Tr. 1375).

I affirm the citation. Copper wire was visible whether the insulation was damaged by heat or it was chipped off. A penalty of $60.00 is appropriate.

6. On November 17, 2005, Inspector Barrington issued Citation No. 6317456 alleging a violation of section 56.12008. (Ex. G-134). The citation alleges that the feeder cable for the No. 14 distribution box entered through a compression bushing that was not properly maintained. The gland locking nut had vibrated loose and was hanging from the leads. Inspector Barrington determined that an injury was unlikely but that any injury would be fatal. The citation was designated as non-S&S and the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

The inspector testified that the locking nut was hanging loose. (Tr. 1333-35; Ex. G-134c). The bushing was metal and he was concerned that vibration could wear down the insulation on the conductors without the nut in place. Peres testified that the bushing provided protection without the lock nut in place. (Tr. 1376).

The locking nut helps keep the cables in place and prevents vibration from damaging the insulation on the conductors. There is no indication that the insulation had been damaged. I find that the Secretary established a violation, but it was not serious. A penalty of $40.00 is appropriate.

7. On November 17, 2005, Inspector Barrington issued Citation No. 6317451 alleging a violation of section 56.14100(b). (Ex. G-135). The citation alleges that the housing on the

Cummins generator was not maintained in good condition. The top of the housing had an open exit gland that exposed the windings in the generator to moisture and dust. Inspector Barrington determined that an injury was unlikely but that any injury would be fatal. The citation was designated as non-S&S and the negligence was moderate. The Secretary proposes a penalty of $60.00 for this citation.

Inspector Barrington testified that because of the dusty conditions, dirt, dust and moisture could enter the opening in the housing. The internal windings could be affected creating a safety hazard. The dust and dirt could cause the generator to get too hot. He considered the cited condition to be a defect affecting safety. (Tr. 1336-39, 1341; Ex. G-135d). The generator was not operating at the time of his inspection. Mr. Peres testified that when the generator is operating, air is forced out of the hole by the cooling fan so any dust present would be blown out. (Tr. 1377).

The standard requires that any defects that affect safety be corrected in a timely manner to prevent the creation of a hazard to persons. I find that the Secretary did not establish that the opening was a defect that affected safety. The generator was in a trailer and there was no proof that dust and dirt would enter the hole or damage the windings in any way. This citation is vacated.

8. On November 17, 2005, Inspector Barrington issued Citation No. 6317456 alleging a violation of section 56.12025. (Ex. G-132). The citation alleges that the grounding system on the 207 bin conveyor was not maintained as required. When tested, the grounding system was open. Inspector Barrington determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was S&S and that the negligence was moderate. The Secretary proposes a penalty of $247.00 for this citation.

The parties agreed that I should base my decision on this citation on the evidence presented with respect to Citation Nos. 6317464 and 6317465. I find that the Secretary established an S&S violation of the safety standard. I credit the inspector's testimony that he correctly tested the grounding systems during his inspections. Although corrosion may have created the problem, the hazard was still present and serious. It was reasonably likely that someone would be injured or electrocuted if the condition were not corrected. A penalty of $250.00 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. Plant 1 had a history of 12 paid violations in the two years prior to November 16, 2005, Plant 2 had a history of 5 paid violations in the two years prior to October 5, 2005, Plant 3 had a history of 6 paid violations in the two years prior to June 28, 2005, Plant 4 had a history of 21 paid violations in the two years prior to November 16, 2005, and Plant 5 had a history of 5 paid violations in the two years prior to October 26, 2005. (Ex. G-136). Most of

these previous violations were non-S&S. Nelson Quarries is a rather small operator and its quarries are small. All of the violations were abated in good faith, except as noted. Nelson Quarries did not establish that the penalties assessed will have an adverse effect on its ability to continue in business. My gravity and negligence findings are set forth above. If I did not discuss gravity or negligence with respect to a citation, then the inspector's determinations are affirmed. 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:

Citation/Order No.	30 C.F.R. §	Penalty
CENT 2006-151-M, Plant 4		
6291250	56.6130(a)	$1,000.00
6291251	56.6300(b)	1,500.00
CENT 2006-178 -M, Plant 1		
6291635	56.14112(b)	Vacated
6291637	56.14100(a)	Vacated
6291642	56.11002	Vacated
6291644	56.20003(a)	Vacated
6291645	56.14107(a)	100.00
6291646	56.18012	50.00
6291647	§109(a) of Act	60.00
6291648	56.11002	Vacated
6317464	56.12025	500.00
6317465	56.12025	500.00
CENT 2006-200-M, Plant 5		
6291590	56.14100(b)	135.00
6291591	56.14132(a)	60.00
6291569	56.14112(b)	Vacated
6291572	56.12004	60.00
6291573	47.41(a)	40.00
6291574	56.12004	60.00

6291576	56.14107(a)	50.00
6291578	56.14112(b)	60.00
6291579	56.14112(b)	60.00
6291580	56.4501	60.00
6291581	56.14107(a)	Vacated
6291582	56.12004	60.00
6291584	56.14107(a)	50.00
6291585	56.20003(a)	60.00
6291587	56.6101(a)	60.00
6291588	56.4101	40.00
6291592	56.14107(a)	60.00
6291593	56.14112(b)	60.00
6291594	56.14100(b)	60.00

CENT 2006-201-M, Plant 5

6291595	56.14101(a)(2)	625.00
6291583	56.14107(a)	70.00
6291589	56.14101(a)(2)	40.00
6291586	56.9300(a)	40.00

CENT 2006-202-M, Plant 1

6291636	47.41(a)	40.00
6291638	56.4104(b)	60.00
6291639	47.41(a)	Vacated
6291640	56.4101	Vacated
6291641	56.14107(a)	60.00

CENT 2006-203-M, Plant 2

6321288	56.14100(c)	800.00
6290517	56.14109	100.00
6317446	56.12040	100.00
6291667	47.7(a)	100.00
6290516	56.14107(a)	40.00
6290520	56.14132(a)	40.00
6290521	56.14100(b)	60.00
6290522	56.14132(a)	40.00
6290523	56.14100(b)	40.00
6290524	56.6132(a)(4)	60.00

6321289	56.14100(b)	60.00
6317429	56.6132(b)	Vacated
6317430	56.6132(a)(6)	Vacated
6317432	56.14107(a)	60.00
6317436	56.14112(a)(1)	Vacated
6317437	56.14107(a)	Vacated
6317438	56.14112(a)(1)	Vacated
6317440	56.11002	60.00
6317441	56.4130(b)	60.00
6317442	56.11002	40.00

CENT 2006-204-M, Plant 2

6290519	56.14101(a)(3)	10.00
6317431	56.14107(a)	Vacated
6317433	56.14107(a)	Vacated

CENT 2006-206-M, Plant 4

6291248	56.6130(a)	500.00
6317458	56.12001	250.00
6291249	56.6132(a)(6)	60.00
6317453	56.12001	60.00

CENT 2006-207-M, Plant 3

6290611	56.14132(a)	40.00
6290612	56.14132(a)	60.00
6290614	56.6202(b)(1)	60.00
6290615	56.14100(c)	60.00

CENT 2006-208-M, Plant 3

6290622	56.5001(a)/.5005	750.00
6291604	56.14107(a)	60.00
6291611	56.12006	60.00

CENT 2006-228-M, Plant 2

6317444	56.12001	250.00
6317445	56.12006	250.00
6317448	56.12025	60.00
6317449	56.12025	250.00

6317428	56.6132(a)(3)	Vacated
6317443	56.12018	60.00
6317447	56.12008	60.00
6317450	56.12008	60.00

CENT 2006-229-M, Plant1 and 3

6291597	56.9315	Vacated
6317462	56.12008	60.00
6317463	56.12032	40.00

CENT 2006-230-M, Plant 4

6291253	56.3200	Vacated
6291257	56.14100(b)	Vacated
6291259	56.11001	60.00

CENT 2006-231-M, Plant 3

6317461	56.12040	60.00

CENT 2006-233-M, Plant 4

6317452	56.12002	40.00
6317454	56.12040	60.00
6317455	56.12025	60.00
6317457	56.12025	60.00

CENT 2006-237-M, Plant 4

6291254	56.3130	Vacated
6291260	56.11003	Vacated
6291266	56.11001	Vacated
6317459	56.12025	250.00
6317451	56.14100(b)	Vacated
6317456	56.12008	40.00
6317460	56.12004	60.00

TOTAL PENALTY	$11,090.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Nelson Quarries, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $11,090.00 within 40 days of the date of this decision. Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Jennifer Casey, Esq., and Kristi Henes, Esq, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Ronald Pennington, Conference & Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (First Class Mail)

Paul M. Nelson, P.O. Box 334, Jasper, MO 64755 (Certified Mail)

Kenneth L. Nelson, President, Nelson Quarries, Inc., P.O. Box 100, Gas, KS 66742-0100 (Certified Mail)

RWM

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

May 1, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-237-M
Petitioner	:	A.C. No. 14-01597-77364-02
	:	
v.	:	
	:	Plant 4
NELSON QUARRIES, INC.,	:	
Respondent	:	

ORDER CORRECTING DECISION

Before: Judge Manning

I issued my decision in this docket, along with 15 other dockets, on April 7, 2008. In this order I am correcting two clerical errors that appear in the decision. First, in numbered paragraph 4 on page 60, the decision should be changed to reflect that Citation No. 6317459 involved the grounding system on the 207 bin conveyor rather than the 509 conveyor. Second, numbered paragraph 8 on page 62 and the paragraph that follows it are both in error and are hereby deleted from the decision.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Henes, Esq, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202

Paul M. Nelson, P.O. Box 334, Jasper, MO 64755

Kenneth L. Nelson, President, Nelson Quarries, Inc., P.O. Box 100, Gas, KS 66742-0100

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
May 5, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-178-M
Petitioner	:	A.C. No. 14-01477-87956
	:	
v.	:	
	:	Plant 1
NELSON QUARRIES, INC.,	:	
Respondent	:	

ORDER CORRECTING DECISION

Before: Judge Manning

I issued my decision in this docket, along with 15 other dockets, on April 7, 2008. In this order I am correcting an error that appeared in the decision. In the discussion of Citation No. 6317465 on page 19 of the decision, I described the citation as being of a significant and substantial nature ("S&S"). In fact, prior to the hearing, the Secretary changed the designation to non-S&S and reduced the proposed penalty to $60.00. I hereby correct my decision to affirm the citation as modified by the Secretary and I assess a penalty of $60.00. As a consequence, the total penalty for this docket is reduced to $770.00 and the total penalty for all 16 dockets is reduced to $10, 650.00.

Richard W. Manning
Administrative Law Judge

Distribution:

Kristi Henes, Esq, Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (via facsimile and U.S. Mail)

Paul M. Nelson, P.O. Box 334, Jasper, MO 64755 (via facsimile and U.S. Mail)

Kenneth L. Nelson, President, Nelson Quarries, Inc., P.O. Box 100, Gas, KS 66742-0100