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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 85-129-M
A.C. No. 41-03217-05505

WHITNEY SAND & GRAVEL
INCORPORATED,
RESPONDENT

Docket No. CENT 86-14-M
A.C. No. 41-03217-05506

Whitney Sand & Gravel
Incorporated

DECISIONS

Appearances: Allen Reid Tilson, Esq., Office of the
Solicitor, U.S. Department of Labor, Dallas,
Texas, for the Petitioner;
John E. Agnew, Esq., Carter, Jones, Magee,
Rudberg & Mayes, Dallas, Texas, for the
Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977. The petitioner seeks civil penalty assessments for three alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations, and one violation of the reporting requirements 30 C.F.R. 50.30(a).

The respondent filed timely answers to the petitioner's proposals, and a hearing was conducted in Dallas, Texas. The parties waived the filing of posthearing arguments or briefs, but I have considered any oral arguments made on the record.

Issues

The primary issue presented is whether or not the respondent violated the cited safety standards, and if so, the appropriate civil penalties which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act. Additional issues raised by the parties are discussed and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub.L. 95Ä164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Stipulations

The respondent agreed that its plant is a "mine" within the meaning of the Act, and it agreed that the plant and the company are subject to MSHA's enforcement jurisdiction, and to the jurisdiction of the Mine Safety and Health Review Commission.

Discussion

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Section 104(a) "S & S" Citation No. 2240701, February 14, 1985, cites an alleged violation of 30 C.F.R. 56.12025, and the condition or practice is stated as follows: "The wet process screening plant was not grounded in that there was no low impedance path back to the electrical source which supplies power to all plant drive motors. Employees are required to come in contact with the plant equipment during operation."

Section 104(a) "S & S" Citation No. 2240702, February 14, 1985, cites an alleged violation of 30 C.F.R. 56.12028, and the condition or practice is stated as follows: "Continuity and resistance of grounding systems test has not been performed at this plant."

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Section 104(a) "S & S" Citation and 107(a) imminent danger Order No. 2241058, August 15, 1985, cites an alleged violation of 30 C.F.R. 56.9003, and the condition or practice is stated as follows: "The AllisÄChalmers Loader, Co. # 514 was not provided with operable foot brakes that would stop the

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unit on level ground. Loader is used to load truck and perform clean-up in the plant area. Moderate foot and truck traffic is present in the working area."

Section 104(a) Citation No. 2241214, September 9, 1985, cites an alleged violation of 30 C.F.R. 50.30(a), and the condition or practice is described as follows: "The operator had failed to submit Form 7000-2 Quarterly Employment and Production Reports for the First and Second Quarters of FY 1985 as required."

Testimony and Evidence Adduced by the Petitioner

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MSHA Inspector Michael Sanders testified as to his background, training, and experience and he confirmed that he has been employed as an inspector since 1977. He confirmed that he conducted inspections at the respondent's plant on February 14, and August 11, 1985. He described the respondent's operation as a sand processing plant. He stated that sand is mined from an open pit by use of a drag line. The sand is loaded and processed through a series of conveyors and it is screened, washed, sized, and stockpiled for later transportation. The plant employs approximately seven to nine people and operates 5 or 5 1/2 days a week, and one daily 8-hour shift.

Mr. Sanders identified exhibits P-1 through P-6 as photographs of the plant and some of the equipment which he took a week or so prior to the hearing. He stated that the source for all electrical power for the plant is depicted in exhibit P-2, and that the electrical lines are routed to the electrical control center shown in exhibit P-1. This control center serves as the "electrical nerve center" for the electrical equipment such as conveyor drive motors, screens, shakers, and conveyor belts.

Mr. Sanders stated that all of the electrical boxes for the plant equipment are located in the control center shed. The plant was down at the time of his inspection, and he determined that the plant was not properly grounded by simply opening the electrical boxes and observing the absence of a ground wire providing a low impedance electrical path back to the electrical source. He did observe a properly grounded water pump which had recently been installed.

Mr. Sanders stated that none of the plant equipment or motors in question were battery operated, and he confirmed

that they were all operated from the electrical sources shown in the photographic exhibits. Mr. Sanders stated that he did not physically check each motor, and that his determination that the plant was not properly grounded could readily be observed by opening the electrical boxes and visually observing the lack of a low impedance ground wire.

Mr. Sanders stated that the plant and the equipment is primarily of steel construction and that it normally operates on 440 volts of power. He believed that the lack of proper grounding posed a hazard of electrical shock. In the event of an electrical short circuit in the plant wiring, there is a potential for "live circuits." In the event someone touched the equipment or otherwise contacted it, he could receive a shock. The lack of proper grounding, the presence of standing water, and the fact that the number 1 and 2 screens are always wet increased the potential shock hazards.

Mr. Sanders stated that the plant operator, as well as two or three other employees, would be exposed to the hazard of shock or electrocution. He also stated that when the plant was originally installed and wired, it was not wired correctly. He conceded that prior MSHA inspections did not result in any prior violations for the lack of proper grounding.

Mr. Sanders confirmed that the respondent did not originally install or wire the plant equipment, and it took over the operation of the plant from a previous owner in March, 1984. He also confirmed that it took him 15 to 30 minutes during his inspection to detect the violation, and that the respondent eventually corrected the condition by completely rewiring the plant and installing ground wires on all equipment and motors. This was a major project, but he did not know how much it cost to properly wire the plant.

Mr. Sanders stated that he issued Citation No. 22040701 because of the lack of proper grounding for the plant wiring. He used no testing devices to support the violation, and relied on his visual observations of the control boxes.

On cross-examination, Mr. Sanders stated that the "other equivalent protection" language provided for in section 56.12-25, could be the isolation of the electrical circuits. Although wire insulation provided a measure of protection, he did not believe that the use of such insulation in and of itself could serve as "equivalent protection."

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Mr. Sanders confirmed that there were no reported accidents concerning the lack of grounding, and he could not state why previous inspections did not result in the issuance of any violations for the condition. He also confirmed that the condition could have been abated earlier by the respondent, and that his abatement was made after he later visited the plant and found that the condition had been corrected.

Mr. Sanders stated that a ground fault interceptor circuit could serve as "equivalent protection," but that such an alternative was not installed or in use at the time he viewed the cited conditions.

Citation No. 2240702

Inspector Sanders testified that he issued the violation after determining that the respondent had not conducted any grounding tests for its plant electrical equipment as required by mandatory standard section 56.12-28. He stated that plant foreman Murphy had no knowledge that the test had been done and he could not produce the test records when asked.

Mr. Sanders stated that the hazards resulting from the failure to conduct the required tests are the same as those resulting from the previous violation No. 2240701. Had the test been conducted annually as required by the standard, the lack of proper grounding would have been detected.

Mr. Sanders stated that the violation was abated after the respondent retained a knowledgeable independent contractor to conduct the test, and after the records of the test were retained at the plant office. Mr. Sanders confirmed that he reviewed the test results and was satisfied that compliance had been achieved. He also confirmed that he left written instructions with foreman Murphy as to how to conduct the required ohm resistance test.

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Citation No. 2241058

Inspector Sanders testified that he issued the violation after finding inadequate foot brakes on an Allis-Chalmers front-end loader being operated at the plant. The loader was used to clean up and load materials, and other trucks were operating in the vicinity of the loader. Mr. Sanders stated that he asked the loader operator to drive the loader in a

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forward motion and to apply the foot-brake, and when he did, the loader would not stop.

Mr. Sanders believed that the inadequate brake condition presented a hazard to those employees on foot and to the other vehicles operating near the loader. He confirmed that there was one employee on foot near the loader, and that he and the foreman were also there. He also believed the loader was operated on ramps and elevated roads.

Mr. Sanders believed that the loader was removed from the property and replaced by a new one, and he confirmed that he issued a combination 104(a) citation and 107(a) imminent danger order in order to insure the removal of the loader from service.

On cross-examination, Mr. Sanders confirmed that plant foreman George Hart informed him of the inadequate brake condition on the loader prior to his inspection of the vehicle. He stated that Mr. Hart told him that he had limited the operation of the loader to level ground and that it could be stopped by use of the parking or hand brake. Mr. Hart also advised him that he had requested a mechanic to perform maintenance on the truck. Mr. Sanders stated that he observed the loader stopping and loading trucks (Tr. 7A77).

Citation No. 2241214

The respondent conceded and admitted that it failed to file the first and second quarter FY 1985 reports as required by mandatory reporting regulation 30 C.F.R. 50.30(a). Under the circumstances, the inspector who issued the violation was not called to testify (Tr. 79).

Respondent's Testimony and Evidence

Citation No. 2241214

Wayne Roberts, testified that he is employed by the respondent as its controller, and he confirmed that it was his responsibility to file the quarterly reports in question. He stated that he delegated this responsibility to one of his secretaries who was subsequently fired for not doing her job. He later learned that the secretary had not filed the reports, and the un-filed forms were found among her unfinished work on her desk. After he discovered that they had not been filed, he filed them immediately.

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Mr. Roberts stated that prior reports had always been timely filed and that the respondent has not been previously cited for failure to file the reports (Tr. 79Ä83).

Citation No. 2241058

George K. Hart, plant foreman, testified that he informed Inspector Sanders about the lack of adequate foot brakes on the front-end loader before he began his inspection. Mr. Hart stated that the brakes had "gone bad" 2Ädays prior to the inspection and that he had reported the condition to a mechanic who was supposed to repair them.

Mr. Hart stated that the loader operator was an experienced operator, and he instructed him to operate the loader on level ground and to restrict its operation to the stock pile area loading sand on the trucks. Mr. Hart stated further that the loader was the only one available at the plant and that its use with inadequate foot brakes was only a temporary measure. There was no foot traffic in the area where the loader was operated, and Mr. Hart estimated that it operated at a speed of 1 or 2 miles an hour. He stated that the loader could be stopped by means of the hand brake or parking brake, and that during the time it was operated with inadequate foot brakes, no harm or damage was done.

Mr. Hart stated that he told Inspector Sanders about the condition of the loader so that he would know that the loader was needed to be used until a replacement loader was received. A replacement loader had been ordered and it arrived a day or two after the citation was issued.

On cross-examination, Mr. Hart stated that the loader was fueled once a day at the end of the shift. He also believed that oil would be added at least once a day. The fueling and oiling took place at the storage shack area, and he indicated that the loader would be driven around the sand stock pile areas and not on the main plant road. He also indicated that the loader operator would park the loader approximately 30 minutes before the other plant employees ended their shift, and he denied that anyone on foot was exposed to any hazard.

Mr. Hart stated that the loader operator and other employees were notified about the condition of the loader, and he believed that it could be safely operated under the controlled circumstances under which it was operated (Tr. 84Ä104).

J.R. Marriot, respondent's operating officer, testified that he first became aware of the brake condition on the front-end loader on the day after the inspection. Had it been brought to his attention earlier, both the machine and plant would have been shut down because only one loader was available. He stated that the respondent was in the process of ordering a new loader, and that the maintenance operation and mechanic who worked on the equipment were located in Dallas. The mechanic had to travel to the plant site to perform maintenance, and Mr. Marriot did not know whether the mechanic had been informed about the conditions of the brakes (Tr. 105, 107). He stated that it is not company policy to operate equipment without operable foot brakes because "it's against the law" and "a danger to everyone" (Tr. 106, 107).

Mr. Marriot stated that the electrical wiring system for the plant has been in place since approximately 1983, when he purchased the operation from S & S Sand and Gravel. He stated further that he has experienced no problems with the system, but that after the grounding citation was issued substantial work was performed to install ground wires at an approximate cost of \$4,000 to \$5,000, and compliance was achieved within the next month of the issuance of the citation (Tr. 109).

Mr. Marriot stated that he has instituted procedures for making employees aware of MSHA's compliance requirements, and that he issues internal citations to employees who violate safety regulations. After three citations, an employee is subject to discharge. He also stated that he has begun a system of personal inspection of the operation to insure that all safety regulations are complied with (Tr. 109-110).

In response to further questions, Mr. Marriot stated that there were problems with the loader in question and that the new loader was ordered because of these problems (Tr. 111).

Inspector Sanders was recalled as the Court's witness, and he testified that he had no reason to question Mr. Hart's assertions that he was aware of the loader brake condition and had instructed the operator to use it under "controlled conditions." Mr. Sanders conceded that he was aware of this when he issued the citation (Tr. 114). He confirmed that at the time of his inspection he did not speak with the loader operator, nor did he determine how much vehicular traffic was in the area where the loader was operating (Tr. 115).

Mr. Sanders stated that he considered the loader citation to be "S & S" because the brakes were inoperable and it

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was the only loader available. In the event of an emergency situation where the loader would be needed in other areas of the plant, he believed that there would have been no hesitancy by the respondent to use the loader in those other areas. He also believed that had he not been there on an inspection, the loader would have been used with faulty brakes until the new one was placed in service (Tr. 116Ä117).

Findings and Conclusions

Docket No. CENT 85Ä129ÄM

Citation Nos. 2240701 and 2240702 - Fact of Violation

The respondent conceded that the plant was not grounded in accordance with the requirements stated in mandatory standard 30 C.F.R. 56.12025 (Tr. 125). Although the respondent suggested that the insulation on the plant wiring provided an "alternative" means of compliance and provided an equivalent means of protection, no credible testimony or evidence was produced to establish this as a defense. Accordingly, this argument is rejected.

Mandatory standard 30 C.F.R. 56.12025, requires that all metal enclosed or encased electrical circuits be grounded or provided with equivalent protection. In this case, the evidence established that the cited drive motors in question were not grounded in accordance with MSHA's requirements pursuant to section 56.12025, nor is there any credible evidence that equivalent protection was provided. Accordingly, I conclude and find that the petitioner has established a violation by a preponderance of the evidence, and Citation No. 2240701 IS AFFIRMED.

Mandatory standard 30 C.F.R. 56.12028, requires that the electrical grounding system in question be tested immediately after installation, and annually thereafter. Inspector Sanders testified that he issued the citation after finding no evidence that the system had ever been tested. The plant foreman had no knowledge as to whether any of the required tests had ever been made, and the respondent produced no records to establish that any tests had ever been made. While it is true that the system was in place when the respondent acquired the plant from the previous owner in 1983, there is no evidence that it ever conducted any annual tests subsequent to that time as required by the standard. Under the circumstances, I conclude that a violation has been established, and Citation No. 2240702, IS AFFIRMED.

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Docket No. CENT 86Ä14ÄM

Citation No. 2241214 - Fact of Violation

The respondent conceded and admitted that it failed to file the reports required by 30 C.F.R. 50.30(a) (Tr. 79). I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2241058 - Fact of Violation

The respondent conceded that the cited loader was operated with inadequate foot brakes (Tr. 119), and the evidence establishes that the respondent was aware of the fact that the foot brakes were inoperable. The respondent's defense is that the loader was only operating in a "controlled environment," and that a new loader was on order to replace the one that was cited. Respondent also asserted that a mechanic was scheduled to repair the cited loader the day after the citation was issued, but did not appear (Tr. 118).

Mandatory standard 30 C.F.R. 56.9003, requires that all powered mobile equipment be provided with adequate brakes. The evidence in this case established that the foot brakes on the cited loader would not stop the machine when tested on level ground. I conclude and find that the brakes were not adequate and that the petitioner has established a violation by a preponderance of the credible testimony and evidence adduced at the hearing. Accordingly, the violation IS AFFIRMED.

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

The record establishes that the respondent is a small mine operator employing approximately seven to nine people in the operation of a sand processing plant. I conclude and find that the civil penalties assessed by me for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Exhibits GÄ8, are two computer print-outs reflecting the respondent's prior compliance record for the periods August 15, 1983 through August 14, 1985, and February 14, 1983 through February 13, 1985. The citations listed on the second print-out are also included on the first one. Accordingly, I have considered only the first listing which

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reflects that the respondent was served with 26 section 104(a) citations and two section 107(a) orders. Two of the citations listed (2240701 and 2240702) are the subject of the instant proceedings. The print-out reflects that the respondent has been assessed civil penalties in the amount of \$4,589, for the listed violations, and that it has made civil penalty assessment payments in the amount of \$2,188 through August 14, 1985.

During the course of the hearing, Inspector Sanders stated that the respondent has been previously charged with "many more" violations for defective brakes on its equipment (Tr. 122). Mr. Sanders stated that it was his "recollection" that he issued two additional orders for defective brakes at the time of his inspection, but since he did not bring his file to the hearing, he could not substantiate this (Tr. 123). The print-out reflects two prior section 107(a) orders for violations of mandatory standard section 56.9003, for which the respondent paid \$1,200 in civil penalty assessments (\$600 for each order). Mr. Sanders believed that these prior violations concerned a different loader and a haul truck (Tr. 124).

I conclude and find that the respondent's overall compliance record is not such as to warrant any additional increases in the civil penalty assessments made by me in these proceedings. However, in view of the two prior imminent danger orders for inadequate brakes on its mobile equipment, I believe that the respondent needs to pay closer attention to its equipment maintenance program, particularly with respect to the brakes on its mobile equipment. I have taken these prior violations into account in assessing the civil penalty for the brake violation which has been affirmed in Docket No. CENT 86Ä14ÄM.

Good Faith Abatement

I conclude and find that all of the violations were subsequently abated in good faith by the respondent.

Gravity

I conclude and find that reporting violation (No. 2241214) was non-serious. I conclude and find that the grounding citation (No. 2240701) and the testing violation (No. 2240702) were both serious violations. Failure to ground the electrical circuits in question presented a shock hazard to mine personnel. Had the respondent conducted the required tests, there is a strong probability that it would have detected the lack of grounding and thus avoided the hazard.

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With regard to the inadequate brake violation (No. 2241058) I conclude and find that this was a serious violation. Even though the respondent may have instructed the loader operator to operate the machine on level ground and in an area where there was little foot or vehicular traffic, and the loader could be stopped by means of the hand brake or parking brake, the lack of inadequate foot brakes presented an accident and injury hazard. The loader had been operated with inadequate foot brakes for at least 2Ädays prior to the inspection.

Negligence

I conclude and find that the grounding, testing, and reporting violations all resulted from the respondent's failure to exercise reasonable care, and that this amounts to ordinary negligence.

With regard to the braking violation, the evidence establishes that the plant foreman was aware of the fact that the loader foot brakes were inadequate and that the machine was in operation with inadequate brakes for at least 2Ädays prior to the inspection. Under the circumstances, I conclude and find that the violation resulted from a high degree of negligence on the part of respondent bordering on gross negligence. However, in mitigation, I have considered the fact that the removal of the loader from operation would have effectively shut down this small operator's operation, that the hand brakes and parking brakes could stop the loader on level ground, and that the foreman instructed the loader operator to restrict the operation of the loader to an area with the least possible exposure to accident or injury and so advised the inspector at the time the violation was issued.

Significant and Substantial Violations

Inspector Sanders testified that the plant and equipment were constructed primarily of steel materials and that the plant operated on a 440 volt electrical system. He believed that the lack of proper grounding posed a hazard of electrical shock. In the event of a short circuit in the system, and in view of the wet plant conditions, someone contacting a "live circuit" resulting from a short in the system could be shocked or electrocuted. In addition, the record establishes that the plant wiring had been in place for some time without proper grounding or testing. Under the circumstances, I conclude and find that the testing and grounding conditions presented a reasonable likelihood of an accident or injury of a

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reasonably serious nature. Accordingly, I conclude and find that Inspector Sanders' "significant and substantial" findings with respect to Citation Nos. 2240701 and 2240702, are fully supported, and they ARE AFFIRMED.

With regard to the inadequate brakes violation, the record establishes that the loader was operated in that condition for at least 2 days prior to the inspection. Inspector Sanders believed that it would have been operated for a longer period of time had he not been at the mine for an inspection, and while he acknowledged that it may have been operated in a "controlled environment," he was concerned that it would have been operated until some unspecified time pending the arrival of a new one.

Although the respondent asserted that a new loader was on order, the fact is that its maintenance shop was in Dallas and the mechanic had to travel to the plant for maintenance. Respondent asserted that the loader was not repaired before the inspection because the mechanic did not show up as scheduled. Since the respondent had a new loader on order, I believe one can reasonably assume that it would not expend money for a brake job given the fact that a new one was on order. I believe that there is a strong inference in this case that the respondent intended to use the loader with inadequate foot brakes until the new one was placed in operation. Since the loader with inadequate brakes was the only one available at the plant, I further believe that the inspector's concern that it would have been used if necessary in areas outside the "controlled environment" was real and reasonable. Under the circumstances, I conclude and find that the inadequate brake condition constituted an accident and injury hazard, and had an accident occurred, I believe it is reasonably likely that disabling injuries would have resulted. Accordingly, the inspector's "S & S" finding with respect to Citation No. 2241058, IS AFFIRMED.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate and reasonable for the violations which have been affirmed.

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Citation No.	Date	30 C.F.R.Section	Assessment
2240701	2/14/85	56.12025	\$213
2240702	2/14/85	56.12028	\$213

Docket No. CENT 86Ä14ÄM

Order/ Citation No.	Date	30 C.F.R.Section	Assessment
2241058	8/15/85	56.9003	\$1,250
2241214	9/9/85	50.30(a)	\$ 20

ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings within thirty (30) days of the date of these decisions. Payment is to be made to MSHA, and upon the receipt of same, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge