FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1701
Telephone: (202) 434-9950
FAX: (202) 434-9949

October 25, 2013

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2011-257-M
Petitioner	:	A.C. No.: 37-00191-259515
	:	
v.	:	
	:	
J. SANTORO, INC.,	:	
Respondent	:	Mine: Wood River Pit

DECISION

Appearances: Gail E. Glick, Esq., U.S. Department of Labor, Office of the Solicitor, Boston, Massachusetts, for the Petitioner,

Ronald Gendron, Pro Se, Smithfield, Rhode Island, for the Respondent.

Before: Judge Koutras

STATEMENT OF THE CASE

This civil penalty proceeding pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 802, et Seq. (20000), hereinafter the "Mine Act", concerns nineteen (19) Section 104(a) non-significant and substantial (S & S) citations, and one "S & S" citation served on the respondent on April 14, 15, and 19, 2011, for alleged violations of mandatory safety and health standards found in Parts 46, 47, and 56, Title 30, Code of Federal Regulations. The civil penalty assessments proposed by the Secretary total $2,036, for all of the alleged violations.

A hearing was held in Providence, Rhode Island on May 29, 2013, and the parties appeared and participated fully therein. The parties were afforded an opportunity to file briefs. The Secretary filed a brief. However, although given an opportunity to file a brief (Tr. 5), the respondent opted not to do so (Tr. 229). I have considered all of the arguments of record in the course of this decision, including the respondent's arguments made in the course of the hearing (Tr. 201-224).

Stipulations

The respondent confirmed the receipt of all of the Secretary's hearing exhibits consisting of the citations, photographs, and field notes of the inspector who conducted the inspections that resulted in the issuance of the alleged violations, and except for "some photographs that are omitted" he agreed to the introduction of all these exhibits for the record (Tr. 6). Further, the respondent was afforded the opportunity to cross-examine the inspector in the course of the hearing, including pointing out any problems with any photographs.

DISCUSSION

MSHA Inspector Andrew Bower testified that he has served as an inspector for five years and two months inspecting metal, non-metal or non-coal surface and underground mines, typically rock quarries, and open pit mines. He confirmed that he inspected the respondent's Wood River Pit on April 14, 2011, met and interviewed Ron Gendron, Sr., confirmed jurisdiction and that the screen plant had been operated in February, 2011, and completed a legal mine ID (Tr. 9-11).

Inspector Bower described the Wood River Pit "Plant" operation as a sand and gravel mine with a gravel bank, a fixed plant and mobile equipment that produced three-quarter inch or three-quarter/three-eights mix, sand, and three-inch stone that is extracted for sale. He identified photograph Exhibit P-1, as the screening plant and confirmed that he took all of the relevant photographs in this case (Tr. 12).

Inspector Bower explained his reasons for issuing Citation No. 8647621, for the failure of the respondent to notify MSHA prior to commencing its plant operation as required by Section 56.1000 (Ex. P-1). He testified that he issued the citation because the plant had operated in February, 2011, and MSHA was not notified that operations had commenced. He stated that the notification requirement was an important requirement because it has been cited as a contributory factor to fatal accidents. He confirmed that he "reactivated" the mine ID number and treated the citation as an "administrative violation" (Tr. 30-31).

Inspector Bower testified that his conclusion that the plant had been operated in February, 2011, was based on the photographs depicting a roadway with visible wheel-loaded tire tracks up the feed approach roadway to the feed hopper for the screening plant as well as belt roller corrosion had been worn off because of the belt running over the rollers (photograph Ex. P-2, P-3, P-4); as well as the statement by Ron Gendron, Jr., that the plant had operated in February, 2011. (Tr. 17-20).

Inspector Bower stated that his field notes of April 14, 2011, reflect statements by Ron Gendron, Jr., that he operated the screening plant to produce 50 yards of material sold to the town

of Smithfield, Rhode Island, in February, 2011, and had "given a few loads to a guy across the street" (Ex. P-3). He confirmed that he had no reason not to believe the respondent's assertion that the plant had not operated from February to April, 2011 (Tr. 21). He reiterated that his field notes state that the respondent sold 50 yards of screened sand to the town of Smithfield, Rhode Island, and operated for six hours that day (Tr. 36). He could not confirm that with the exception of that sale, no sales were made from 2008 through August, 2011 (Tr. 34).

Inspector Bower stated that when he initially arrived at the plant on April 14, he asked about the status of the operation, including past and present operations, its availability for use, and whether it was locked out. He stated that the plant is operated "off street power", that a lock was installed on the disconnect but it was not locked out for the purpose of shutting it down for the season for maintenance (Tr. 15). He stated that when he met with Ron Gendron, Jr., the next day on April 15, he reviewed every violation and Mr. Gendron did not dispute or challenge his findings and agreed to take corrective action and confirmed that he corrected all of the cited conditions (Tr. 23).

Inspector Bower stated that the plant was available for use and that "it had operated in February under the violative conditions and was in service and ready and available for use" (Tr. 15). He confirmed that the plant was locked out and not in operation or producing product on April 14, 15, and 19, 2011, when he conducted his inspections (Tr. 15-16). He further confirmed that the plant operated under a separate mine ID number until 2003, when it was placed in an abandoned status, until he reactivated the ID number on April 14, 2011 (Tr. 27-29).

In the course of cross-examining the inspector, respondent took issue with the inspector's contention that the plant operated for six-hours in February, 2011, and pointed out that the inspector confirmed the loader did not operate when he was there. He disputed the inspector's notes that reflected another loader was used that day (Tr. 38).

The respondent asserted that he and his son were at the plant on one day in February for six hours, and he agreed with his son's statement that the plant was running for one hour trying to free the hopper from snow and ice from the feeder and that no sand or gravel material was processed through the plant because the ice at the base of the feeder and hopper could not be removed (Tr. 40).

Mr. Gendron, Sr., stated that it took three hours "to get the loader running", and that at 2:00 or 3:00 p.m. that day "went to the gravel in the back and took two loads of gravel back" and that "the plant did turn the conveyors but produced no material". He did not deny that "something was done that day" (Tr. 41-42). He further confirmed that he and his son admitted that something was done and were not attempting to hide anything (Tr. 43).

Mr. Gendron stated that the plant has been idle since 2011, and has not operated subsequent to the issuance of the citations in this case. In response to the Court's inquiry, Inspector Bower stated that he had no knowledge whether or not the plant has been abandoned or shut down and

that after his follow-up inspection in April, 2011, he had no further contact with that operation. He confirmed that none of the violations in this case involved any accidents or injuries (Tr. 44). The record reflects that the respondent was afforded an opportunity to present evidence and inquire about each of the remaining citations (Tr. 63).

Citations 8647622 and 8647628 concern alleged violations of Section 56.9300(b), requiring berms to be maintained at least mid-axle height of the largest self-propelled mobile equipment usually traveling the roadway (Ex. P-4, P-5 citations and photographs). Inspector Bower testified that he measured the heights of the existing berms and found that they were deficient in height with respect to the height of the Michigan 17A-A wheel loader. The height of the berms were described as ranging as high as 24 inches, at the locations described on the face of the citations, and he measured the mid-axle height of the loader as 32 inches.

Inspector Bower concluded that the height of the berms exposed the loader operator to an overtravel/overturn hazard, and he described the conditions that he observed and recorded in his notes for both violations, including, his non - S & S, unlikely gravity, and moderate negligence findings (Tr. 58 - 66). The respondent opted not to question the inspector with respect to the berm violations (Tr. 66).

Citations 8647626 and 8647627 concern alleged violations of Section 56.14112(b), requiring guards to be securely in place while machinery is being operated (Ex. P-6, P-7). With respect to Citation 8647626, inspector Bower testified that the guard for the self cleaning conveyor tail pulley was missing and not maintained in its proper position. The citation states that it was removed for cleanup purposes and placed on a nearby concrete block.

Inspector Bower testified that the respondent informed him that the conveyor ran without the guard in place because of the accumulated snow (Tr. 71). Mr. Bower stated that the missing guard posed an accidental contact hazard with the rotating tail pulley fin and belt that was readily accessible (Tr. 72 - 73). He determined the violation was non - S & S, the gravity as unlikely, and moderate negligence.

With respect to Citation 8647627, Mr. Bower stated that he found unguarded gaps of 18 x 24 inches on the left side of the cited conveyor, and gaps of 6 x 20 inches on the right side. He stated that the guards had been removed and posed a hazard of an accidental contact with the rotating tail pulley that was elevated eight inches above ground level.

Inspector Bower identified the individual in the photograph (Ex. P-7) as Mr. Gendron, Sr., and speculated that he was cleaning out the snow. He stated that his notes reflect that Mr. Gendron told him the guard was removed in February, 2011, to remove snow and that the plant ran with the guard off. He further stated that Mr. Gendron informed him that he planned to reinstall the guard after clearing out the snow and that he did so (Tr. 76 - 77).

Citation 8647633 concerns an alleged violation of Section 56.14107(a), requiring the

guarding of machine parts to protect persons from contacting moving machine parts that can cause injury (Ex. P-8). Inspector Bower testified that he found an unguarded V-belt drive assembly on a garage shop air compressor with an exposed belt and pulley system and motor and drive shafts. The hazard concerned a pinch point between the compressor belt and drive sheave as shown by an arrow on the associated photograph (Ex. P-8). While there was limited use of the adjacent travelway, it was unlikely that anyone would be in the area, but the rear of the compressor at the pinch point would be accessible from the front of the compressor, and if someone were to stumble or fall they could reach out and contact the belt (Tr. 78 - 81).

Inspector Bower determined that the violation was non - S & S, that any injury was unlikely, and resulted from moderate negligence. Although he indicated that any injury would be permanently disabling, this was only possible if anyone contacted the unguarded pinch-point (Tr. 82 - 83). The respondent opted not to question the inspector concerning Citations 8647626 and 8647627 (Tr. 77). However, he questioned the inspector, and explained the air hoses related to the cited compressor pinch point associated with Citation 8647633, but did not further question the inspector (Tr. 79).

Citation 8647636, concerns an alleged violation of Section 56.12004, requiring electrical conductors to be of a sufficient size and current carrying capacity to insure that a rise in temperature resulting from normal operations will not damage the insulating materials, and the protection of conductors from exposure to mechanical damage, (Ex. P-11).

Inspector Bower testified that two bushings that were installed to hold the 480 volt power cable for the junction box on the frame of the sand stacker were broken and the conduit was pulled away exposing the inner power feed wires between the box and the conduct on the top and left side. He also found that the upper bushing hole was not sealed to prevent water and dust entering the box, and water was coming out of the box (Tr. 97-99).

Inspector Bower stated that the last sentence of Section 56.12004, requires that electrical conductors exposed mechanical damage be protected. He confirmed that he relied on that sentence in issuing the citation because the damaged bushings did not afford protection for the inner insulated power feed wires because the broken bushings were apparently subjected to some mechanical damage (Tr. 97-100). He believed the damaged bushings presented a potential electrocution hazard (Tr. 101). He determined that the violation was non - S & S, with unlikely injuries and resulted from moderate negligence (Ex. P-11).

The respondent questioned the need for a conduit on the conveyor and stated that the wire is heavy duty and that he installed the conduit because "he was a safety nut" and the conveyor is insulated (Tr. 100). He had no further questions for the inspector (Tr. 101).

Citation No. 8647642 concerns an alleged violation of Section 56.12028, requiring an operator to conduct annual electrical continuity and resistance testing of its grounding systems and to make available a record of the most recent testing on a request by the Secretary's authorized

representative (Ex. P-12).

Inspector Bower stated that he issued this citation because the respondent could not produce a record of a recent grounding system continuity test and that his notes reflected that he was informed that no test had been made for three or four years. His notes further reflect a notation that the respondent did not address this issue because "the plant is used on an intermittent basis, ran one day in February, very little usage except this year if at all", and that the ground rods were in place (Tr. 104).

Inspector Bower stated that the plant, as well as a nearby service garage, operated from "street power" and that the operational equipment was powered by 480 volt and 110 volt electrical circuits. He stated that testing was required to insure that all electrical systems are operating properly in the event of a ground fault condition that may result in a potential fatal electrocution hazard (Tr. 103-106). He determined that the violation was non - S & S, with unlikely injuries, and resulted from moderate negligence (Ex. P-12).

The respondent questioned the inspector with respect to this citation (Tr. 107-110). The inspector confirmed that the pit location had at least three electrical services. The respondent asserted that it purchased its own testing equipment and that he and his son were trained by an MSHA inspector to use the equipment for testing at his Smithfield, Rhode Island, location, and records are kept there (Tr. 107-108). Inspector Bower confirmed that he could not recall that he was shown the testing equipment at that location (Tr. 108).

The respondent agreed that its wood river pit operations utilizing a 440 volt electrical service was susceptible to a ground fault and that he would perform testing and record the results if the plant was in operation. The respondent conceded that no tests were performed on the one day in February, 2011, when he was "trying to produce sand" for the city of Smithfield because the plant was not used that day. The respondent further conceded that the plant was available for use that day and he could not produce any record of testing for the inspector (Tr. 109-111).

Citations 8647637 and 8647638 concern alleged violations of Section 56.11001, requiring an operator to provide and maintain a safe means of access to all working places (Ex. P-13, P-14). With respect to Citation 8647637, Inspector Bower testified that a fixed vertical ladder providing access to the screen plant elevated walkway was directly over a sloped ground area consisting of unconsolidated gravel material that did not provide a level surface beneath the ladder. He was concerned that someone could slip or fall while attempting to access the ladder (Tr. 112-113).

Inspector Bower confirmed that he reviewed the citation with the respondent, but his notes do not reflect that they discussed the ladder accessibility issue and do not reflect that it was accessed in February, 2011 (Tr. 114). He explained that even if any personal exposure was once during the year the plant was in operation for one day, "that one time is too much without taking corrective action" (Tr. 114).

Inspector Bower agreed that the ladder was sufficient in terms of "stability", but not sufficient to provide safe access (Tr. 116). However, he explained that in order to access the ladder, someone would be standing on sloped hazardous loose materials below the ladder that did not provide a level base for access from the sloped ground (Tr. 120-121). Anyone accessing the ladder from the front or side could slip or slide while attempting to access the ladder or stepping off onto the slope that was on an approximate angle of thirty degrees (Tr. 123-124). He agreed that it was possible that the sloped area was the result of sand that may have accumulated after ten years of inactivity in an area that was not used during that time (Tr. 115).

In its defense to this citation, the respondent stated that he completely removed the ladder and replaced it without another one, welded a piece across that location and installed steps to the left of the conveyor for a safe access (Tr. 124).

With regard to Citation 8647638, Inspector Bower stated that he found that similar sloping ground conditions did not provide safe access to a ground-level electrical disconnect box adjacent to the screen plant in front of the steep drop-off consisting of unconsolidated gravel materials (Tr. 126). The disconnect switch would be used to energize or de-energize the screen plant. Although the sloping ground was not as severe as the ladder citation slope, it did constitute a slipping hazard (Tr. 127). He confirmed that fill was added to the slope and a chair railing was painted a conspicuous color (Tr. 129).

The respondent questioned the inspector about several plant locations that housed power disconnecting devices for locking out the entire property, including the garage and generator building. The respondent stated the cited disconnect device was totally disabled. The inspector could not recall that the respondent informed him that it was not functional. He stated it was not locked out and had no warning tag (Tr. 130-135).

The inspector determined that Citation 8647637 was significant and substantial (S & S) with a reasonably likely injury, and the result of moderate negligence (Tr. P-13). He determined that Citation 8647638 was non-S & S, with unlikely injury, and the result of moderate negligence.

Citation 8647641, 8647635, and 8647630 (Ex. P-15, P-16, P-17) concern alleged violations of Section 56.18002(a), requiring a competent person designated by an operator to examine each working place at least once a shift for conditions which may adversely affect safety (8647641); Section 46.3(b)(1) through (b)(5), requiring the development and implementation of a written MSHA approved training plan for surface sand, gravel, and stone mine operations; and Section 47.31(a) requiring the implementation and maintenance of a written HazCom written program.

With respect to Citation 8647641, Inspector Bower stated that he based his determination that the required pre-shift examinations were not made was based on the fact that he issued thirteen citations during his inspection on April 14, 2011, and concluded that the violative conditions could have been discovered with a complete and thorough workplace examination that he believed was ineffective and inadequate because of the number of cited violations, as well as the severity of the

hazards. He conceded that such a determination is an inspector's "judgment call" and that he did not consider the last sentence of the cited Section 56.18002(a), stating "the operator shall promptly initiate appropriate action to correct such conditions" (Tr. 136-137).

Inspector Bower confirmed the operator's requirement to note the examinations when they are done and in reply to a question concerning the existence of a pre-shift book, he stated as follows at (Tr. 140):

> THE WITNESS: There was in my notes. I think it was in a journal or something. I would have to look through my notes. But I think something may have been documented. I'd have to look through.
>
> THE COURT: May have been. Did you look?
>
> THE WITNESS: I always look for workplace exams. If I may look through my field notes?

Upon examination of his notes, Mr. Bower found no notation of any record of any workplace examination being made (Tr. 141). The Court notes that his inspection notes do not reflect that he asked for or reviewed any pre-shift examination books. His justifying notes that the operator (Ron Gendron, Jr.) conducts work place exams ("confirmed by doc 2010"), but that "his father (Ron Gendron, Sr.) does not follow 58.18002, . . . and mgmt did not spot check to insure they were being done properly. Got lax due to limited activity." (Ex P-15).

Inspector Bower conceded that none of the 13 citations alleging violations at the plant and garage were not further described or incorporated by reference (Tr. 141-142). He commented that "I do that diligently now. I didn't here." (Tr. 143). The respondent asked no questions and the Secretary's counsel asked no further questions (Tr. 147).

With respect to Citation 8647635, Inspector Bower stated that he issued the citation because the respondent had no training plan for the Wood River Pit, and he treated it as a record keeping violation of a low hazard level because Mr. Ron Gendron, Sr., did have current annual refresher training, and he was trained under the respondent's training plan for its Smithfield main plant mine ID number which had a training plan for that location and not the pit operation (Tr. 148). The inspector's notes states "the operator felt it was acceptable to MSHA to (sic) the plant/mine under the 37-00065 ID" (Ex P-16).

Inspector Bower testified that he issued Citation 8647630 because the respondent had no written HazCom plan, including the program contents pursuant to Section 47.32. He stated that hazardous chemical material and flammable and oxidizing compressed gases were present at the plant. His notes reflect that fuel, oil, grease, and compressed flammable and oxidizing gases were located in the garage (Tr. 150-152).

Inspector Bower stated that the respondent informed him that he was not aware of any hazard associated with the storage of an acetylene tank and if he had a HazCom program in effect he would have been aware of the fact that storing acetylene on the side causes acetylene to separate from the solvent and becomes highly unstable when used upright or on its side and could cause a fatal accident (Tr. 152-153).

The respondent questioned the inspector about the use of an acetylene tank and asserted that the acetylene cylinders were on the floor so they would not hurt anyone. He believed that since no one would go to the area, it would be safer to leave them on the floor then have them roll into someone. The respondent explained that any cylinder that is turned upright after laying on its side is not used for twelve hours. The inspector commented that two hours was sufficient to safely use the cylinder (Tr. 153-154).

In addition to the presence of acetylene tanks, the respondent confirmed that motor oil and greases were in the garage and agreed that they were chemicals and commented that "after 30 years, no one ever mentioned that you need a HazMat (sic) for a pail of grease and a pail of motor oil (Tr. 157).

Inspector Bower determined that citations 8647641 and 8647630 were non - S & S, with unlikely injuries, and that Citation 8647635 was non - S & S, with no likelihood of any injury and the result of low negligence (Ex. P-15, P-16, P-17).

Citations 8647631 and 8647632 concern an alleged violation of Section 56.4201(b), requiring the person inspecting the fire extinguishers to certify that an inspection had been made and the date on which it was made (8647631, Ex. P-18); and Section 56.13015(a), requiring compressed air receivers to be inspected by an inspector holding a National Board Commission pursuant to the inspection code followed by that organization (8647632, Ex. P-19).

Inspector Bower stated that he issued the fire extinguisher citation after finding three of them in the garage that had no attached service tag verifying that they had been inspected. Inspections are necessary to insure they are serviceable and have been maintained pursuant to the maintenance standard. The extinguisher pressure gauge reflected they were fully charged but their actual condition could not be determined without a service tag (Tr. 158-160).

Inspector Bower stated he issued the air tank receiver citation because it was an operable air tank that could be used for compressed air cleaning, inflating tires, spray painting "and a number of things". Although it was not used frequently, it was operable and energized (Tr. 161-162). He confirmed that he found no record of any inspection that is important in order to insure the tank was in a safe functional condition and met the code requirements. In the event of a tank rupture, personnel in the garage shop could be affected (Tr. 163). The respondent did not question the inspector. However, he confirmed that the inspector's inspection note stating "mine mgmt not aware of MSHA standard requirement" was true, and that he was not aware and had never conducted any such test. The inspector confirmed that the test was done and the citation was

terminated (Tr. 164). He determined that the citations were non - S & S with unlikely injuries and the result of low negligence (Ex. P-18, P-19).

Citation 8647629 concerns an alleged violation of Section 56.16005 requiring compressed liquid gas cylinders to be secured in a safe manner (Ex. P-20). Inspector Bower stated that he found a gas cylinder and an acetylene gas cylinder lying on their side in the middle of the garage floor. He considered this an unsafe storage method that posed a fall hazard as well as an exposure of physical damage to the cylinders as a result of not being secured. The garage is accessed by Ron Gendron, Sr., who secured the cylinders within an hour by securing them upright on a cart within an hour (Tr. 167-167). The inspector determined the violation was non - S & S, with unlikely injury, and the result of lower negligence (Ex. P-20).

Citation 8647639 concerns an alleged violation of Section 56.14100(b), requiring the timely correction of any equipment or machinery defects that affect safety in order to prevent the creation of a hazard to persons. Inspector Bower referred to three photographs that he took at the time of his inspection and described in detail the condition of the feed hopper, including the supporting steel structures and steel bracing materials (Ex. P-21).

Referring to the first photograph of the top of the feeder, Mr. Bower stated that the diagonal bracing for the four structural supports was either detached or severely damaged and bent out of shape, and there were corroded welds at the steel plates welded to the medical support columns. He believed these conditions may compromise the integrity of the structure and that any impact loading over time, given the damaged hopper bracing, presented the possibility the structure holding the chute would fall (Tr. 169-170). He identified the damaged angle iron bracing, one that was detached, and another that had broken off. Although there was some horizontal cross-bracing for the structure, he concluded that "the bracing for torsional strength is pretty much detached or severally damaged" (Tr. 171-172).

Inspector Bower confirmed that while the plant was a "one man operation", if the structure would fall, crushing injuries would result and the horizontal bracing needed to be fixed. He confirmed that it was (Tr. 172). His notes reflect that "bracing was reconnected and weld repairs were performed on the feed hopper support structure", and the defects were eliminated (Tr. 176).

The respondent questioned Inspector Bower and learned that he is a structural engineer with a degree in structures, mechanics, and materials (Tr. 172). Although the inspector initially believed the four hopper support beams embedded in concrete would support the hopper, he explained that he could not state with 100 percent certainty when the structure would fail or what would cause it to fail, and given the bracing conditions at the lower point of the hopper, he believed the integrity has been compromised because of the weight of the materials as it is dumped into the hopper (Tr. 172 - 173). He determined the violation was non - S & S with unlikely injury and moderate negligence (Ex. P-21). The respondent explained that the bottom braces were removed when the plant electricity was installed in order to get under the conveyor to shovel, and he did not believe the small 3 inch angle iron braces added anything to support the hopper (Tr.

176).

Citation 8647640 (Ex. P-22) aptly characterized by the Secretary's counsel as "the toilet in the woods" (Tr. 179) concerns an alleged violation of Section 56.20008(a), that states as follows:

> (a) Toilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel.

Inspector Bowers described the alleged violations as follows:

> The mine operator failed to provide toilet facilities at the mine property. There were no company or public toilet facilities immediately available, leaving personnel with no sanitary toilet facilities to use if needed. This condition increases the risk of adverse health effects. One worker is employed at the mine property.

Inspector Bower confirmed that he issued the citation because there is no toilet facilities at the mine property. He stated that he always asks an operator "is there something really close around the corner? And there wasn't anything available and simply doesn't meet the standard requirement" (Tr. 180).

Inspector Bower explained the hazard associated with the lack of toilet facilities as "urinary retention in some circumstances and defecation delay with some people". Although Mr. Gendron, Sr., was the only person at the pit, the inspector stated that "I wasn't talking specifically Mr. Gendron", and that it could happen to anyone whether its on the site or not (Tr. 180 - 181).

Inspector Bower confirmed that the respondent purchased a Porta-Potty and that it was acceptable, and considering the small operation, he may have checked its acceptability. He was not aware of any MSHA mine toilet policies. With respect to the meaning of the regulatory term "compatible", he believed it may refer to the number of employees at the site and the need for more than one toilet, the use of chemicals that may be hazardous, hand cleaning facilities, and more specifically providing enough toilets in relation to the size of the mine (Tr. 183 - 184).

The respondent explained that his practice was to use "the McDonald's around the corner and usually go there for breakfast and we go back to the pit". He stated the distance from McDonald's to the plant as "an eighth of a mile (Tr. 186), and not even a quarter of a mile" (Tr. 187). He stated his Smithfield operation probably had two toilets that were in compliance (Tr. 184 - 185).

In reply to a bench question regarding discretion on his part to allow the respondent to use the McDonald's facility, Inspector Bower replied as follows at (Tr. 186):

> THE WITNESS: There is discretion. If there's a – if there's – within a

quarter or half mile, they can take a short, either walk or ride to get to a bathroom, there's a gas station off the mine, that's fine.

MR. GENDRON: It's an eighth of a mile.

THE WITNESS: I asked, What's the closest facility? And actually, sometimes there are houses nearby, really, close enough, again, readily accessible to mine personnel.

Absolutely, there's discretion in that standard. There was no Porta-Potty. And it's my understanding that there was nothing reasonably accessible. And I usually look at about a – a judgment, a mile, a mile and a half, whatever, two miles, if it's that far away.

Robert Dow, Supervisory MSHA inspector, testified that he has been employed by MSHA since May, 1993, and has served as the supervisor of ten inspectors at the Manchester, New Hampshire, field office since June, 2007, and he explained his duties (Tr. 188-189). He stated that he became familiar with this case on April 14, when inspector Bower called him and informed him of the conditions that he found at the respondent's plant. After discussing jurisdiction, how long the plant had existed, when it had operated after 2003, when it had closed, and the fact that it had operated again. He agreed with the need to conduct a full inspection (Tr. 190).

Mr. Dow explained the procedures and availability of MSHA compliance assistance visits (CAV) that is "a courtesy" inspection conducted by an individual who is not an authorized inspector and who is assigned to MSHA's small mines office of the educational field service division. They are not authorized to issue citations that authorized inspectors are required to issue when they observe any violation. He confirmed that CAV inspections were made at the respondent's pit during 2001, but not since that time, and that any follow-up regular inspections are not CAV inspections (Tr. 191-193).

With respect to Citation 8647634 concerning the Murray fuse box (Ex. P-9), Mr. Dow reviewed the photograph of the panel and described the large openings on the face that would allow access to energized components that could possibly result in accidental contact with energized conductors and electrical injury (Tr. 94). He believed these conditions are covered by Section 56.12002, requiring electrical equipment to be of approved design and construction and properly installed, and he explained as follows at (Tr. 195):

This one, especially 634, in the photograph, that is basically – it looks like a modified breaker panel. Because usually we see these types of panel, they have the breaker switches. This large opening here is very unusual.

Also, to have the plug in – the screw-in fuses, we normally see

this type of panel with the switch-type breakers.

> This is a very unusual, to see an opening that large, it almost looks like that breaker panel has been altered at some point.

Mr. Dow confirmed that his opinion and conclusion that Section 56.12002, was properly cited is based on the fact that given the size of the panel box openings, it was not properly designed and installed, and if it was, the openings would not be as large as shown. He agreed that this is not explained on the citation form and that "it probably should have been a little more detailed (Tr. 193-194).

Mr. Dow stated that the cited fuze box "is actually part of the violation of the lower end, the smaller opening, getting in there you have the wires", and that the box is within the meaning of "electrical equipment" stated in Section 56.12002, "a broad statement covering a wide variety of electrical equipment" (Tr. 197). He believed inspector Bower focused on the large box openings and that "the installation process was not of a caliber to protect the miner" (Tr. 198).

With regard to Citation 8647643 (Ex. P-10) concerning the missing knockout plug from the top of the electrical disconnect box, Mr. Dow stated that inspector Bower probably looked at Section 56.12032, requiring equipment and junction boxes and cover plates be kept in place at all times, except during testing or repairs (Tr. 198). He did not believe that inspector Bower should have cited Section 56.12032, because the knockout hole opening would not be used for the purpose of looking inside, and was part of the structural part of the top section of the box and was therefore not properly constructed. He explained that the entire disconnect box is an electrical component with the disconnect lever arm on the right side and it used to shut down power. In his opinion, the entire disconnect box is a switch and he agreed that the condition or practice should have been expanded with more detail (Tr. 199-201). The respondent did not question Mr. Dow about the aforementioned citations (Ex. P-9, P-10).

The respondent asserted that no production takes place at the pit and he referred to photographs of the scale house that has been inoperative for over ten years (Tr. 203). Note: the photographs were not supplied or introduced as evidence during the hearing. However, the respondent mailed them to the Court and copies were provided to the Secretary's counsel by the Court and are part of the file, not the official trial record.

The responded stated that the plant has not been in production, and has had no pit sales, since April of 2011, when the citations were issued, as well as the earlier years beginning in 2001. He stated that when the pit was in operation, materials were processed and left the plant through the scale house and were delivered across to the concrete plant (Tr. 203-204). He explained that in 2003, MSHA Inspector John Newby came to the pit and met with him and his son who manages the company and informed them that he was "tired of visiting the property for nothing, . . . and you'd better close this place or start running it", and that "we explained to him, there's no market down there." The inspector then told him to close the plant (Tr. 205). Mr. Dow identified

inspector Newby as his former supervisor from MSHA's Springfield office and stated that he did not train him, had no daily contact with him, and had no knowledge as to what he may have discussed with the respondent (Tr. 203-204).

The respondent further stated that he agreed to do whatever inspector Newby required, including calling MSHA if he ran the plant, and to inform any inspector that came to his Springfield operation. The respondent stated he and his son kept their word and informed inspector Bower about the Wood River plant, even though he did not know about that operation (Tr. 206).

The respondent confirmed that he informed inspector Newby about his desire to go to the plant for an hour or two intermittently to service the conveyors, and that it did so for a couple of years once or twice every two or three months, and in February, 2011, when he took inspector Bower to the pit site and at 2:30 and they stayed until 5:30 or 6:00 p.m., when he finish his work. He commented that Mr. Bower was "diligent and competent" and that "I have no repercussions with Mr. Bower. He's doing his job". The respondent further commented "I feel the facility is being misjudged and we're just not there. I wish we were" (Tr. 207).

Mr. Dow stated that inspector Bower conducted his April 14, 2011, inspection based on information that the plant had operated "even though in a small form, and not for an extended period of time, exposure" (Tr. 210). The respondent replied "I have no argument" (Tr. 210), and that he did not intend to present anyone else to testify in this case (Tr. 226). He reiterated that all of the violations at the pit, as well as the Smithfield plant, were corrected within 24 hours and had nothing further to say (Tr. 221-222).

The respondent confirmed that while the pit is currently shut down, he may go there occasionally "to get some gravel" as he explained when he filled out an MSHA ID form. He further stated that he has had two MSHA mine ID numbers and cancelled an active number at the direction of the last inspector in connection with a 2013 inspection (Tr. 208).

Mr. Dow stated that an attempted E-28 inspection occurred on January 10, 2013, and that the respondent has a mine ID number. However, he stated "I believe it's been put into temporary idle" (Tr. 209). The respondent explained that when the inspector came to the pit at that time in 2013, he inquired why he was not at the site, and that he informed the inspector that "we never go there" (Tr. 209). This is consistent with the respondent's statements that an inspector went to the site two or three times in 2013, and found no one there and suggested that the pit be closed so "he would not have to keep come here for nothing" (Tr. 45).

The respondent alluded to two citations that were mailed to him by MSHA in 2012 and 2013. He stated that the inspector in 2012 checked the gravel bank and instructed him to remove two batteries that were on the ground and informed him he would have to issue a citation (Tr. 45). He produced a Section 104(a) non - S & S Citation No. 8712111, issued on January 10, 2013, by inspector David A. Levesque for an alleged violation of Section 56.1000, for failure to notify

MSHA's Manchester field office of the current status of the pit. The citation was terminated on February 5, 2013, after the respondent faxed a notice that the pit was open for sales. A copy of the notice states that the pit was engaged in "open-sales, processing "RAP" or loam only". (The citation issued to the pit reflects mine ID No. 37-00191, the same ID number reflected on all of the citations in this case.)

FINDINGS AND CONCLUSIONS

Jurisdiction

Throughout this proceeding the respondent has taken the position that its Wood River Pit was not subject to the Secretary's enforcement jurisdiction based on its arguments stated in its September 13, 2011, answer to the Secretary's civil penalty assessment petition. In that answer, the respondent argued that the Wood River Pit was closed for five years, had no sales during 2008 through 2010, as well as up to August of 2011, and that the pit was locked down for the most part when the inspection of April 14, 2011, took place.

The respondent's answer further referred to an "agreement" with MSHA not to operate the pit for more then one hour a year in order to rotate the belts and create movement in the gear cases and to disclose the pit location to all inspectors. Mr. Gendron, Sr., further explained his discussions with an MSHA inspector in 2003, at the pit, and while Inspector Dow confirmed that the individual was his former supervisor he had no knowledge of what may have transpired at that time (Tr. 203-207).

Subsequent to the hearing and the close of the record, Mr. Gendron, Sr., on June 4, 2013, mailed several photographs of the location and condition of the pit scale house with a statement that "it had not operated for over a decade, and that it is impossible to sell a finished product without a scale at the Pit." The Court furnished copies of the photographs and statements to the Secretary for information, but they were not received as part of the hearing record and remain as part of the file.

Mr. Gendron questioned Inspector Dow concerning MSHA's jurisdiction in the absence of any sales (Tr. 201-208), but nonetheless conceded that when the pit operated it moved and processed sand and gravel that was transported through the scale house and across the street to a concrete plant for its customers (Tr. 203).

Although Mr. Gendron stated that "those citations shouldn't exist because that plant is locked out" (Tr. 206), he admitted that "for a couple of years I would go once or twice every two or three months", as well as in February, 2011" (Tr. 207). He further stated that the pit is shut down, but he occasionally goes there to get gravel and still has an active mine ID number (Tr. 208).

Inspector Bower's conclusion that the pit was active prior to his April 14, 2011, inspection, and at least in February of that year is based on circumstantial evidence of signs of activity as shown in photographic exhibits P-2 and P-4, and his field notes that reflect that Mr. Ron Gendron, Jr., informed him that the pit was his father's "sand box", supplied bank gravel, and operated in February, 2011, to produce 50 yards of material for sale to the town of Smithfield after it ran out of winter sand. (Mr. Gendron, Jr., did not appear in this case.)

Although Mr. Gendron, Sr., denied that the pit operated for six hours in February, 2011, he conceded that it was operated for at least one hour that day to free snow and ice from the feeder; that three hours were expended to make the loader operational; that the conveyors were turned; and that "something had taken place", including the movement of at least two loads of gravel. He further admitted that he was "trying to produce sand" for the city of Smithfield that day, and the plant was available for use (Tr. 41-43; 109-111).

Based on all of the aforementioned circumstances, the Court concludes that although the respondent's Wood River Pit has operated for many years on a rather sporadic, intermittent cycle bordering on abandonment, with little proven substantial production or sales, it was nonetheless available for use with functioning equipment and machinery, including the periods it was locked down and could not be inspected, and in particular in February, and on April 14, 2011, at the time of the inspection. Accordingly, the Court finds and concludes that the respondent's Wood River Pit was subject to the enforcement jurisdiction pursuant to the Mine Act at all times relevant to this case, and the respondent's arguments to the contrary are rejected.

The Alleged Violations

The only alleged significant and substantial (S & S) violation is Citation No. 8647637, citing Section 56.11001, for the failure to provide a safe means of access to a fixed ladder that provided access to the screen plant elevated walkway. Inspector Bower confirmed that the ladder railings provided sufficient stability (Tr. 116). His safety concern was the sloped area along the base of the ladder and elevated walkway consisting of loose sand materials that he believed would not provide a level footing for anyone walking to access the ladder, thereby posing a potential fall of approximately six feet down the slope (Tr. 120-124).

A significant and substantial ("S&S") violation is described in Section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.,* 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that 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) 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 will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); see also, *Buck Creek Coal, Inc*. v. FMSHRC, 52 F3d 133, 135 (7th Cir. 1995); *Austin Power, Inc*. V. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc*., 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.,* 6 FMSHRC at 1574. The question of whether a particular violation is significant and substantial must be based on the particular facts surrounding the violation. *Texasgulf, Inc*., 10 FMSHRC 498 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987)

The Court finds that although the inspector's notes describe the cited conditions, and include notations regarding gravity and negligence, there is no comment or notation that the violation is significant and substantial (S&S), a notation that is usually made by inspectors as part of their notes (Ex. P-13). Although the inspector stated that he reviewed all of the violations with the respondent, he could find nothing in his notes relative to any access questions (Tr. 115). The Court further notes the absence of any testimony by the inspector explaining or distinguishing his "reasonably likely" gravity S&S determination, particularly in view of his "unlikely" gravity non-S&S determinations in connection with nineteen other citations.

The citation reflects that the ladder was accessed "as needed" to cleanup spillage and service, and the inspector had no evidence that it was accessed on the one day in February, 2011, or any other day. He nonetheless still believed that "one time is too much without taking corrective action" (Tr. 114).

The Court concludes and finds that the petitioner's credible evidence establishes a violation

of the cited Section 56.11001, and satisfies the first prong of the Mathies test. The Court further concludes and finds that the failure to provide safe access as charged presented a discrete safety hazard satisfying the second Mathies test.

The inspector noted that "after ten years of inactivity", it was possible that the sloped materials were washing out and accumulating because "this place hasn't been used in ten years" (Tr. 115). Further, there is no evidence that anyone other than Mr. Gendron, Sr., worked at the pit with any regularity. The record reflects that he took immediate action in removing the ladder and relocating access to the platform to another area by installing a stairway, eliminating any access hazard.

With respect to the third prong of the Mathies test requiring the establishment of a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury, an evaluation of the risk of injury necessarily assumes the continuance of normal mining operations based on the facts of the particular case. In the instant matter, the evidence establishes many years of pit inactivity, with sporadic or no meaningful production, including period when the pit was either shut down, idled, or locked out with limited or no power prior to the inspection of April 14, 2011, and subsequently for two years, except for one unspecified day in February, 2011, and for two subsequent years until the hearing on May 29, 2013.

Based on the foregoing findings and conclusions, the Court finds no credible evidence to support any reasonable expectation by the inspector that the pit would likely continue to operate with a reasonable expectation and likelihood that the hazard will result in an injury. Accordingly, I cannot conclude that the third and fourth prongs required by the Mathies test have been established. The violation IS MODIFIED and AFFIRMED as a non-S&S violation.

Citation Nos. 8647634, 8647643, and 8647641

In the course of the hearing in this case, the Court questioned the adequacy and sufficiency of the inspector's narrative descriptions of the "condition or practice" as stated on the face of the citations with respect to Citation Nos. 8647634 and 8647643; and whether or not the condition or practice described by the inspector with respect to Citation No. 8647641, constituted adequate "notice" with respect to the alleged failure by the respondent to examine each working place for conditions adversely affecting safety (Tr. 91, 94, 143, 225-226).

Citation Nos. 8647634 and 8647643

After careful review of the hearing transcript and the arguments presented by the Secretary in support of the interpretation and application of the cited Section 56.12002, including the credible testimony of the inspectors, the Court concludes and finds that the Secretary has established the violations by an unrebutted preponderance of the credible evidence of record.

The Court credits the testimony of inspectors Bower and Dow that the cited electrical

disconnect box with a missing knockout plug, as well as the electrical service panel with a fuse box were switching electrical devices that constituted electrical equipment or controls within the meaning of Section 56.12002, and that the cited unprotected openings in the electrical service panel, as well as the missing knockout plug, presented potential inadvertent hazardous electrical contact with anyone accessing that equipment. Under the circumstances, the Court credits the inspectors conclusions that the cited electrical equipment was not properly constructed on installed as required by Section 56.12002. Accordingly, the citations ARE AFFIRMED.

Citation No. 8647641

The Court takes note of the fact that inspector Bower did not ask for or review any pre-shift examination reports, and while he testified that his notes contained no reference to any workplace examination (Tr. 141), his notes state that "Daily workplace examinations conducted at the mine site were not complete and thorough", and that "mine operator conducts workplace exams when on site, but his father (Ron Gendron, Sr.), does not follow 56.18002". The notes further state that mine management (Ronald Gendron, Jr.) did not conduct spot checks to ensure that the examinations were done properly, and "got lax due to very limited activity" (Ex. P-15).

The Court finds that the inspector issued the violation based on the assumption that a competent examination was not done in light of the 13 violations that could have been discovered had a complete and effective examination been conducted (Tr. 141). Although the inspector's notes reflect that the respondent generally conducts workplace examinations in compliance with Section 56.18002, the Court finds that the inspector took this into consideration as a mitigating factor in support of his moderate negligence finding.

After careful consideration of the Secretary's arguments with respect to this citation, the Court finds that unlike a situation in which an inspector and the person designated to conduct the required examination view the alleged hazardous condition and express conflicting opinions or judgements, on the facts of this case, the credible evidence supports the inspector's determination that no workplace examination was conducted by Mr. Gendron, Sr., the operator and only person working at the pit on April 14, 2011, who was available to conduct the examination on that day, and could have presented any evidence to establish that he conducted an examination. Under the circumstances, the violation IS AFFIRMED.

Citation No. 8647640

The inspector's brief description of the condition or practice allegedly in violation of Section 56.20008(a), states "There were no company or public toilet facilities immediately available, leaving personnel with no sanitary toilet facilities to use if needed".

The Court notes that the rather vague one sentence regulatory standard language does not include the words "public" or "immediately available". It simply requires toilet facilities that are readily accessible to mine personnel. The inspector's determination that an immediately

unavailable public toilet constituted a violation clearly implies or suggests that an available public facility would constitute an alternative method of regulatory compliance.

The inspector's notes state that there was no prompt access to sanitary facilities and that the respondent was not fully aware of the toilet requirements and did not believe a toilet was required at the pit location based on limited hazard exposure. The inspector further noted that pit visitors would be affected by the lack of a toilet even though the standard, on its face, only requires accessibility to mine personnel. The record establishes that the respondent purchased a portable toilet for $100, in order to abate the pit violation, and that its Smithfield location was equipped with toilet facilities (Tr. 185, 187).

Inspector Bower testified that he was unaware of any MSHA toilet facility policy or guidelines with respect to the interpretation and application of Section 56.20008(a). He confirmed that he may exercise his discretion and judgement with respect to the question of whether an off-site toilet facility was "reasonably accessible", and stated there is "absolutely, discretion in that standard" (Tr. 186).

The inspector further explained that off-site toilet locations within "a quarter or a half-mile, they can take a short, either walk or ride to get to a bathroom, there's a gas station off the mine, that's fine" (Tr. 186). He further stated "actually, sometimes there are houses nearby, really, close enough, again, readily accessible to mine personnel" (Tr. 186). His explanations were in response to the Court's question whether the use of a toilet at a McDonald's across the street from the pit would be acceptable and within his discretion (Tr. 185).

The respondent, Mr. Gendron, Sr., stated that a McDonald's restaurant located around the corner "an eighth of a mile, to less than a quarter of a mile" from the pit was available for his use. The Court notes that the record reflects that Mr. Gendron, Sr., would be the only person at the pit. When asked if an inspector would have access to any toilet at the pit and whether he would charge the inspector for its use, he stated as follows:

> "It's a hundred acres. It's all woods . . . we have a McDonald's around the corner. We usually go there for breakfast and we go back to the pit, and that's how it works" (Tr. 184).

Based on the facts of this case, and in particular the inspector's testimony with respect to his understanding of the interpretation and application of Section 56.20008(a), with respect to the respondent's pit location that the Court finds has had virtually little or no active production on April 14, 2011, on the day of the inspection, one day in February of that year, and for several prior years when it was non-productive and locked out, the Court concludes and finds that the Secretary has not established a violation by a preponderance of the credible evidence.

The Court credits the unrebutted testimony of the pit operator Ron Gendron, Sr., the only individual working at the pit, that he, and possibly another inspector, regularly used the

McDonald's restaurant located an eighth of a mile, to less than a quarter of a mile from the pit, a distance well within the distances the inspector in this case conceded would be acceptable for compliance, provided a readily accessible toilet facility that the Court finds constituted meaningful, logical, realistic, and substantial compliance with the rather vague cited standard. Accordingly, the citation IS VACATED.

Citation Nos. 8647621, 8647622, 8647628, 867626, 8647627, 8647633, 8647636, 8647642. 8647637, 8647638, 8647635, 8647630, 8647631, 8647632

Inspector Bower testified credibly that after he issued the citations, he met with the respondent's operator, Ronald Gendron, Jr., the next day on April 15, 2011, and reviewed all of the citations with him and that Mr. Gendron did not dispute or challenge his findings and informed him that he would take corrective action and did so (Tr. 23). Mr. Gendron, Jr., did not appear to testify in this case.

The Court takes note of the fact that Mr. Gendron, Sr., confirmed that he did not intend to call any other witnesses to testify in this case (Tr. 226), and that he opted not to file a brief (Tr. 229). He took the position that all of the violations were corrected with 24 hours, has never had any accidents, and that he had nothing more to say (Tr. 221-223). He stated that Inspector Bower was diligent and competent and that he had "no repercussions" with him and recognized "he was doing his job" (Tr. 207).

The Court finds that the respondent's defense to the aforementioned citations focused on its arguments concerning jurisdiction based on little or no sales over many years at the pit location, mitigating circumstances dealing with negligence, gravity, rapid compliance, and its good safety record, rather than any substantive evidence with respect to whether or not the conditions cited were in fact violations of the cited standards.

The Court finds and concludes that the credible testimony and evidence presented by the Secretary establishes that each of the aforementioned violations have been established by a clear preponderance of the evidence. Accordingly, all of the determinations made by the inspector with respect to these citations, ARE AFFIRMED.

History of Prior Violations

Supervisory Inspector Robert Dow testified that the respondent has a very good safety record (Tr. 223). MSHA's Inspection Summary Report (Ex. P-3(b)), associated with the citations in issue in this case reporting inspections from March 2, 2001, through January 10, 2013, reflects no violations from March 2, 2001, through March 14, 2003.

With the exception of one citation issued between July 9-11, 2001, during a regular inspection, the report also notes numerous attempted inspections, compliance assistance visits and other compliance activities. Also listed is one order issued during May 4-12, 2011. No further

information was produced with respect to this information. Based on all of this information, the Court finds and concludes that the respondent's compliance history does not warrant any increased civil penalty assessments.

With respect to a June 26, 2012, citation issued during a "regular inspection", and a January 10, 2013, citation during a "mine idle inspection", as reflected in the aforementioned report, they are not part of this case. As previously noted, the respondent alluded to these citations (Tr. 45), and Inspector Dow confirmed an attempted inspections on January 10, 2013, and believed the mine has been placed on temporary idle (Tr. 209).

Good Faith Compliance

The evidence establishes that all of the cited conditions were timely abated, and respondent asserted all of the conditions were corrected within 24 hours. Further, the Secretary and Inspector Bower confirmed the violations were timely abated in good faith (Tr. 23-24).

Gravity

The record reflects that nineteen (19) citations were issued non - S & S citations, with the exception of Citation No. 8647837, for a violation of Section 56.11001 (Ex. P-13), for a failure to provide a safe means of access to a working place. That citation was issued as a significant and substantial (S & S) violation. The Court AFFIRMS all of the non - S & S determinations with respect to the nineteen citations, and has modified Citation No. 8647837 to a non - S & S violation.

Negligence

The inspector determined that eighteen (18) of the citations were the result of moderate negligence, and that two (2) (8647621 and 8647635) were the result of low negligence. The Court AFFIRMS all of these findings.

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

The Court concludes and finds that the respondent is an extremely small sand and gravel facility operated by a father and son (Ronald Gendron, Sr., and Ronald Gendron, Jr.,). The Secretary agreed that based on MSHA's Inspection Summary Report (Ex. P-3), for three quarters of the year 2011, reflecting 145 annual hours of operation, including office workers at the strip, quarry, open pit, and mine site, reflects "an extremely small operation" (Tr. 32).

MSHA's mine status report (Ex. P-3(b)), reflects the year 2011 mine status as "intermittent", with 145 annual product hours from February 1 through April 14, 2011, the date of the inspection in this case, with one employee at the Wood River Pit. Notwithstanding all of the aforementioned information, the Court concludes that the penalty assessments made by the Court

will not adversely affect the respondent's ability to pay those assessments.

Penalty Assessments

After careful consideration of all of the evidence and the facts in this case, including the civil penalty assessment criteria set forth in Section 110(I) of the Mine Act, including the Court's discretion as recognized by the Secretary's counsel in the course of the hearing at (Tr. 212) in this case with respect to the assessment of civil penalties, independent of the statutory minimums applicable to the Secretary, the Court finds and concludes the penalty assessments determined by the Court are fair and reasonable and that any increased penalties will not serve any realistic deterrent purposes.

The Court voices its disappointment with the failure of the parties to settle this case, and recognizes the efforts of the Secretary's counsel to achieve a settlement based on "purely a money issue with no discussion about the citations per se" (Tr. 212), with a focus on whether or not the Secretary would accept a 50 percent reduction in penalties, that the respondent agreed to pay, or a 30 percent reduction offered by the Secretary (Tr. 211-212). Given the shortage of available resources and in the interest of judicial economy, the Court respectfully suggests that the parties address the concerns of the Court with respect to any future settlement negotiations.

ORDER

Based on the foregoing findings and conclusions in this case, and in consideration of the civil penalty criteria set forth in Section 110(I) of the Mine Act, the Court assesses the following civil penalties for all of the following violations that have been AFFIRMED:

Citation No.		Citation No.	
8647621	$50	8647634	$50
8647622	$50	8647635	$75
8647626	$50	8647636	$50
8647627	$50	8647637	$50
8647628	$50	8647638	$50
8647629	$50	8647639	$50
8647630	$75	8647641	$75
8647631	$50	8647642	$50
8647632	$50	8647643	$50
8647633	$50		

Section 104(a) non - S & S Citation No. 8647640, issued on April 14, 2011, 30 CFR 56.20008(a) IS VACATED and the proposed penalty of $100 IS DISMISSED.

Section 104(a) S & S Citation No. 8647637, issued on April 14, 2011, 30 CFR 511001, IS

MODIFIED to a non - S & S citation.

The Respondent is ORDERED to pay a total civil penalty assessment of $1,025.00, in satisfaction of the aforesaid violations issued in this matter. Payment shall be made within thirty (30) days of the date of this decision, and remitted by check made payable to U.S. Department of Labor/MSHA, P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, this matter IS DISMISSED.

/s/ George A. Koutras
George A. Koutras
Administrative Law Judge

Distribution:

Gail E. Glick, Esq., US Department of Labor, Office of the Solicitor, JFK Federal Building, Room E-375, Boston, MA 02203

Mr. Ron Gendron, J. Santoro, Inc., 79 Cedar Swamp Road, Smithfield, RI 02917