FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 7, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 98-260-M
Petitioner	:	A. C. No. 34-01570-05524
v.	:	
	:	Docket No. CENT 99-93-M
NELSON BROTHERS QUARRIES ,	:	A. C. No. 34-01570-05525
INCORPORATED,	:	
Respondent	:	Docket No. CENT 99-110-M
	:	A.C. No. 34-01570-05526
	:	
	:	Docket No. CENT 99-141-M
	:	A.C. No. 34-31570-05527
	:	
	:	Quapaw Mine

DECISION

Appearances: Erica J. Rinas, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for the Petitioner;
Paul M. Nelson, President, Nelson Brothers Quarries Incorporated, Quapaw, Oklahoma, for the Respondent.

Before: Judge Feldman

These proceedings concern petitions for assessment of civil penalties filed by the Secretary of Labor (the Secretary) against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a). The petitions seek to impose a total civil penalty of $1,911.00 for 18 alleged violations of the mandatory safety standards in 30 C.F.R. Part 56 of the Secretary's regulations governing surface mines. These matters were heard on August 10, 1999, in Springfield, Missouri.

At the hearing, the parties were advised that I would defer my ruling on the 18 citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. Accordingly, this written decision formalizes the bench decision issued with respect to each of the contested citations.
The bench decision vacated four citations and affirmed nine citations. With respect to the remaining citations, the Secretary stipulated to vacating two citations and the parties reached a settlement wherein the respondent agreed to pay a $55.00 civil penalty for each of three non-S&S citations. A total civil penalty of $652.00 was imposed for the nine affirmed citations. Thus, the total civil penalty imposed in this matter, including the $165.00 the respondent agreed to pay, is $817.00. The bench decisions herein are edited versions of the bench decisions issued at trial with added references to pertinent case law.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the Commission's standards with respect to what constitutes a significant and substantial (S&S) violation. A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. 6 FMSHRC at 3-4.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 104-05 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

In determining if it is reasonably likely that a cited condition will result in serious injury, it is not necessary to show that miners were exposed directly to the resultant hazard at the time of the inspection. Rather, the Commission has stated:

> [T]he fact that a miner may not be directly exposed to a safety hazard at the precise moment that an inspector issues a citation is not determinative of whether a reasonable likelihood of injury existed. The operative time frame for making that determination must take into account not only the pendency of the violative condition prior to the citation, but also continued normal mining operations. *Halfway Incorporated*, 8 FMSHRC 8, 12 (January 1986).

The bench decision also applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. Section 110(i) provides, in pertinent part, in assessing civil penalties:

> the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The respondent, Nelson Brothers Quarries, is a small mine operator that is subject to the jurisdiction of the Mine Act. The evidence reflects that the respondent has a good compliance history with respect to previous violations in that it was cited for only three significant and substantial violations during the two years preceding the issuance of the citations in issue; that, with the exception of one citation where the respondent was waiting for ordered parts, the respondent abated the cited conditions in a timely manner; and that the $1,911.00 civil penalties proposed by the Secretary will not effect the respondent's ability to continue in business.

I. Findings and Conclusions

The citations that are the subject of these proceedings were issued by Mine Safety and Health Administration (MSHA) Inspector Curtis W. Dement during the course of his regular 1A bi-yearly inspections of the respondent's surface limestone mine site conducted in October 1997 and July 1998. The citations are addressed herein in the order the Secretary presented them at trial, rather than by the docket number they were assigned.

Nelson Brothers Quarries Incorporated is a small mine operator that extracts limestone from the Quapaw Mine site located in northeast Oklahoma in Ottawa County. The mine site consists of a pit and a crushing plant. There are approximately six employees working at this facility.

A. Citation Nos. 4454811 and 4460056

At the beginning of the trial the Secretary moved to vacate Citation Nos. 4454811 and 4460056 because the facts surrounding the issuance of these citations do not support the alleged violations of the mandatory safety standards. The Secretary's motion to vacate these citations was granted at the hearing. Accordingly, **Citation Nos. 4454811 and 4460056 are vacated**.

B. Citation No. 4454808

During the course of Dement's October 1997 inspection, Dement observed an unguarded left portion of a radiator fan blade on a Dart end dump truck. Dement noted the unguarded fan blade was approximately 14 inches from a ladder that drivers use to enter the operator's cab. Dement concluded it was reasonably likely, given continuing mining operations, that a driver could sustain serious injury in the event he inadvertently caught his hand in the moving fan blade. Consequently, Dement issued Citation No. 4454808 alleging an S&S violation of the mandatory safety standard in section 56.14107, 30 C.F.R.§ 56.14107, that requires fan blades to be guarded to protect persons from contact with moving parts.

Ralph Carter, the respondent's foreman, testified the Dart truck was not manufactured with a guard over the cited exposed area of the fan blade. In addition, Carter opined that, if a driver lost his balance on the ladder, the driver would fall off the ladder to the ground without touching the fan blade. A photograph of the cited fan blade area was admitted in evidence.

The bench decision for Citation No. 4454808 noted the controlling case law on guarding citations is *Thomas Brothers Coal Company, Inc.*, 6 FMSHRC 2094 (September 1984). In *Thomas Brothers* the Commission stated:

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

6 FMSHRC at 2097.

Applying the concept of reasonable possibility of contact during inadvertent falling or momentary inattention, the evidence reflects the unguarded area of the fan blade is approximately 14 inches from the side of the ladder. Stumbling, by nature, is sudden and unanticipated. In such circumstances, it is reasonably likely that the operator of this Dart truck will grab onto this unprotected area as a reflex. In such an event, the operator will sustain serious injury to his hand from contact with the moving fan blade. Accordingly, **Citation No. 4454808 is affirmed**.

With respect to the appropriate civil penalty, the absence of screw holes reflects that the truck may not have been manufactured with a guard in the cited area. In this regard, there is no evidence that a guard had been installed and subsequently removed. Consequently, the degree of negligence attributable to the respondent is reduced from moderate to low. Thus, **the civil penalty is reduced from the $111.00 initially sought by the Secretary to $75.00**.

C. Citation No. 4454809

Further inspection of the Dart end dump truck revealed the truck's back-up horn, used to alert other vehicles and persons in the vicinity of the truck of its backward movement, was not operative. Consequently, Dement issued Citation No. 4454809 citing a non-S&S violation of the provisions of 56.14132(a), 30 C.F.R. § 56.14132(a), that requires back-up warning devices on mobile equipment to be maintained in functional condition.

Paul M. Nelson, the respondent's President, admitted the back-up horn was not functional. However, Nelson testified he preferred that truck drivers and personnel on the ground use caution when vehicles are driven in reverse, and that employees communicate directly instead of using a safety horn to warn of danger.

The bench decision concluded that Nelson's preference for direct verbal communications did not absolve the respondent of its duty to maintain the back-up warning device. Accordingly, **Citation No. 4454809 is affirmed and the $50.00 civil penalty proposed by the Secretary shall be imposed**.

D. Citation No. 4454810

Dement tested the Dart end dump truck and determined it had a defective parking brake in that the parking brake would not prevent movement when the truck was standing still with its typical load on the maximum grade it travels as required by section 56.14101(a)(2), 30 C.F.R. § 56.14101(a)(2). Consequently, Dement issued Citation No. 4454810 alleging a non S&S violation of section 56.14101(a)(2). The Secretary subsequently modified this citation to alternatively allege a violation of section 56.14100(c) for the respondent's failure to "tag out" the Dart end dump truck after the respondent alleged the truck was not in service.

The bench decision rejected the respondent's assertion that a violation did not lie because the dump truck had a dump brake in addition to the parking brake that could be used to hold the truck in place. The respondent's assertion is belied by the fact that the vehicle is equipped by the manufacturer with a parking brake and there is no evidence that the parking brake is redundant or otherwise unnecessary. The bench decision also noted that alleging that a vehicle is currently not in service is not a defense to a citation citing a vehicle defect. An inspector can cite a violation of a mandatory safety standard without direct observation of a violation. *Emerald Mines Corp.*, 9 FMSHRC 1590 (Sept. 1987); *aff'd*, 863 F.2d 51, 55 (D.C. Cir. 1988). The presence of a defective vehicle on mine property that has not been taken out of service provides a basis for concluding that the vehicle was last operated in its defective condition. In addition, a back-up piece of equipment that is not properly maintained suddenly can be placed in service. Consequently, **Citation No. 4454810 is affirmed and the respondent shall pay the $50.00 civil penalty proposed by the Secretary**.

E. Citation Nos. 4460044, 4460049 and 4460054

At the hearing the Secretary agreed to modify Citation No. 4460044 by deleting the significant and substantial designation. Citation Nos. 4460049 and 4460054 had been issued as non-S&S citations. **The respondent agreed to pay a total civil penalty of $165.00 comprised of $55.00 civil penalties for Citation Nos. 4460044, 4460049 and 4460054**.

F. Citation No. 4460045

During the course of Dement's July 1998 regular inspection of the Quapaw facility, Dement noted a missing wiper blade on the wiper arm of a 966 Caterpillar front end loader. Dement issued Citation No. 4460045 for a non-S&S violation of the provisions of section 56.14100(b), 30 C.F.R. § 56.14100(b), that requires defects that affect safety to be corrected.

The respondent's defense to this alleged violation is that the front end loader is used in a high dust environment. Therefore it is not uncommon to spread mud on the windshield when wiper blades are used.

The bench decision noted that, as asserted by the respondent, there may be situations when a wiper blade is not effective. However, the absence of a wiper blade precludes using windshield wipers when they would be beneficial, particularly in heavy rain. **Accordingly, the bench decision affirmed Citation No. 4460045 but reduced the civil penalty from $55.00 to $35.00 based on a reduction in the respondent's negligence**.

G. Citation No. 4460046

Dement observed two V-belts on an air compressor that was located against a wall in a parts trailer near the plant office. At the time of Dement's observations, two men were working outside the trailer using the compressor to power equipment. Dement concluded a person could sustain serious injuries if he were to get entangled in the moving v-belt. Consequently, Dement issued Citation No. 4460046 citing an S&S violation of the mandatory guarding standard in section 56.14107(a).

At the hearing the respondent admitted the compressor belt was not guarded. However, the respondent asserted the only purpose served by the parts trailer was to house the compressor. The respondent further contended that personnel were not exposed to moving parts because the compressor could be turned on and off from outside the trailer.

The respondent's defense, in essence, is that the trailer housing the compressor served as perimeter guarding. However, perimeter guarding is not a substitute for site specific guarding of moving parts because once an individual enters inside the guarded perimeter he is exposed to the hazard of inadvertent contact. *See Moline Consumers Company*, 15 FMSHRC 1954, 1957-58 (September 1993) (ALJ). **Accordingly, Citation No. 4460046 is affirmed**. However, Dement did not rebut the facts proffered by the respondent that men rarely enter the trailer, and that the compressor can be turned on and off outside the trailer. Consequently, **Citation No. 4460046 is modified to a non-S&S citation** to reflect that it is unlikely that a serious injury will result as a consequence of the cited condition. **Therefore, a $55.00 civil penalty is imposed for this citation**.

H. Citation No. 4460050

During Dement's July 1998 inspection, Dement went down a set of steel steps located between the generator trailer and the plant. The steps were embedded in a sloping dirt bank. Upon stepping on the first step, the step came loose and the left side of the step raised in the air. As a result, Dement issued Citation No. 4460050 citing an alleged S&S violation of the provisions of section 56.11001, 30 C.F.R. § 56.11001, that require a safe means of access to all working places. Dement concluded the cited condition was attributable to the respondent's

moderate negligence. At the beginning of the hearing the Secretary moved to modify the citation to reflect a low level of negligence "because the steps broke or moved when the MSHA inspector stepped on them, and it was not readily apparent that the steps were damaged before that." (Tr. 25). Consequently, the Secretary lowered her proposed penalty for this citation to $111.00.

Consistent with the Secretary's modification, Dement candidly testified, "[the steps] were in place. They all looked alike. It could have broke [sic] when I stepped on it." (Tr. 148-49).

The bench decision noted that, although the Mine Act is a strict liability statute, a violative condition must pre-exist an inspector's observations. The Secretary carries the burden of establishing the fact of a violation. Here, Dement testified the violative condition may not have existed until he stepped on the step. Consequently, there was no maintenance obligation on the part of the respondent that would give rise to liability. Accordingly, **Citation No. 4460050 is vacated.**

I. Citation No. 4460047

Dement noted that the parts trailer containing the compressor that he cited for unguarded v-belts had two areas of missing floor, each measuring approximately three feet by three feet. One area was located on the left hand side of the entrance to the trailer, and the other area was located at the end of trailer at the rear of the compressor. Dement also felt the trailer floor giving way under his feet and concluded the floor could break away under a person causing serious leg injuries. Based on his observations, Dement issued Citation No. 4460047 citing an S&S violation of the safe access provisions of section 56.11001.

The respondent admits the missing areas of trailer flooring cited by Dement and the deteriorated condition of the remaining floor. In this regard, the respondent explained that the trailer floor had been damaged significantly as a result of flooding that occurred in 1993. However, the respondent relied on the fact that employees rarely go into the trailer in that the compressor can be operated from outside the trailer.

Citation No. 4460047 cites a violation of section 56.11001 that requires a mine operator to provide and maintain a safe means of access to all working places. Section 56.2, 30 C.F.R. § 56.2, of the regulations defines "working place" as "any place in or about a mine where work is being performed." An area can constitute a working place even if it is periodically accessed rather than accessed on a daily basis. Applying the Commission's controlling case on determining whether a condition is unsafe, it is clear that a reasonably prudent person, familiar with industry standards and the factual circumstances surrounding the condition and use of the trailer, would recognize the cited hazard required corrective action. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2129 (December 1982). Here, there is a need to periodically service the compressor. Given the admitted missing and deteriorated portions of trailer flooring, it is reasonably likely, in the context of continued mining operations, that someone entering the trailer will sustain serious injuries as a result of the unstable floor. Accordingly, the Secretary has

demonstrated that access to the trailer was unsafe. Consequently, **Citation No. 4460047 is affirmed, including the S&S designation, and the $122.00 civil penalty sought by the Secretary shall be imposed**.

J. Citation No. 4460048

During his July 1998 inspection, Dement informed foreman Ralph Carter of his desire to inspect the Caterpillar DW water wagon. Dement's contemporaneous notes reflect Carter stated the water wagon was operated only once or twice a month, and that the battery was dead. Carter also stated "the brakes need some work." (Tr. 183-84). Carter testified that the brake problem was caused by mud on the brake shoes that interfered with the shoes' contact with the brake drum. Carter testified the condition was routinely corrected by hitting the brake shoes with a wrench to dislodge the mud. He did this after the battery had been recharged.

Dement was unable to test the service brakes due to the discharged battery. Nevertheless, solely on the information provided by Carter, Dement issued Citation No. 4460048 alleging an S&S violation of section 56.14101(a) that requires a service brake to be capable of stopping and holding a vehicle on the maximum grade it travels. The Secretary has the burden of proving the alleged violation. Vehicles "needing brake work" can still perform adequately. While Carter's statement that "the brakes needed some work" is an admission entitled to evidentiary weight, I conclude, given the Secretary's burden of persuasion, that this statement, alone, in the absence of testing the vehicle, is insufficient to establish, by a preponderance of the evidence, that the service brake was ineffective to the extent contemplated by section 56.14101(a). Accordingly, **Citation No. 4460048 is vacated**.

K. Citation No. 4460051

Dement observed a self-cleaning tail pulley on the second -overs- conveyor was not guarded on the left hand side. The conveyor belt was not operating at the time of Dement's observations. Dement issued Citation No. 4460051 citing a non-S&S violation of the guarding standard in section 56.14107(a). Dement characterized the cited condition as non-S&S because he concluded "no one goes in the area when the belt is running." (Gov. Ex. 21).

The respondent introduced photographs illustrating that the area of the unguarded pulley essentially was under the steel belt support structure. (Resp. Exs. 22(a) and 22(b)). Moreover, the testimony reflects the cited area was in the inner perimeter of three belt structures. It was necessary to walk around to perimeter of these belt structures to approach the cited area on the other side. Dement testified the cited pulley was "10 to 12 feet, at least" from the area where people normally walk. (Tr. 196).

As previously noted, in *Thompson Brothers*, the Commission noted the guarding standard imports the concepts of reasonable possibility of contact and injury, including contact from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. Here, Dement has characterized the possibility of contact and injury as unlikely. The cited area is inside a belt structure more than 10 feet away from where people normally travel. In this regard, section 56.14107(b) exempts the guarding requirement for moving parts that are at least seven feet away from walking surfaces. Given the totality of circumstances, including the protection of the moving parts afforded by the belt structure, the location of the pulley inside the belt structure, and the absence of people traveling within 12 feet of the cited area, I conclude that the Secretary has failed to satisfy her burden of demonstrating a violation of the cited mandatory standard. Accordingly, **Citation No. 4460051 is vacated**.

L. Citation No. 4460052

Dement issued Citation No. 4460052 citing a violation of the guarding standard in section 56.14107(a) for three unguarded "V" belts on the 4 feet by 12 feet second screen. Dement noted in the citation that a walkway led up to the belt and pulleys. The belt was not operating at the time of Dement's inspection and Dement was informed that no one travels the walkway when the screen is running. Dement characterized the cited violation as non-S&S.

The respondent maintains the cited "V" belts did not have to be guarded because no one is on the structure when the screens are operating. In support of its position, the respondent presented testimony reflecting that the screen was accessed by a ladder placed at the other side of the screen. Based on the placement of the ladder, the respondent asserted the only way to approach these unguarded belts when they were in operation was to walk across the moving screen, which would be virtually impossible.

The bench decision noted that the reasons that provided the basis for vacating Citation No. 4460051 that concerned an unguarded tail pulley, *i.e.*, that it was located in an area where people do not normally travel, were absent in this instance. Unlike the circumstances in Citation No. 4460051, here the unguarded area is adjacent to a walkway. Given continuing mining operations, it is likely that personnel may be required to traverse the walkway to observe the screen in operation for maintenance purposes. The requirement to guard moving parts adjacent to walkways to prevent the hazard of inadvertent contact is the precise purpose of section 56.14107(a). Although exposure to such a hazard may be infrequent, as acknowledged by the non-S&S designation of the cited condition, an identifiable hazard still exists. Consequently, **Citation No. 4460052 is affirmed and the $55.00 civil penalty sought by the Secretary shall be imposed**.

M. Citation No. 4460053

Citation No. 4460053 was also issued for an alleged violation of the guarding provisions of section 56.14107(a). The citation concerns an inadequately guarded self cleaning tail pulley on the impactor belt. Dement characterized the cited condition as non-S&S in nature.

At the hearing the respondent presented credible testimony that the cited pulley guard is removed for cleaning the area around the pulley each time the belt is used. The respondent further testified that the guarding was inadequate to cover the entire pulley because the guard had been reinstalled incorrectly. The guard was installed lengthwise rather than in the direction of its width. Dement agreed that the guard may have been installed improperly, and he conceded that he may not have issued this citation if he had been aware that the guard had been installed incorrectly. (Tr. 227).

Notwithstanding the strict liability of the Mine Act, I have given the respondent the benefit of the doubt in this instance. Since the guard was adequate, although incorrectly, installed, **I am vacating Citation No. 4460053**.

N. Citation No. 4460055

Dement issued Citation No. 4460055 for a non-S&S violation of section 56.14132(a) because there was no audible back-up alarm on a red Chevrolet welding truck. The cited mandatory standard requires maintenance of existing audible warning devices. The respondent presented evidence that the cited vehicle was a 1970 model that was not equipped with a back-up alarm. It is undisputed that the truck carries a stationary welder on its truck bed directly behind the operator's cab that obstructs the operator's view. Consequently, at the hearing, to conform to the evidence, I permitted the Secretary to modify Citation No. 4460055 to cite a section 56.14132(b)(1) violation. This mandatory safety standard requires the installation of audible back-up alarms, even if not originally installed by the manufacturer, when the operator's view is obstructed.

The respondent contended an audible alarm was unnecessary because it could use a spotter. However, there is insufficient evidence to establish operation of this truck was limited only to situations when a spotter was present. The photograph of the cited vehicle reflects the operator's rear view was significantly obstructed by the welding equipment. Therefore, an audible warning device was required. (Gov. Ex. 29).

The abatement date for Citation No. 4460055 was July 23, 1997, two days after the issuance of the citation. Upon returning to the mine site on August 25, 1997, Dement determined the audible warning device had not been installed on the cited welding truck. Consequently,

Dement issued a 104(b) Order No. 4460128. The Secretary seeks to impose a total civil penalty of $281.00 for this non-S&S violation and 104(b) order in view of the respondent's failure to timely abate the citation.

Carter testified that he could not abate the citation by the July 23, 1997, deadline because he had to order the horn to retrofit the truck. The parts were delivered on August 18, 1997. Dement testified that an extension of the abatement period would have been granted upon the respondent's request.

There is no evidence that the respondent failed to timely abate the other cited violative conditions that are the subject of these proceedings. While, absent an extension request, the respondent's failure to timely abate cannot be excused entirely, the delay in obtaining parts is a mitigating circumstance. In view of the above, **Citation No. 4460055 and 104(b) Order No. 4460128 are affirmed**. **The delay in obtaining the necessary parts justifies the imposition of a reduction in civil penalty from $281.00 to $110.00**.

O. Citation No. 4460057

Dement testified that, with the exception of one piece of paper that did not specify particular dates, there was no evidence that on-shift examinations were being performed. Consequently, Dement issued Citation No. 4460057 citing an S&S violation of the on-shift requirements of section 56.18002(a), 30 C.F.R. § 56.18002(a), that requires at least one on-shift examination of each working place. Section 56.18002(b), 30 C.F.R. § 56.18002(b), requires a record of such examinations must be kept for at least one year, and that such examination records must be made available to mine inspectors upon request.

The respondent states the pit, the plant, and the stockpile areas of the mine facility are checked informally each shift. However, citing "a real paperwork burden," the respondent admits it does not keep formal records of such examinations. (Tr. 259).

In the absence of documentation of such examinations consisting of entries in an on-shift book that demonstrate hazard recognition and appropriate, timely action to correct hazardous conditions, there is inadequate evidence to support the respondent's claim that thorough on-shift examinations had occurred. The respondent's reliance on "paperwork burdens" for its failure to record on-shift examinations and remedial maintenance is rejected. The respondent's paperwork burden must be subordinate to its obligation to ensure safety. Recording on-shift examination results documents hazardous conditions and alerts the mine operator of the need for timely remedial action. Accordingly, **Citation No. 4460057 is affirmed**. Giving the respondent the benefit of the doubt that informal on-shift examinations did occur, **I will reduce the $161.00 penalty proposed by the Secretary to $100.00**.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 4454811, 4460047, 4460050 and 4460056, **ARE VACATED**. **IT IS FURTHER ORDERED** that Nelson Brothers Quarries Incorporated **pay a total civil penalty of $817.00** in satisfaction of the remaining citations and order in these proceedings.[1] Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, theses docket proceedings **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

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/mh

[1] The bench decision noted the total civil penalty imposed was $812.00. (Tr. 264). The $812.00 was based on the mistaken belief that the respondent had agreed to pay a $50.00 civil penalty for Citation No. 4460044. However, the transcript reveals the respondent agreed to pay the $55.00 civil penalty initially proposed by the Secretary for Citation No. 4460044. (Tr. 121-23). Consequently, the correct total civil penalty due and payable by the respondent in these matters is $817.00.