FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

September 11, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. HIGMAN SAND AND GRAVEL, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2012-080-M A.C. No. 13-02346-269803 HSG-Perm Washta Plant
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MIKE HUBER, employed by HIGMAN SAND AND GRAVEL, INC., Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2013-701-M A.C. No. 13-02346-330309 A HSG-Perm Washta Plant

DECISION

Appearances: Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Godwin & Lohr, Sioux City, Iowa, for Respondents.

Before: Judge Manning

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Higman Sand and Gravel and Mike Huber pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Act" or "Mine Act"). The parties introduced testimony and documentary evidence at a hearing held in Sioux City, Iowa, and filed post-hearing briefs.

Higman Sand and Gravel operates a permanent wash plant (the "Plant") in Washta, Iowa, on an intermittent basis. These cases involve Citation No. 6550983, which was issued on May 16, 2011, under section 104(d)(1) of the Mine Act. 30 U.S.C. § 814(d)(1). The Secretary proposed a penalty of $3,000.00 under his special assessment regulation against Higman Sand & Gravel and a penalty of $2,200.00 against Mike Huber under section 110(c) of the Mine Act.

I. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 16, 2011, MSHA Inspector Howard W. Wood issued Citation No. 6550983 under section 104(d)(1) of the Mine Act, alleging a violation of section 56.12032 of the Secretary's safety standards. (Ex. G-3). The citation alleges that a 480 volt energized switch box upon a stacker conveyor was damaged in such a way that the door did not close completely, leaving an opening of about 4 inches. The door to the switch box includes push buttons that control the stacker. The citation further alleges that there was standing water in the area and that miners access the area at least two times a day. The citation states that miners informed the inspector that this condition existed for at least one month and that the operations manager was informed of the condition at least one week before the inspection.

Inspector Wood determined that an injury was reasonably likely to occur and that such an injury could reasonably be expected to be fatal. Further, he determined that the violation was Significant and Substantial ("S&S"), the operator's negligence was high, and that one person would be affected. Section 56.12032 of the Secretary's safety standards provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs." 30 C.F.R § 56.12032. The Secretary proposed a penalty of $3,000.00 against Higman Sand & Gravel under his special assessment regulation at section 100.5. 30 C.F.R. § 100.5.

The Secretary also brought a civil penalty case against Mike Huber, a superintendent and operations manager with Higman Sand & Gravel, for the same alleged violation. This proceeding was brought under the authority of section 110(c) of the Mine Act. 30 U.S.C. § 820(c). The Secretary proposed a penalty of $2,200.00 against Huber.

I find that Mike Huber did not violate section 110(c) and therefore the civil penalties assessed against him are vacated. I also modify Citation No. 6550983 to a 104(a) citation with moderate negligence.

Summary of the Evidence

Inspector Wood testified that when he inspected the No. 220 stacker conveyor he noticed that the energized electrical switchbox attached to the conveyor was damaged. (Tr. 19). He photographed the damaged switchbox, which was bent on the bottom right corner. (Ex. G-2). He assumed that the box was hit by a piece of equipment. As a result of the damage, the door to the electrical box did not fully close. He estimated that the distance between the door and cabinet of the box in the bottom right corner was 3 to 4 inches. (Tr. 20, 24-25; Ex. G-2). He did not measure the width of the opening. (Tr. 41). The circuits in the electrical box carry 480 volts of current. The inspector believed that a miner accessed the box at least twice a day to turn the conveyor on and off. (Tr. 25, 26).

The conveyor stacks sand, which is often wet. Inspector Wood testified that he was concerned about water and sand dripping off the bottom of the belt, entering the electrical box, shorting out the box, and energizing the cabinet of the box. (Tr. 20, 25-26). He observed

puddles of water upon the ground in the vicinity of the electrical box and there was wet sand on top of the box. (Tr. 21; Ex. G-2). According to the inspector, the cabinet and door of the box could become energized if wet sand accumulated upon the contacts within the box. (Tr. 25).

Based upon his observations and his conversation with the foreman at the plant, Inspector Wood issued Citation No. 6550983 under section 104(d)(1) of the Mine Act. He determined that the violation was serious and that an injury was reasonably likely based upon the conditions he observed. (Tr. 31). He determined that any injury was reasonably likely to be fatal because the area was wet, the box was metal, there were live 480 volt circuits in the box, and miners must open the box to turn the conveyor on or off twice a day. (Tr. 32). He further determined that the violation was S&S and one person would be affected. He considered the violation to be the result of Higman's high negligence because Larry Holzman, the foreman, told him that the box was in that condition for at least one week. Although Holzman requested that the electrical box be replaced a week before the inspection, Higman did not purchase a new one. (Tr. 32-34, 74-75). Holzman's supervisor was Mike Huber and according to the inspector, Huber told Holzman to try to straighten the existing box. (Tr. 35).[1]

Inspector Wood recommended that MSHA file a penalty proceeding against Huber because he was the production supervisor, had the authority to purchase supplies, and failed to order a new electrical box to correct the hazardous condition. (Tr. 36-37). The inspector testified that he did not know whether Huber saw the damaged electrical box or knew the extent of the damage. (Tr. 37-38, 40-41, 50). Inspector Wood testified that Huber was not at the plant the day of the subject inspection.

Jason Coombs, a former assistant production manager at the plant, worked for Higman when the cited electrical box was damaged and when the subject citation was issued. He testified that the box was damaged around June 2009 when a loader operator backed into it. (Tr. 107-08). He did not believe that the damage to the box created a safety hazard. (Tr. 150). This damaged electrical box was not cited by MSHA until the May 2011 inspection.

Coombs further examined the electrical box after it was removed from the stacker conveyor and stated that there was a lip around the cabinet of the box that prevented rain or moisture from entering the box. (Tr. 115, 138-39; Ex. R-103(f)). He measured the opening between the door and the cabinet to be less than 1 inch. (Tr. 117; Ex. R-103(i)). He testified that it was possible that the opening in the box was different when he examined it than when the inspector cited it but, because the box was able to close and latch, it could not have been substantially different. (Tr. 128, 130).[2] Coombs further testified that, even if there was water in the area, a miner could not get a hand into the box to be shocked by energized parts. (Tr. 142).

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[1] Inspector Wood initially determined that the violation was the result of Higman's "reckless disregard" but he modified the citation to high negligence because he did not talk to Huber. (Tr. 38).

[2] Higman used the box in the damaged condition to operate the sand conveyor and the box will not energize the conveyor unless the door is closed and latched. The damage did not affect the ability of miners to close and latch the door.

Mike Huber is the production manager for Higman. He oversees a number of plants and pits for Higman. (Tr. 153-54). His "second in command" is Jason Coombs. Larry Holzman became the foreman of the Washta Plant in April 2011. (Tr. 154-55). Huber testified that he never saw the subject electrical box prior to the MSHA inspection on May 16, 2011, but he knew that a loader damaged it. (Tr. 155). Holzman's predecessor, Randy Rasmussen, accidently backed into the electrical box. Huber testified that Rasmussen told him that the damage was "just a cosmetic issue." *Id.* Huber stated that Higman did not move the cited sand conveyor after the loader damaged the electrical and that MSHA inspected it several times without issuing a citation. (Tr. 156). Because the electrical box was neither cited by MSHA nor mentioned as a safety issue, Huber did not think about the box until Holzman mentioned it shortly after he was hired in April 2011. (Tr. 157). Huber testified that he believed that the damage Holzman referred to was the "cosmetic" damage that Rasmussen told him about. (Tr. 158). He testified that he did not know that the electrical box presented a safety hazard and, if he had reason to believe that a hazard was present, he would have replaced the box. (Tr. 158).

Huber does not believe that the damaged electrical box presented a safety hazard to miners. (Tr. 169). First, moisture was unable to enter the box. Second, the continuity and resistance tests performed upon the box prior to the MSHA inspection demonstrate that the box was fully grounded. (Tr. 168-69, Ex. R-104). If water or wet sand did enter the box, the circuit breaker would cut off all power. (Tr. 182-83). Huber believed that MSHA inspectors examined the sand stacker conveyor including the electrical box during past inspections. Because these inspectors did not issue any citations for the condition of the electrical box, Huber assumed that it complied with the safety standards. (Tr. 173-74, 177). He never saw the box after the loader backed into it. The operations he supervises are spread out over 100 miles and they include about 400 conveyors. (Tr. 175). When it was reported to him that a loader damaged the box, but that the damage was cosmetic, he had no reason to disbelieve that statement. *Id.*

Larry Holzman started working for Higman as a foreman at the Washta Plant in April 2011. (Tr. 186-87). He was present during Inspector Wood's May 2011 inspection. He testified that the opening in the electrical box caused by the loader was too narrow for a person to put their hand or fingers into the box. (Tr. 189). The gap was about 3/4 of an inch at its widest point. (Tr. 189-90, 195; Ex. R-103(g) & (i)). The presence of the "rain gutter lip" prevented extraneous material or someone's fingers from entering the box. (Tr. 194-95). Holzman testified that it was not reasonably likely that the electrical box would injure anyone. (Tr. 190). Continuity and resistance testing demonstrated that the box was fully grounded. Although he recommended that the box be replaced, he did not believe that it was dangerous. (Tr. 192). He never indicated to Huber that it presented a hazard to miners.

Richard Lemmon, the safety superintendent with Higman, worked for the company for eight years. He does not work at the plant. He testified that after Rasmussen hit the electrical box with the loader, MSHA inspected the plant several times but issued no citations. (Tr. 200, 206-07, 218). He also stated that he is not aware of any facts that would have alerted Huber that the box presented a safety hazard to miners. (Tr. 207). He testified that the condition of the electrical box did not create a safety hazard, but he admitted that if water entered the box *and* the box became energized, someone could be electrocuted. (Tr. 213-14, 215, 217-18). The

grounding system would prevent the box from being energized in the event of a short, so a miner would not be shocked or electrocuted. (Tr. 220).

Discussion and Analysis

Higman does not dispute the fact of violation for Citation No. 6550983, but does challenge the S&S, negligence, and unwarrantable failure designations. Mike Huber argues that he should not be assessed a penalty under the section 110(c) civil penalty action.

I find that the violation was S&S.[3] Higman accepts the violation of section 56.12032. I find that the discrete safety hazard presented by the violation was the danger of electrifying the box and resulting electric shock. As is typical, it is the third element of the *Mathies* test that presents the greatest challenge. In *U.S. Steel Mining Co.*, the Commission held that "the third element of the *Mathies* test does not require the Secretary to prove it was 'more probable than not' an injury would result." 18 FMSHRC 862, 865 (citation omitted). The Commission has also long held that "[t]he fact that injury has been avoided in the past in connection with a particular violation may be 'fortunate, but not determinative.'" *U.S. Steel,* 18 FMSHRC at 867 (quoting *Ozark-Mahoning Co.*, 8 FMSHRC 190, 192 (Feb. 1986)).

The Commission reiterated these principles in *Cumberland Coal Resources, LP*, 33 FMSHRC 2357 (Oct. 2011), and *Musser Engineering, Inc. and PBS Coals, Inc.*, 32 FMSHRC 1257 (Oct. 2010). In *Musser Engineering*, the Commission rejected the mine operator's argument that "there must be a reasonable likelihood that the violation will cause injury." 32 FMSHRC at 1280-81. Instead, the Commission held that the "test under the third element [of *Mathies*] is whether there is a reasonable likelihood that the hazard contributed to by the violation will cause injury." *Id.*

Assuming continued mining operations, the hazard contributed to by the violation was reasonably likely to lead to a serious injury. The cited cover closed and latched, preventing miners from directly contacting the interior circuit. I credit Inspector Wood's testimony, however, that a miner could be shocked because the gap where the door met the cabinet could allow water to enter the box, contact the circuits, cause a short, and energize the box. This gap was in the bottom corner of the box, there was no foreign material in the box at the time of inspection, and the box had a lip to prevent material from entering; Higman, however, did not

[3] An S&S violation is a violation "of such nature as could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." 30 U.S.C. § 814(d) (2006). 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). In order to establish the S&S nature of a violation, the Secretary must prove: "(1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard – that is, a measure of danger to safety – contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury will be of a reasonably serious nature." *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984); *accord Buck Creek Coal Co., Inc.*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power Co., Inc.*, 861 F. 2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

plan to replace the electrical box. Assuming continued mining operations, I find that the violation and conditions in the area could degrade to allow water, sand, and other materials to enter the electrical box through the opening. This material could short the electrical circuit and the grounding system could fail to prevent current from energizing the box. Miners access the box at least twice a day. The electrical components in the box carry 480 volts of electricity. If this current energized the box as a result of foreign material entering the box through the opening, anyone who contacted the box would suffer a serious electrical shock, which is reasonably likely to cause a serious or fatal injury. I find that the risk of death or serious injury was not so remote as to fail the third element of the *Mathies* test. Consequently, I find that the violation was S&S.

Looking at all the facts and circumstances of this case, I find that the violation was the result of Higman's moderate negligence, not its high negligence or unwarrantable failure.[4] The cited condition existed since June 2009 when a loader backed into the box. Although the violation existed for more than two years and was in plain sight, the plant did not move in that time and MSHA never cited the condition, despite conducting several inspections. The operator knew of and did not abate the condition, but I credit the testimony of Holzman, Coombs, Lemmon, and Huber that they did not believe that the damage to the electrical box presented a hazard and that Higman did not know that the condition violated the standard. None of the photographs the parties introduced at the hearing are conclusive and witness accounts differ concerning the condition of the box, but the damage was not extensive because the door still latched.[5] The Secretary did not show that the operator was on notice that greater efforts were necessary for compliance with section 56.12032. Higman should have corrected the cited condition and therefore the violation was the result of its moderate negligence. Citation No. 6550983, however, was not the result of Higman's unwarrantable failure because its conduct was not aggravated.

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[4] Unwarrantable failure is defined by such conduct as "reckless disregard," "intentional misconduct," "indifference" or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003; *see also Buck Creek Coal, Inc. v. FMSHRC*, 52 F. 3d 133, 136 (7th Cir. 1995). Whether conduct is "aggravated" in the context of an unwarrantable failure analysis is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See e.g. Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Repeated similar violations are relevant to an unwarrantable failure determination to the extent that they serve to put an operator on notice that greater efforts are necessary for compliance with a standard. *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992).

[5] A shadow obscures the damaged area of the box in the Secretary's photo. (Ex. G-2). The photos presented by Respondents were taken after the box was removed from the sand conveyor. (Ex. R-103)

I find that the Secretary did not fulfill his burden[6] to show that Huber knew or had reason to know of the cited condition that violated section 56.12032 and Huber therefore did not violate section 110(c).[7] I credit Huber's testimony that he believed that the condition cited in Citation No. 6550983 constituted cosmetic damage that neither violated the Secretary's safety standards nor posed a danger to miners. Huber's subordinates alerted him of the damage, but did not suggest that it was dangerous or violative. Because the electrical box was neither cited by MSHA nor mentioned as a safety issue, Huber lacked notice that it required replacement. He did not work on-site and supervised all Higman's operations that included 400 conveyors spread over 100 miles. Huber did not see the cited condition; he relied upon the opinion of the miners he trusted who did not believe the condition created a hazard. Although Huber knew that the box was damaged, the Secretary did not present evidence to show that Huber knew or had reason to know that the cited condition created a hazard or violated the Secretary's safety standards. His actions did not exhibit aggravated conduct or greater than ordinary negligence. The civil penalty proposed by the Secretary against Mike Huber in CENT 2013-701-M under section 110(c) is **VACATED**.

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[6] In order to find individual liability in a 110(c) action, the Secretary bears the burden to show by a preponderance of the credible evidence that the conduct at issue was aggravated. *Maple Creek Mining*, 27 FMSHRC 555, 570 (2005).

[7] The Commission summarized the law applicable to a Section 110(c) violation as follows:

> Section 110(c) of the Mine Act provides that, whenever a corporate operator violates a mandatory health or safety standard, a director, officer, or agent of such corporate operator who knowingly authorized, ordered, or carried out the violation shall be subject to an individual civil penalty. 30 U.S.C. § 820(c). The proper legal inquiry for determining liability under section 110(c) is whether the corporate agent knew or had reason to know of a violative condition. *Kenny Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983); *accord Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362-64 (D.C. Cir. 1997). To establish section 110(c) liability, the Secretary must prove that an individual knew or had reason to know of the violative condition, not that the individual knowingly violated the law. *Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) (citing *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 563 (1971)). A knowing violation occurs when an individual "in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Kenny Richardson*, 3 FMSHRC at 16. Section 110(c) liability is predicated on aggravated conduct constituting more than ordinary negligence. *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1245 (Aug. 1992).

Cougar Coal Company, 25 FMSHRC 513, 516 (Sept. 2003).

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth the criteria to be considered in determining an appropriate civil penalty. I have considered the Assessed Violation History Report, which was submitted by the Secretary. (Ex. G-1). MSHA issued 15 citations at the plant in the 15 months prior to May 16, 2011, and none of the violations were S&S. At all pertinent times, the HSG-Perm Washta Plant was a small operation and Higman Sand and Gravel, Inc., was a small mine operator. The violation was abated in good faith. The penalty assessed in this decision will not have an adverse effect upon the ability of Higman Sand & Gravel to continue in business. The gravity was serious and the negligence was moderate.

III. ORDER

For the reasons set forth above, Citation No. 6550983 is **MODIFIED** to a section 104(a) citation with moderate negligence and Higman Sand & Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $1,250.00 within 30 days of the date of this decision.[8] The case against Mike Huber, CENT 2013-701-M, is hereby **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Two Pershing Square Building, 2300 Main Street, Suite 1020, Kansas City, MO 64108

Jeffrey A. Sar, Esq., Baron, Sar, Godwin, Gill & Lohr, PO Box 717, Sioux City, IA 51102

[8] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.