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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. LAKE 90-11-M  
A.C. No. 11-00136-05505

v.

Valley Plant No. 7

MOLINE CONSUMERS COMPANY,  
RESPONDENT

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor,  
U.S. Department of Labor, Chicago, Illinois, for  
the Petitioner;  
James R. Papenhausen, Safety Director, Moline  
Consumers Company, Moline, Illinois, for the  
Respondent.

Before: Judge Koutras

Statement of the Case

This is a civil penalty proceeding initiated by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). Petitioner seeks a civil penalty assessment in the amount of \$160 for an alleged violation of mandatory safety standard 30 C.F.R. 56.14107. The respondent filed a timely answer contesting the alleged violation, and a hearing was held in Moline, Illinois. The parties were given an opportunity to file posthearing briefs. The Petitioner opted not to file a brief, but the respondent filed a letter stating its position. I have considered this argument, as well as the arguments made by the parties during the hearing in my adjudication of this matter.

Issues

The issues presented in this proceeding are (1) whether the respondent violated the cited mandatory safety standard, and if so, (2) the appropriate civil penalty to be assessed pursuant to the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of this decision.

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Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 301, et seq
2. Sections 110(a) and 110(i) of the Act.
3. Commission Rules, 29 C.F.R. 2700.1, et seq.

Stipulations

The parties stipulated to the following (Exhibit ALJ-1):

1. The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings.
2. Respondent's operation affects interstate commerce.
3. The Valley Quarry does not ship out of Illinois.
4. Respondent owns and operates the Valley Plant No. 7.
5. The Valley Plant No. 7 extracts limestone which is crushed and broken.
6. Respondent worked 16,097 manhours from October 16, 1988 through October 16, 1989 at the Valley Plant No. 7.
7. Respondent worked 430,086 manhours from October 16, 1988 through October 16, 1989 at all of its mines.
8. Moline Consumers Company is a corporation.
9. Respondent had four violations in the preceding 24-months ending on October 16, 1989.
10. On June 21, 1989 an Inspector from the Federal Mine Safety and Health Administration conducted an inspection on the Valley Plant No. 7.
11. On June 21, 1989, Citation No. 3258150 was issued to respondent. (ALJ Exhibit 1-(A)).
12. On August 14, 1989, a section 104-b Order No. 3259254 was issued to respondent. (ALJ Exhibit 1-(B)).
13. A proposed assessment was issued to respondent on October 16, 1989. (ALJ Exhibit 1-(C)).
14. A proposed assessment of \$160 would not affect respondent's ability to continue in business.

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#### Discussion

Section 104(a) non-S&S Citation No. 3258150, June 21, 1989, cites an alleged violation of mandatory safety standard 30 C.F.R. 56.14107, and the cited condition or practice states as follows: "The 'V' belt drive that powers the primary crusher motor was not provided with a guard. The crusher was operating at the time of this observation."

The inspector fixed the abatement time as 8:00 a.m., June 26, 1989.

On August 14, 1989, section 104(b) withdrawal Order No. 3259254, was issued because of the alleged failure by the respondent to provide a guard for the cited belt drive in question within the time fixed for abatement. The order was terminated within 40 minutes after it was issued after the respondent provided a guard for the cited piece of equipment.

#### Petitioner's Testimony and Evidence

MSHA Inspector Jimmie L. Davis confirmed that he conducted an inspection at the respondent's mine on June 21, 1989, and after observing that the primary crusher V-belt drive was not guarded, he issued the contested citation. He explained that there was a gate at the crusher location, but it was partially opened and unlocked. He identified photographic exhibits P-1 through P-6 as the cited crusher in question. The lock was a key padlock, and the crusher was running and operating at the time of the inspection, and the crusher operator was in the crusher booth approximately 10 to 12 feet above the crusher location, as shown in exhibit P-3 (Tr. 9-11).

Mr. Davis stated that the citation was non-S&S, but that the unlocked gate presented a hazard in that "somebody could get in through the pinch point of the V-belt drive" (Tr. 11). He cited a violation of section 56.14107, because the guard was not in place and a person could come in contact with the pinch point. He confirmed that if he had found the gate locked with a padlock, rather than bolted shut, he would have still issued a citation because MSHA's policy, as explained to him, is that padlocks are not acceptable as guards. If the gate had been bolted, he would not issue a citation. If the guard were in place around the V-belt drive, and the gate were padlocked, he would not issue a violation (Tr. 13).

Mr. Davis explained that a bolted gate would be acceptable in lieu of a guard around the individual crusher components because a bolted gate provides a barrier or barricade preventing anyone from entering the crusher area. A bolt with a nut inserted into the gate to hold it together so that a wrench would be needed to remove it would be acceptable as a guard (Tr. 14).

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Mr. Davis stated that plant superintendent Jeff McGee, who accompanied him during the inspection, advised him that the crusher operator had the key to the padlock, but Mr. McGee could not explain why the gate was unlocked, and he surmised that the crusher operator had done some work greasing, oiling, or checking the crusher and failed to lock the gate (Tr. 15).

Mr. Davis stated that he based his gravity finding of "unlikely" on the fact that no one was in the crusher area at the time he observed the cited condition, but he believed that an injury would be "permanently disabling" if someone had come in contact with the pinch point. If this had occurred, "an arm could have been cut off or a leg. They would have been mangled up" (Tr. 16). One person would be exposed to the hazard while cleaning up or greasing in the crusher area (Tr. 16).

Mr. Davis stated that he based his "moderate" negligence finding on the fact that the crusher gate was the only gate on the property being used as a guard. All other moving machine parts at the site were properly guarded with guards in place at the individual pinch points, and in view of this, he believed that the respondent should have known that the crusher V-belt drive should have been guarded (Tr. 17).

On cross-examination, and in response to a hypothetical question, Mr. Davis confirmed that if he had a storage shed on his property, he would prefer to secure it with a padlock rather than a bolt because he would be the only person with a key, he could control access to the shed, and he would probably be the only person there (Tr. 19). He confirmed that in the normal course of business, no one other than the crusher operator would be expected to be close to crusher. He confirmed that he did not see the key and did not ask the crusher operator about it (Tr. 21).

Mr. Davis explained that the use of a bolt provides a barrier to the crusher area, and he conceded that any guarding device which is easier to remove and replace would more likely be replaced once it has been removed (Tr. 24). According to his training, one bolt would constitute a permanent barrier, as long as it is the proper size and length so that it can be used with a nut (Tr. 24).

Mr. Davis stated that even though the crusher operator was in his booth, it was possible for someone else to gain access to the crusher, and this would pose a hazard. Although he made no determination in this case that a supervisor would walk into the area to visit the crusher operator, he believed that a supervisor who is responsible for the safe operation of the crusher is supposed to check it, and he could visit the crusher area with the gate unlocked. If he were to travel inside the gate area,

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near the unguarded pinch point, he would be exposed to a hazard (Tr. 27). Mr. Davis confirmed that he interviewed the supervisor, but did not ask him if he ever walked into the crusher area while it was operating (Tr. 27). When asked whether he made any determination that anyone else would likely walk through the unlocked gate while the crusher operator was in his booth, Mr. Davis stated that the only person present was the loader operator, and if he had observed someone cleaning in the crusher area, he would have issued an "S&S" citation (Tr. 28).

Mr. Davis identified a ladder shown in some of the photographs, and he explained that it is used by the crusher operator to reach his booth. He stated that the ladder "goes by the place in question" (Tr. 28). He stated that a supervisor has a duty to conduct a walkaround inspection of the crusher area while it is operating, but that he would not have to walk inside the gate area to do this, and would not have to use the walkway into the crusher area if he were simply there to speak to the crusher operator (Tr. 29).

MSHA Inspector Robert Flowers, confirmed that he visited the site on August 14, 1989, to conduct a follow-up inspection with respect to the citation previously issued by Inspector Davis and that he was accompanied by Mr. McGee. Mr. Flowers stated that he found the crusher V-belt drive unguarded, but could not recall whether the gate in question was locked or open. He confirmed that he issued a section 104(b) order because the crusher V-belt drive had not been provided with a guard. Assuming the gate were locked with a pad lock, he would still have issued the order "because in our training and everything, we do not accept locked gates with a padlock as a guard" (Tr. 35). He would have accepted a bolted gate as a suitable guard because "the guide is that locked gates with a bolt become a permanent fixture" (Tr. 36). If there were no gate, and there was a proper guard over the belt drive, this would have been acceptable. The order was terminated after the superintendent installed a guard over the belt drive (Tr. 36).

Mr. Flowers stated that he informed Mr. McGee that MSHA does not accept padlocked gates as a guard and that the belt drive pinch point needed to be guarded with a guard. Mr. McGee then informed him that he had been instructed not to guard it and to simply post warning signs on the gate. Mr. Flowers confirmed that the signs were on the gate. Mr. McGee then called his supervisor, Mr. Marshall Guth, vice-president for operations, and Mr. Flowers spoke with him and explained MSHA's policy, and Mr. Guth instructed Mr. McGee to guard the pinch point. The guard was fabricated with two pieces of expanded metal and it was installed within 40 minutes. Mr. Flowers found it acceptable (Tr. 38).

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Mr. Flowers confirmed that in the event he returned to the site, and found a bolt through the gate, rather than a guard over the belt drive, he would find this acceptable as long as it was a proper bolt which required the use of wrenches to remove it (Tr. 39). Mr. Flowers confirmed that the crusher operator was in his booth at the time of his inspection (Tr. 40).

Mr. Flowers stated that in his experience as an inspector, employees who work on a crusher would generally inspect it to see that it is operating properly, and would perform maintenance work on it to replace missing belts or to check for leaks (Tr. 40). He confirmed that he has observed a primary crusher in operation, and that people will inspect it from time to time during the day while it is running. If an employee were to walk into the area of an unguarded belt drive he would be exposed to a hazard while inspecting the crusher during any daily work shift (Tr. 41).

On cross-examination, Mr. Flowers stated that he was standing on the walkway next to the gate, but did not consider himself to be in any danger because he did not enter the crusher area. Assuming that the gate were locked, he could not have accidentally contacted any of the crusher pinch points, and he would have to go to a great deal of effort, or climb over the gate, to reach any pinch points (Tr. 43). A superintendent or anyone else walking around the plant would also experience the same difficulty in reaching the pinch point area. However, if the gate were bolted, rather than padlocked, the amount of effort to reach the pinch point area would be different because the individual would have to obtain a wrench to remove the bolt, or he would have to obtain a key if it were padlocked. Mr. Flowers agreed that a guard would more likely be replaced if it can be replaced easily instead of with difficulty. He also agreed that there was no remote way anyone could accidentally contact the drive in question with the gate locked (Tr. 44).

When asked about the practical difference between the use of a bolt and a padlock, Mr. Flowers responded "it's that you have a quicker access to the area with a padlock and a key than you do with a bolt and nut on it. You can get in and out faster and quicker" (Tr. 46). In response to further questions, he stated as follows (Tr. 46-47):

JUDGE KOUTRAS: There is only one key and the operator has specific policies and safety rules and controls, limited access. Would that make any difference.

THE WITNESS: We still have accidents from this type of incident.

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JUDGE KOUTRAS: If there is only one key and only one man has access to it, he's up in his tower and the thing is padlocked, there is no way anybody can get in there. Is that right?

THE WITNESS: Should be.

JUDGE KOUTRAS: If a guy is up in the control tower and there is one bolt in it and somebody wanted to get in it, all they would have to do is take a wrench and open it up, and the fellow with the wrench can get into the area.

THE WITNESS: Yes.

JUDGE KOUTRAS: This theory about one bolt as opposed to a padlock, does that come from the notion that exposed pinch points and drives of this kind have to be permanently guarded? In other words, instead of guarding the particular "V" belt drive here, you take a larger guard, which is the size of a gate, and you put it out by that. You put a bolt in it, and that's sufficient. That provides a barrier from somebody getting in there. Is that the theory?

THE WITNESS: Yes.

JUDGE KOUTRAS: And a padlock is not that kind of a barrier then.

THE WITNESS: No.

JUDGE KOUTRAS: Is that policy written anywhere, this padlock versus --

THE WITNESS: No.

MSHA Supervisory Inspector Ralph D. Christensen, Peru field office, confirmed that he supervises Mr. Davis and Mr. Flowers, and is aware of the citation and order issued in this case. He stated that MSHA's policy is not to accept padlocks on gates as equipment guards. However, if the gate were bolted, it would be acceptable because "it becomes a barrier" (Tr. 51). He explained that a padlock is not acceptable because an operator can readily use a key and enter the area while a crusher is running, and that in his personal experience he has found numerous occasions where the locks are not locked. He stated that when he was hired as an inspector in 1978, he was informed by his supervisor during his orientation that a padlock is not an acceptable way of providing a guard for a pinch point. He confirmed that he has consulted with his district manager and with MSHA's chief of safety in



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Arlington, Virginia, and they confirmed that padlocks are absolutely not acceptable as a guarding device (Tr. 53). Mr. Christensen stated that if the gate were locked and the belt was not guarded "we would have issued a violation because our history shows that they leave the lock unlocked and people can enter into the area at any time" (Tr. 53).

Mr. Christensen explained the purpose of a bolt as follows (Tr. 54):

A. The bolt on a gate turns the gate and that fence area into a wall, a barrier that's not readily accessible for employees to walk in there while it's running. They have to work on it to get in there, perhaps like a mechanic going in to service equipment. They unbolt guards to get in that equipment, and we would view this then as unbolting to get into the equipment to maintain it.

Q. Are you assuming that the equipment would be shut down?

A. They're required to lock out before they go into the area to do maintenance work.

Q. In other words, by "lock out," the crusher would not be operating, right?

A. Right.

Mr. Christensen confirmed that in the event a bolted gate is used to guard equipment such as a V-belt drive, if the gate is unbolted, this would constitute a violation of the standard cited in this case (Tr. 55).

On cross-examination, Mr. Christensen confirmed that bolted guards are left off "all the time" and that people do leave them off notwithstanding any MSHA or operator policies requiring them to be replaced (Tr. 55). In his opinion, access to a particular area can be better controlled by the use of a bolt rather than a padlock because an employee with a key can gain access into the area any time while the drive is running, but a crusher operator would not have a wrench because his duty is to see to it that the crusher does not become plugged and that the material is flowing. Maintenance men would normally carry wrenches. He estimated that it would take 5 seconds to unlock a padlock with a key, and 10 to 15 seconds to remove a bolt with a wrench (Tr. 56). The use of a bolt would restrict access to a crusher operator who normally has no business in the area because a maintenance man would generally take care of the drive unit (Tr. 57).

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In the case of electrical lockout devices, Mr. Christensen stated that padlocks are used instead of bolts because the electrical boxes are designed for that purpose. If a box were designed for the use of a bolt, the use of the bolt would be illegal because anyone could remove the bolt at anytime and the person locking out the box with a bolt would not have control over anyone else removing it. By providing a lock, the person locking out the box has the only key and he is the only person in control (Tr. 58). A crusher operator with a key can unlock the gate and enter the area where the drive is running, and with a wrench, he could also enter the area, but it might take 10 seconds longer to do so (Tr. 58).

Oscar W. Ellis, respondent's president, testified that he has a degree in mining and engineering from the University of Arizona, and that he designed the primary crusher operation in 1980. He stated that the crusher platform is approximately 6 feet long and 16 feet wide, and he described the equipment located in that area (Tr. 62). He stated that the area was designed to provide adequate walking clearances and that it has a 2-foot wide walkway around the equipment to provide ready access to the equipment. He stated that "it would be stupid" for anyone to walk around that area with the crusher in operation because the pinch point would be dangerous, and he agreed that if someone were to circumvent the gate he could come in contact with a pinch point similar to a situation where an attached guard is removed from a particular pinch point (Tr. 64).

Mr. Ellis confirmed that he would expect the crusher operator to have a key to the padlocked gate in question, but he did not know who else would have one. He confirmed that a superintendent or maintenance personnel would not have a master key to all of the plant locks because many of the locks are not associated with master keys. He did not know whether extra keys to the gate in question would be available to anyone other than the crusher operator (Tr. 65). Mr. Ellis believed that the chances of someone being accidentally injured with the use of a padlocked gate or properly-designed guard over the pinch point "is virtually zero" (Tr. 65). He further believed that the possibility of any injury is greater by using a guard over the belt drive because such a guard would probably weigh 50 pounds and someone could twist their back lifting it if they were bent over and picked it up the wrong way (Tr. 66). He also believed that someone would more likely replace a guard which has been removed if its easier to do so (Tr. 67).

Mr. Ellis agreed that a bolt would be adequate, but he did not believe that it was as safe as using a lock. He alluded to equipment guards used in quarries which are provided with hinges and twist locks by the manufacturer to prevent access to the equipment. He agreed that if a bolt were taken off the gate, it would be the same as leaving a guard off, and that it would need

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to be replaced. He confirmed that the only time anyone would be in the area which was cited in this case would be for the purpose of performing maintenance work, but the crusher would not be running and it would be locked out. He confirmed that his company policy is to have the gate locked and there is very little need for maintenance in that area. The gates were part of the initial design of the crusher plant and they were installed before the plant went into operation (Tr. 69). He pointed out that he tries to interpret MSHA's regulations "as best we can" and that he tries to provide a solution which is both practical and safe to prevent accidents (Tr. 70).

Mr. Ellis stated that at the time Mr. Davis conducted his inspection he (Ellis) was unhappy that the gate was unlocked and that Mr. McGee was specifically instructed to make sure the gate was always locked in accordance with company policy (Tr. 71). At the time Mr. Flowers visited the site, the gate was locked and warning signs were posted to emphasize the point to anyone who might go into that area (Tr. 71). He was not certain when any discussion with Mr. Davis over the use of padlocks may have taken place, and he believed that he had complied with the law and should not have been cited by Mr. Flowers in August. He also did not believe that the use of a bolt rather than a lock made much sense because he would have better control over who would go in and out of the cited area by using a lock rather than a bolt (Tr. 72). He confirmed that he now understands MSHA's theory with respect to the use of a bolt, but believes that it is incorrect (Tr. 73). He pointed out that there are many hinged equipment guards in use in quarries which are held in place by twist locks and they are not bolted (Tr. 73).

Mr. Ellis stated that a supervisor or foreman is instructed to make a complete inspection of the mine every day, and that he would walk around the crusher area and talk to the crusher operator. He could walk up to the booth by using the ladder, but he would not step off onto the platform, but would go directly to the booth. He confirmed that Mr. McGee is also a mining engineer and is a good and knowledgeable superintendent and would not tolerate any unsafe conditions. Mr. Ellis did not dispute the fact that the gate was unlocked when Mr. Davis conducted his inspection, and he guessed that someone had gone into the area but was careless after leaving the area and did not lock the gate when he left (Tr. 75).

#### Respondent's Testimony and Evidence

James Papenhausen, respondent's safety director, testified that company policy requires that a particular piece of equipment be deenergized or locked out at its power source before any guard is removed so as to eliminate the chance of an accidental startup. He confirmed that the respondent has disciplinary measures, including discharge, in place which are used in the

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case of any employee violating company or federal policies regarding the removal of guards in areas where they may be working. He cited an example of an employee who was discharged for refusing to wear safety glasses (Tr. 78).

Mr. Papenhausen stated that prior to Mr. Flowers' inspection, the superintendent was instructed to lock the gate and the signs were put in place before that inspection. He confirmed that after that inspection, makeshift guards were installed to abate the citation, and approximately 3 days later after telephone conversations and an exchange of correspondence with Mr. Christensen, the guard was removed from the crusher belt drive after the respondent was advised that a gate would be acceptable to MSHA if the lock was removed and replaced with a bolt. He confirmed that this was done. He also confirmed that the respondent also installed bolts on similar gates which are used at all of its mine sites to avoid being continually cited for using padlocks. However, in addition to the bolts, the respondent also uses padlocks in keeping with its policy (Tr. 80). He confirmed that the signs are merely to remind employees that they are not allowed in the crusher areas in question (Tr. 81). Mr. Papenhausen pointed out, however, that the respondent operates mines in St. Louis, which are under the enforcement jurisdiction of another MSHA district, and in "exactly the same situation" as this case, and it uses padlocks rather than bolts. One mine has been in operation for 2 years, has had five or six MSHA inspections, and it has never been cited for using padlocks and the issue has never come up (Tr. 87-88).

Mr. Papenhausen stated that in no instance has the respondent ever guarded large plant areas with gates. The guards are always in close proximity to the crusher equipment and enclose a natural area immediately around the drive (Tr. 82). He made reference to MSHA's "guide for guarding" and pointed out that the respondent tries to take into consideration all of the guarding criteria in order to provide adequate guards (Tr. 82).

#### Findings and Conclusions

##### Fact of Violation

The respondent is charged with a violation of mandatory safety standard 56.14107, which provides as follows:

56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, fly-wheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

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(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

The facts in this case reflect that Inspector Davis cited the respondent with a violation of section 56.14107, on June 21, 1989, after observing that the belt drive which powered the primary crusher was not guarded while the crusher was in operation. Although the drive was not physically guarded at the drive location, the respondent had a well constructed gate in place at the entranceway of the platform area where the drive was located. The respondent's policy required that the gate be kept locked with a padlock at all times while the crusher and drive were in operation, but at the time of the inspection, the gate was unlocked and opened, allowing anyone to freely enter the unguarded crusher drive area.

Inspector Davis established June 26, 1989, as the abatement date for the violation. Inspector Flowers went to the mine on August 14, 1989, for a follow-up inspection, and after finding that the previously cited drive was not guarded, and that "no action was taken to correct the violation," he issued a section 104(b) order for non-compliance. The respondent's credible and unrebutted testimony establishes that the gate was locked with a padlock, and that the key was in the possession of the crusher operator who was in his control booth which was elevated above the crusher platform and physically separated from the platform by the locked gate. The violation was abated and terminated after the respondent promptly fabricated and installed a guard over the crusher drive. Several days later, and after further contacts with an MSHA supervisory inspector, the respondent was advised that it could continue to use the gate as a guarding device for the drive as long as the gate was secured by a bolt, rather than a padlock, and that this would suffice as a means of compliance with the standard. The respondent installed a bolt on the gate, but removed the guard which had been installed over the drive, and also posted signs. The respondent also continued to use a padlock on the gate, in addition to the bolt.

The respondent takes the position that the use of substantial gates with padlocks, coupled with a lockout procedure to guard and prevent injuries at its crusher drives, the posting of warning signs forbidding access to these areas, and severe disciplinary action against employees who violate its policy in this regard, is the most efficient and effective means for preventing accidents. Respondent suggests that in these circumstances, the use of padlocked gates as a means of guarding its crusher drives complies with the requirements of section 56.14107. The respondent also asserted that the drive areas are in no-ones work area or even in the path of anyone who would be travelling to the area to work, and that the equipment is locked out for inspections and maintenance.

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MSHA takes the position the cited crusher belt drive was not guarded at the time Inspector Davis conducted his inspection and issued the citation. Although the evidence in this case reflects that MSHA would accept a gate as compliance with the guarding requirements of section 56.14107, even though the particular equipment pinch point is not physically and individually guarded at its immediate location, MSHA's position is that the gate must be secured with a bolt and nut rather than a padlock.

In Yaple Creek Sand & Gravel, 11 FMSHRC 1471 (August 1989), Judge Morris found that a gate 4 to 5 feet from an unguarded chain drive assembly on a hopper feeder conveyor belt did not satisfy the guarding requirements of section 56.14001 (redesignated 56.14107). In Walker Stone Company, 12 FMSHRC 256 (February 1990), Judge Fauver found that a stop cord located over the unguarded portion of a conveyor belt tail pulley did not satisfy the guarding requirements of section 56.141001, and he observed that the standard does not provide for the use of a stop cord in lieu of guarding.

The evidence in this case establishes that the cited belt drive was not individually physically guarded at the time of the inspection, and the gate which served as guard was unlocked and opened, thereby allowing free access to the crusher belt drive area immediately inside the gate. The respondent has conceded that the cited belt drive was not guarded as required, and that the cited condition constituted a violation of section 56.141107. Under all of these circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

In its pleadings (answer), filed in this case, the respondent asserted that the use of a guard large enough to cover the particular drive in question would create a hazard every time it were removed and replaced because it would weigh several hundred pounds and was extremely bulky, and would subject employees to pushing and pulling injuries. The respondent also maintained that requiring such a guard would make repairs extremely time consuming in requiring additional people and equipment to simply remove the guard, therefore greatly increasing their exposure to any number of additional hazards associated with lifting heavy bulky objects. Mr. Ellis, who designed the crusher operation, confirmed that someone could twist their back while lifting the guard, but he estimated that a good substantial guard would weigh fifty (50) pounds.

In justifying the use of a padlock, the respondent relied on MSHA's Guide to Equipment Guarding, and it included selected and highlighted portions of this publication as part of its answer, and made reference to it in the course of the hearing. The highlighted publication language reads as follows:

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The installation and maintenance of machinery and machine guards are governing factors in controlling and preventing accidents and injuries. In devising protection against moving machinery and machine parts, the goal should be to make it as effective as possible. . . .

An effective machine guard should have certain characteristics in design and construction. Such a guard should:

1. Be considered a permanent part of the machine or equipment.
2. Afford maximum positive protection.
3. Prevent access to the danger zone during operation.
4. Be convenient; it must not interfere with efficient operation.
5. Be designed for the specific job and specific machine, with provisions made for oiling, inspecting, adjusting, and repairing machine parts.
6. Be durable and constructed strongly enough to resist normal wear.
7. Not present a hazard in itself. (Page 3).

It is recognized that a given situation--a hazardcreating motion or action--may frequently be guarded in a number of ways, several of which may be satisfactory. The selection of a guarding method to be used may depend upon a number of things--space limitations, production methods, size of stock, frequency of use, and still other factors may be important in making the final decision. Moving machine parts, nip points and pinch points must be guarded individually rather than restricting access to the areas by installing railings. It is not the intent of this guide to suggest which method of guarding is the best for a given situation, but rather to show that there are a number of ways to guard each different condition. This will be done by illustrating typical situations which may be guarded by a variety of methods. (Page 4).

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Remote areas protected by location need not be guarded. However, if work is performed at such location as shown in figure 5, the equipment must be deenergized and locked out and a temporary safe means of access (ladder) provided before any work is started. (Page 8).

MSHA's Program Policy Manual, Volume IV, pg. 55, July 1, 1988, contains no reference to the use of padlocked or bolted gates as a means of complying with the guarding requirements of former section 56.14001. However, the policy does state the following: "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."

Although the respondent's reliance on the information found in the aforementioned guarding guide may be considered in weighing the respondent's negligence and good faith compliance, I reject its reliance on this guide as an absolute defense to the violation. I have reviewed a complete copy of this publication, and I find absolutely no reference to the use of gates, padlocked or bolted, as an acceptable means of guarding or complying with the guarding standard in question. Indeed, some of the language found in this publication seemingly makes it clear that equipment and components thereof which present a hazard must be individually guarded by guards affixed to the particular piece of equipment rather than to the general area where the equipment may be located. See the last paragraph at page 3, which states ". . . it must be kept in mind that protective guards placed around the moving machinery should completely enclose the moving part and should be positioned so that the moving equipment or pinch point which presents a hazard cannot be reached." See also the fifth paragraph at page 4, which states "Moving machine parts, nip points and pinch points must be guarded individually rather than restricting access to the areas by installing railings." (Emphasis supplied).

I have some difficulty comprehending MSHA's theory that the use of a bolt and nut to secure a gate, as opposed to a padlock with a key, would make it more difficult for someone to gain access to a crusher area where an unguarded belt drive was located. It seems to me that the use of a padlock in a situation where there is only one available key which is in the possession of the crusher operator at all times, would limit access to the hazardous area to that one individual, and would preclude any unauthorized entry by anyone else. However, the use of a bolt and nut inserted through a hole drilled in the frame of the gate, would allow any number of people with an ordinary or household wrench, which I assume are readily available at rock quarries, to readily access the area if they are so inclined.



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In commenting on the permissible use of padlocks to secure or lock out electrical boxes, Inspector Christensen distinguished the use of those locks from a padlock used to secure a gate on the ground that an electrical box is specifically designed to accommodate the use of a lock, and the individual locking out the box always has control of the key, thereby excluding anyone else from opening the box. Mr. Christensen stated that it would be illegal to use a bolt to secure an electrical box, even if the box were specifically manufactured to accommodate a bolt. He reasoned that anyone could remove the bolt at anytime, and the person who initially locked out the box with a bolt would have no control over anyone who may remove it. Quite frankly, I fail to see the logic in the rather contradictory distinctions made by Mr. Christensen in the two scenarios presented.

The introductory statement found on the first page of MSHA's guide to guarding reflects that the information found therein is intended to assist industry, labor, and MSHA inspectors in obtaining uniformity throughout the mining industry. On the facts of this case, and notwithstanding the total lack of any references to the use of bolted gates as an acceptable means of guarding equipment, MSHA has apparently, in one district, accepted the use of gates, as long as they are secured by a bolt and nut, rather than a padlock. In order to achieve clear and unambiguous uniformity, I would respectfully suggest that there is need for MSHA to clarify and amend its policy and guide so as to insure even-handed enforcement among its various enforcement districts. Further, if MSHA believes that the use of a bolted gate is a recognized and acceptable means of guarding an equipment area, it should consider adopting and incorporating compliance criteria as part of its Part 56 regulations so that mine operators who are subject to civil penalty sanctions are fairly and uniformly put on notice of what is required of them for compliance. The disclosure of information clarifying the regulation will serve the goal of enforcement by encouraging knowledgeable and voluntary compliance with the law. See my comments in Massey Sand and Rock Company, 1 FMSHRC 545, 554-555 (June 18, 1979), Commission review denied, 1 FMSHRC (July 1979).

Although the respondent has not specifically raised an estoppel defense in this case, Mr. Papenhausen alluded to the fact that another MSHA enforcement district has not cited the respondent for securing gates used to guard equipment with padlocks rather than bolts. Although I believe that MSHA should be consistent in the interpretation and application of any mandatory standard, the fact that one district has opted not to cite the respondent under circumstances similar or identical to those presented in this case, may not serve as a defense to the violation issued in this case. See: Ferndale Ready Mix & Gravel, 6 FMSHRC 2154 (September 1984), and the cases cited at 6 FMSHRC 2159; J & R Coal Company, 3 FMSHRC 591 (1981); Burgess Mining and

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Construction Corporation, 3 FMSHRC 296 (1981); Price River Coal Company, 5 FMSHRC 1734 (1983).

The respondent's suggestion that the cited crusher drive was guarded by location is likewise rejected. I find no credible evidence to support any such conclusion. Although the location of the drive may be relevant to the question of gravity or negligence, it may not serve as a defense to the violation. The cited standard requires the guarding of moving machine parts that can cause injury. The evidence in this case clearly establishes that contact with a moving crusher drive would result in serious injuries. Although MSHA has not rebutted the respondent's credible testimony that the crusher is locked out before any maintenance work is performed in the area, and no one is usually in the area when the crusher is in operation, Mr. Ellis did not dispute the fact that the gate was open and unlocked when Inspector Davis conducted his inspection, and Mr. Ellis surmised that someone had entered the area but was careless after leaving and failed to lock the gate when he left. Inspector Davis testified that Mr. McGee told him that someone had probably done some work in the area greasing, oiling, or checking the crusher, but failed to lock the gate (Tr. 15).

Inspector Flowers, an inspector with 12 years of experience, including the inspection and observation of operating crushers, testified credibly that a supervisor generally will observe an operating crusher on a daily basis during each shift to ascertain that it is operating properly, and that if he were to walk into the area he would be exposed to a hazard if a belt drive were not guarded. Mr. Ellis conceded that if anyone opened the gate and walked into the area, he could get hurt if he contacted the unguarded drive (Tr. 64).

Although Inspector Davis failed to develop any evidence as to who may have been in the crusher area when he found the gate unlocked, and failed to ascertain whether any maintenance men or other personnel were in the area immediately prior to his inspection, Mr. Ellis confirmed that a supervisor or foreman is expected to make complete inspections of the plant each day, including a walkaround of the crusher area. Mr. Ellis also confirmed that the crusher platform area was specifically designed to provide walking clearances around the crusher equipment, and was provided with a designated walkway to provide ready access to the equipment. He conceded that anyone walking around in that area while the crusher was in operation would be exposed to the dangerous pinch points. Although Mr. Ellis believed that it would be stupid for anyone to be in the area with the crusher running, I believe that it could very well be that this "stupid" individual was the same "careless" individual who went into the area and left without locking the gate. Mr. Ellis conceded that Inspector Davis acted properly in citing a violation, and that

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the respondent violated the cited standard by leaving the gate unlocked (Tr. 31, 42).

Although the respondent has achieved compliance in this case by installing a bolt in the gate used to guard its crusher belt drive, it has gone one step further and continues to use a padlock as an additional means of securing the gate, and has posted warning signs on the gate. The belt drive itself continues to remain individually unguarded. It seems obvious to me from the record in this case that the respondent is not too enchanted with MSHA's view that a gate may be used, as long as it is bolted, but that padlocks are unacceptable. Under the circumstances, the respondent may wish to consider initiating a modification proceeding pursuant to section 101(c) of the Act, seeking a variance to continue its use of padlocks as a means of achieving compliance with section 56.14107.

#### History of Prior Violations

The parties stipulated that the respondent was issued four violations during the preceding 24-month period ending on October 16, 1989. The petitioner offered no further evidence with respect to the respondent's compliance record, and there is no evidence of any prior guarding citations. Under the circumstances, I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in this case.

#### Size of Business and Effect of Civil Penalty Assessment on the Respondent's Ability to Continue in Business

The record reflects that the respondent operates a limestone mining and crushing operation, and that it has nine employees at its Valley Plant No. 7, including a superintendent and a scale person (Tr. 76). I conclude and find that the respondent is a small operator. The parties stipulated that the payment of the proposed civil penalty assessment will not adversely affect the respondent's ability to continue in business.

#### Gravity

Inspector Davis' non-S&S finding was based on his conclusion that it was unlikely that anyone could have been injured at the time of the inspection because he observed no one in the crusher area other than the crusher operator who was in his control booth. Although it is true that anyone contacting the belt drive could be injured, the respondent's un rebutted evidence establishes that the crusher is deenergized and locked out when any work is performed in the area, that the gate leading to the crusher drive area is normally locked in accordance with company policy, and the key is normally kept in the operator's possession.

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Although the petitioner suggested that a supervisor or foreman may venture into the platform drive area where the crusher was located, Inspector Davis made no inquiries in this regard and developed no evidence to establish the likelihood of anyone being inside the gate area while the crusher was in operation. Further, I find no credible evidence to establish that anyone going and coming from the operator's crusher control booth by means of a ladder shown in the photographic exhibits would likely be inside the platform area where the crusher drive was located. Under all of these circumstances, I conclude and find that the violation was non-serious.

#### Negligence

Inspector Davis confirmed that he based his moderate negligence finding on the fact that with the exception of the gate which was used as a means of guarding the crusher belt drive, the respondent had guards installed over all of its remaining moving equipment at the pinch points. Although the respondent relied on MSHA's guarding guidelines in concluding that it could use a padlocked gate as a guarding device, as noted earlier, the guidelines made no mention of the use of padlocks, and they indicate that exposed moving equipment pinch points should be physically guarded individually. However, I believe that the respondent's negligence is mitigated by the fact that MSHA has accepted a bolted gate as a suitable guard, and I conclude and find that it was not totally unreasonable for the respondent to believe that padlocking the gate with a key which is normally kept in the possession of the crusher operation was sufficient compliance with the cited standard. However, since the gate was unlocked and open at the time of the inspection, I conclude and find that the respondent knew or should have known that the belt drive was unguarded. Under all of these circumstances, I conclude and find that the respondent's failure to exercise reasonable care to insure that the belt drive was guarded while the crusher was in operation constitutes ordinary negligence.

#### Good Faith Compliance

Inspector Davis confirmed that he fixed the abatement time of June 26, 1989. However, no testimony was forthcoming from the inspector with respect to whether he specifically made it clear to Mr. McGee that the use of a padlocked gate was unacceptable. Inspector Flowers testified that at the time he issued the order the pending office file contained no inspection field notes incident to Mr. Davis' prior inspection, and he simply relied on a copy of the citation which reflected that the drive motor was not guarded. Mr. Flowers confirmed that Mr. McGee told him that he was instructed not to guard the belt drive and to simply post warning signs on the gate, and Mr. Flowers confirmed that the signs were in fact posted.

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Mr. Ellis testified that after the citation was issued, Mr. McGee was instructed to insure that the gate was kept locked at all times in accordance with company policy. Mr. Ellis was unsure as to when Inspector Davis may have informed management that a lock on the gate would not suffice as compliance with the cited standard. Mr. Ellis explained that in his view, the failure to lock the gate at the time Mr. Davis conducted his inspection was "just like leaving the guard off" and he believed that compliance was achieved at the time Mr. Flowers inspected the site and issued the order because the gate was locked and signs were added to emphasize the point to anybody who might go into the area (Tr. 71). He also explained that when the respondent was told that a bolt would be better than a lock, it made no sense to him because he believed that better control could be achieved by the use of a lock rather than a bolt (Tr. 72). Mr. Ellis also considered the fact that various types of equipment are guarded by devices which are hinged and secured by twist locks provided by the manufacturers (Tr. 73).

The section 104(b) order issued by Inspector Flowers is not directly in issue in this case and there is no evidence or information of record as to whether or not the respondent filed any separate contest of that order within the required time period. However, the order is relevant to the proposed civil penalty assessment made by MSHA in this case since it seems obvious that MSHA took the order into consideration as part of its proposed civil penalty assessment, particularly with respect to the question of negligence and good faith compliance.

The evidence in this case establishes that the respondent abated the order within 40 minutes of its issuance and promptly installed a guard at the cited belt device. Within a few days, the respondent was allowed to remove the guard, and in lieu of an individual guard, was permitted to continue to use the then bolted gate as a means of guarding the belt drive. In addition to the bolted gate, the respondent continued to keep the gate padlocked and posted with warning signs.

Having viewed Mr. Ellis during the course of the hearing, he impressed me as a credible and responsible safety-conscious individual. On the facts of this case, and taking into account the aforementioned mitigating circumstances under which the respondent continued to use a padlocked gate as a means of guarding the cited belt drive, I conclude and find that the respondent ultimately achieved good faith compliance in correcting the cited condition.

#### Civil Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the civil penalty assessment criteria found

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in section 110(i) of the Act, I conclude and find that a civil penalty assessment of \$50 is reasonable and appropriate for the contested section 104(a) citation which I have affirmed in this case.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment of \$50 for section 104(a) Citation No. 3258150, June 21, 1989, 30 C.F.R. 56.14107. Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras  
Administrative Law Judge