# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

October 15, 2015

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| SECRETARY OF LABOR<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>Petitioner | CIVIL PENALTY PROCEEDING<br><br>Docket No. CENT 2014-298-M<br>A.C. No. 13-02285-344601 |
| v. | |
| JEPPESEN GRAVEL,<br>Respondent | Mine: Jeppesen Pits |

## DECISION AND ORDER

Appearances: Robert Alan Kelly, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Petitioner

Jay A. Jeppesen, Owner of Jeppesen Gravel, Sibley, Iowa, *pro se*

Before: Judge Rae

This case is before me on a petition for assessment of civil penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Jeppesen Gravel pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or the "Act"). A hearing was held in Sioux Falls, South Dakota on July 14, 2015 at which the parties presented testimony and documentary evidence. The parties submitted post-hearing closing statements as well.

## I. Background

Jay Jeppesen owns and operates Jeppesen Gravel as an unincorporated sole proprietorship located in Osceola County, Iowa. The mine has been in business since the 1950s operated by Jeppesen's father until Jeppesen took it over in 1975 and has continued in operation to this day. The gravel pit is a part-time endeavor and one of several other businesses Jeppesen runs on the property including a borrow pit. On May 1, 2012 and October 12, 2012, inspectors for MSHA made inspections of the Jeppesen Pits and issued various orders and citations for violations of mandatory safety and health standards. Jeppesen was given a period of time in which to abate the conditions. When the inspectors returned to the mine, either the violations had not been abated or Jeppesen denied the inspectors entry to the mine to inspect for compliance. Jeppesen was ordered to withdraw from any affected areas or equipment, if it had

not already been so ordered, as a result. MSHA inspectors Troy Van Wey[1] and Jeffrey Breon[2] then returned to the mine on July 22, 2013 and issued 18 violations, one of which was vacated prior to hearing. Of the 17 remaining, one was issued for a denial of entry and the remainder for operating the withdrawn equipment or in the affected areas without termination of the outstanding withdrawal orders. For the reasons set forth below I find the violations have been established and the penalties are assessed as set forth herein.

## II. Right of Entry Violation

### A. Citation 6550468

MSHA inspector Troy Van Wey issued citation 6550468 on October 1, 2012 for a violation of section 103(a) of the Mine Act. The lengthy narrative portion of this citation reads in pertinent part:

> Jay Jeppesen, owner, interfered with the right of entry of MSHA inspectors Jeffrey Breon and Troy Van Wey, both authorized representatives of the Secretary, as they sought to inspect the Jeppesen Pits mine site pursuant to Section 103(a) of the Mine Act. When inspectors attempted to conduct their inspection, Mr. Jeppesen stated that they were trespassing onto private property. Mr. Jeppesen then contacted the Osceola County Sheriff's Office to have the authorized representatives arrested and told the Inspectors to wait in their van until the patrolman arrived instead of beginning the inspection. The Osceola Patrol Deputy arrived at the scene and remained there to keep the peace … Once the inspectors began their inspection Mr. Jeppesen and his son, Alan, hindered and interfered with the inspection. Jay Jeppesen moved into the close personal space of Inspector Van Wey and yelled at him. When Inspector Van Wey asked [him] to back up out of his personal space, Alan Jeppesen approached … from the other side and stuck a recording device within one inch of [the inspector's] face. At another point Alan Jeppesen pushed the Federal Inspectors out of the way. When Alan was told that if he pushed the Inspectors again it would result in a citation for intimidation, Alan responded that he had not pushed the Inspectors but if they wanted to see a push, he … would push both of them and they would know they had been pushed …
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> Denial of entry has been a recurring and persistent problem at this operation over the years. Most recently on June 11, 2012, citation no. 8668129 was issued to Jay Jeppesen for a violation of Section 103(a) of the Mine Act.

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[1] Van Wey has been an MSHA inspector for 10 years, and was assigned as the field office supervisor of the Ft. Dodge, Iowa office for four years, including the timeframes pertinent to this case. He has conducted approximately 200 mine inspections and has 13 years' prior experience as a miner. Tr. 14-18.

[2] Breon was an aircraft mechanic in the U.S. Air Force for 11 years upon graduation from high school. He has 12 years of experience as a miner and became an MSHA inspector in 2010. He has performed approximately 150 inspections of mines. Tr. 106-09.

Ex. S-3. The negligence was assessed as the result of reckless disregard with a proposed special assessment of $4,000.00.

Section 103(a) of the Act provides that any authorized representative of the Secretary "shall have a right of entry to, upon, or through any coal or other mine" for the purpose of making any inspections under the Mine Act. 30 U.S.C. § 813(a). The refusal to permit an inspection is a violation of section 103(a) for which a penalty must be imposed. *Waukesha Lime & Stone Co.*, 3 FMSHRC 1702, 1703 (July 1981). A denial of entry may occur when an operator impedes, interferes with, hinders or delays an inspection of a mine. *Veris Gold USA, Inc*., 35 FMSHRC 2977 (ALJ) (Sept. 2013). MSHA inspectors are not required to subject themselves to confrontation or physical harm in order to carry out an inspection. *Calvin Black Enterprises*, 7 FMSHRC 1151, 1157 (Aug. 1985). The Commission has recognized that "denial of access to an MSHA inspector ... is an action not to be taken lightly." *Tracey & Partners*, 11 FMSHRC 1457, 1464 (Aug. 1989).

Jeppesen has a long and contentious history with MSHA which is relevant to the determination of whether Jeppesen's conduct here rises to the level of a denial of the right of entry to the mine as provided by Section 103(a) of the Mine Act and to substantiate the negligence and special assessment proposed by the Secretary. A summary of this history, as outlined in detail in Judge Manning's decision in *Jeppesen Gravel*, 30 FMSHRC 324, 325-30 (Apr. 2008) (ALJ), bears repeating here.

As a result of nearly two years of MSHA's inability to gain Jeppesen's cooperation in filing legal identity papers, consenting to an inspection without intimidating and harassing the inspectors, and participating in a Compliance Assistance Visit ("CAV"), the U.S. Attorney's office was contacted for assistance. The end result was that Jeppesen entered into a Consent Judgment in November 2004 issued by the U.S. District Court for the Northern District of Iowa Western Division in which he was ordered to permit representatives of the Secretary of Labor entry to, upon, and through Jeppesen Gravel mines without further direct or indirect interference, hindrance, or delay for the purpose of making inspections. It was further ordered that any inspector may request the presence of a U.S. Marshall to accompany the inspector should the inspector encounter any violation of the Judgment. Ex. S-33.

Following the entry of the Judgment, in June 2005, MSHA returned to the mine to conduct a CAV and Jeppesen failed to cooperate. Several violations were found and the inspectors attempted to speak with Jeppesen to discuss remediation of the conditions. Jeppesen actively avoided them and continued to operate the mine without making what would have been very inexpensive repairs. As a result of his continued refusal to allow inspectors on the property, he was issued violations for not abating 104(b) orders in October 2005. In January 2006, an Assistant U.S. Attorney accompanied by a U.S. Marshall and an Osceola County deputy sheriff went to the mine to encourage Jeppesen's compliance. The AUSA explained the process for contesting citations and made a comment that it would likely cost Jeppesen only $1,500.00 to abate the outstanding violations. At that point, Jeppesen became confrontational and refused to cooperate in an inspection so they left the property.

In July 2006, MSHA went to the mine to terminate the outstanding violations. Alan Jeppesen was present initially but he immediately parked the loader he was using and drove away. Jay Jeppesen then arrived and ordered the inspectors off the property. Jeppesen's actions were so severe that the inspectors left to prevent an altercation. In August 2006, MSHA attempted to make a compliance visit accompanied by a county deputy sheriff. Jeppesen was asked to operate equipment so that the brakes, horns and alarms could be tested. He refused and told the inspectors to leave.

Jeppesen was cited for denial of entry in May 2004, June 2006, July 2006 and August 2006 as a result of his argumentative and intimidating behavior as described above. Judge Manning found Jeppesen had repeatedly harassed and attempted to intimidate MSHA inspectors while in performance of their duties. He noted that Jeppesen did not dispute the violations at trial. Based upon Jeppesen's claimed inability to pay the assessed penalties, he was given an 82% reduction in penalties for the 16 violations. 30 FMSHRC at 336-39.

On December 11, 2013, Jeppesen entered into a settlement agreement with the Secretary that included another violation of 103(a) for denial of entry on June 11, 2012 as well as 36 additional violations including each of the 16 underlying violations at issue herein. He agreed to pay reduced penalties amounting to $28,500.00. Ex. S-37.

The instant 103(a) violation occurred on October 1, 2012 but was not included in the settlement order of December 11, 2013. MSHA inspectors Van Wey and Breon traveled to the Jeppesen mine to conduct an inspection. They accessed the property via the gravel road located at 719 8th Street, the official mine address provided by Jeppesen to MSHA. Once on site, they contacted Jeppesen by cell phone to begin their inspection. Jeppesen, however, did not arrive until approximately thirty minutes later and immediately commenced yelling and screaming at the inspectors telling them that they were trespassing. He then called 911 and while awaiting the arrival of the deputy sheriff informed the inspectors that they were not permitted to begin their inspection. The two inspectors waited inside their vehicle for the sheriff to come. When deputy sheriff Nate Krikke arrived, Jeppesen instructed him to arrest the two inspectors and tow their vehicles from the property. After Van Wey and Breon properly identified themselves to Krikke, the deputy told Jeppesen that he would not do so. Jeppesen then attempted to send Krikke away but the deputy took it upon himself to remain to keep the peace. Jay Jeppesen continued to harass the inspectors by getting up in Van Wey's face yelling and screaming at him while his son, Alan Jeppeson, pointed a video camera in Van Wey's face and video-recorded the entire inspection. Jay Jeppesen continued to yell at the inspectors and raised his arms in the air in an attempt to physically prevent their access and to intimidate them.[3] At one point Alan Jeppesen assaulted Van Wey by pushing his shoulder into the inspector's chest while Jay Jeppesen stood by and laughed at Van Wey. This incident was verified by Deputy Krikke's report and testimony. Tr. 202-06; Ex. S-4. I find the inspectors' and Krikke's version of the facts to be credible.

[3] Jay Jeppesen is a tall and heavy man. The inspectors are of average height and weight. I find it objectively reasonable that they would feel physically threatened and intimidated by Jeppesen's actions.

Jeppesen did not deny the facts as presented by Krikke and Van Wey but asserted at trial that he was upset with the manner in which the inspectors arrived on the property. He testified that there were children playing outside the house adjacent to the road the inspectors allegedly sped down and he was concerned for their safety. Krikke, however, credibly testified that there were no children to be seen in the area. Tr. 208. The inspectors testified that they had already arrived at the mine and had been waiting approximately 30 minutes when Jeppesen appeared which makes it highly unlikely anyone saw the inspectors as they drove past the house. They further confirmed that Jeppesen did not raise any concerns about children at the time of the attempted inspection; the first time this issue was raised was at trial. Jeppesen's other objection to MSHA's presence on the property was that they used the ¾-mile-long private road to reach the mine. It was his contention that MSHA should be compelled to use a helicopter instead.

I find that Jeppesen's assertion that he was fearful for the safety of children was an invention conjured up for trial. His opinion that MSHA should arrive by helicopter to perform its inspections does not warrant comment. The road used by MSHA is the one provided by Jeppesen himself as the legal address of the mine and the only means of access by motor vehicle.

I find the violation to be very serious particularly in light of the many instances of such conduct to the point the Secretary had to request the intervention of the Federal District Court, the U.S. Attorney's Office, the U.S. Marshall service, and the county sheriff's office to impress upon Jeppesen the gravity of his actions and the absolute right of the inspectors to enforce the Mine Act. Unfortunately, it appears that Jeppesen has no genuine interest in cooperating with MSHA or complying with a federal order. Jeppesen's conduct was egregious and completely uncalled for. He clearly engaged in harassment, intimidation, and threats of physical harm towards the two inspectors to prevent or unreasonably delay their entry to the mine. I find the violation has been established.

B. Negligence

The Commission has held "that an operator's intentional violation constitutes high negligence for penalty purposes." *Topper Coal Co., Inc.*, 20 FMSHRC 344, 350 (Apr. 1998) (quoting *Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992)). It is clear that Jeppesen's conduct on October 1, 2012 was a continuing display of his complete contempt and disregard for MSHA's authority to inspect the mine for health and safety violations and to enforce the Act. His conduct was egregious and both his and his son's actions constituted criminal assault and battery on Van Wey as well as a violation of Section 103(a) of the Act. Their behavior was designed to intimidate and harass the inspectors and presented a real potential for physical harm had it not been for the presence of the deputy sheriff on the property during the inspection. There is no doubt Jeppesen's conduct was intentional and deliberate and constitutes recklessness.

The Secretary has proposed a special assessment for this violation in the amount of $4,000.00. Part 100 of the Secretary's regulations provides MSHA with the authority to waive the regular assessment process when certain conditions warrant an enhanced penalty. 30 C.F.R. § 100.5(a). Such enhanced assessments are designed for particularly serious or egregious violations. *Coal Employment Project v. Dole*, 889 F.2d 1127 (D.C. Cir. 1989). The severity of conduct at the most extreme end of the spectrum may involve physical assault of an inspector

resulting in serious injury; however, lesser degrees of conduct may justify a special assessment. Here, while no injury occurred, Jeppesen's conduct rose to the level of an assault on Van Wey while his son's conduct constituted a battery. Jeppesen's actions were intentionally designed to intimidate the inspectors and posed a threat of imminent physical harm. Had it not been for Krikke's arrival, physical harm may well have occurred. Jeppesen's actions rose to the highest level of egregious conduct and the Secretary's proposed special assessment is well deserved. The appropriate penalty will be set forth below.

III. Violations for "Working in the Face of an Order"

The following 16 violations were issued under Section 104(a)[4] of the Mine Act for "working in the face of a prior order" rather than violations of mandatory health and safety standards. Therefore, gravity, significant and substantial,[5] and unwarrantable failure[6] designations do not apply.

Twelve of the underlying violations issued to Jeppesen were originally written as Section 104(a) citations for violations of mandatory safety standards, five of which were significant and substantial ("S&S"). Having failed to abate the cited hazards within the prescribed time period, Jeppesen was then issued Section 104(b)[7] orders mandating withdrawal from the cited equipment and areas until the violations were abated and MSHA was called in to terminate the orders. The remaining four are predicated upon Section 104(d) orders[8] that were originally assessed as S&S and unwarrantable failure violations. On July 22, 2013, when MSHA inspectors returned to the mine they found that Jeppesen had continued to use the equipment or areas affected by the prior orders and had not contacted MSHA to terminate any of the orders.[9] These "working in the face of a withdrawal order" violations were issued as a result by Inspectors Breon and Van Wey.

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[4] Section 104(a) provides, in pertinent part, that if during an inspection of any mine the inspector finds the operator has violated the Act, or any mandatory standard, he shall issue a citation to the operator stating the nature of the violation. 30 U.S.C. § 814(a).

[5] A violation is S&S if it is of such nature as could significantly and substantially contribute to the cause and effect of a health or safety hazard. 30 U.S.C. § 814(d). A violation is properly designated as S&S if 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).

[6] Unwarrantable failure is defined as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Emery Mining Corp.*, 9 FMSHRC 1997, 2003 (Dec. 1987).

[7] Section 104(b) of the Mine Act states that upon any follow-up inspection of a mine, if a violation has not been totally abated within the prescribed time, an inspector shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the withdrawal of all persons from the area until it is abated. 30 U.S.C. § 814(b).

[8] Section 104(d) of the Mine Act is similar to 104(b) in that it requires the inspector to issue an order withdrawing all persons from the affected area, but it pertains to violations that are S&S and/or an unwarrantable failure to comply with a health or safety standard rather than violations that constitute a failure to abate a prior violation. 30 U.S.C. § 814(d).

[9] Any order issued under any subsection of Section 104 remains in effect until it is modified, terminated or vacated by the Secretary or his authorized representative or by the Commission or courts. 30 U.S.C. § 104(h).

Each of the underlying 16 violations were conceded by Jeppesen and incorporated into the aforementioned settlement agreement of December 11, 2013. Ex. S-37. Jeppesen did not contest any of the withdrawal orders in accordance with Commission Procedural Rule 20.[10] Therefore all prior underlying violations and the propriety of any subsequent withdrawal orders are admitted and unreviewable at this time.

Jeppesen has raised an overarching claim that he was denied a Compliance Assistance Visit ("CAV") prior to being issued many of the underlying citations herein. Because Jeppesen entered into the settlement agreement in December 2013, this issue is now moot. I would, nevertheless, find that such a claim does not rise to the level of a defense. Jeppesen neither contacted MSHA to request a CAV on any of the underlying citations or orders nor did he cooperate in any of the CAVs MSHA attempted to conduct in the past, as outlined in Judge Manning's decision. A CAV is available to an operator at the onset of operations or when putting new equipment or a new plant into service. Any violations found are written up in a notice and the operator is given an opportunity to correct the conditions. If the corrections are not made in a relatively short period of time, the notice becomes a regular citation. Because Jeppesen had been in business for 20 to 30 years before the issuance of the initial underlying citations and orders, which did not encompass any new equipment recently put into service, he was not entitled to a CAV. Tr. 104. Even if he had been, the issue is irrelevant as the conditions went unabated for many, many months and would have been converted into regular violations. MSHA's failure to conduct a CAV would not have precluded the issuance of the subsequent withdrawal orders or the citations now at issue.

Jeppesen also has raised an inability to pay for the necessary repairs as a reason for not having abated the hazards in question. However, an inability to pay is relevant only to the issue of penalties, not the necessity to abate the condition. *See Asarco, Inc. v. FMSHRC,* 868 F2d 1195 (10th Cir. 1989) (finding that mine operators are strictly liable for violations of safety and health standards).

Additionally, Jeppesen claimed that he was unaware of the requirement to contact MSHA in order to terminate a withdrawal order. Tr. 332. I find this claim to be without merit. An operator is charged with the responsibility to know, understand and adhere to the Act, the mandatory health and safety standards, and all applicable regulations if it is to engage in mining. Jeppesen clearly understands the proper procedure for terminating prior citations and orders. He has been issued many of both citations and orders in the past as demonstrated by the MSHA Violation History Report and prior ALJs' decisions and settlement order. *Jeppesen Gravel,* 32 FMSHRC 1749 (Nov. 2010) (ALJ); *Jeppesen Gravel,* 30 FMSHRC 324 (Apr. 2008) (ALJ); Exs. S-34, 35, 37, 44. He has been given detailed in-person instructions by the U.S. Attorney on how to properly contest violations. He has been offered the opportunity to participate in close-out conferences and CAVs by MSHA. In short, he has been provided more opportunities than the average small mine operator to familiarize himself with the requirements under the Mine Act. He is clearly not an unintelligent person; he has operated this mine as well as several other businesses for decades. He was savvy enough to have obtained and submitted a copy of the U.S.

[10] Commission Rule 20 provides all contests of citations or orders issued under Section 104 must be filed by the operator within 30 days of receipt. 29 C.F.R. § 2700.20.

Department of Labor's "Small Mine Assessment Process Summary" Booklet published by the DOL and National Mine Health and Safety Academy in his pretrial hearing report. Ex. R-23. I find Jeppesen's allegation is disingenuous.

Jeppesen did not seriously contest that he placed the withdrawn areas or equipment back into service without having the withdrawal orders terminated. At trial he admitted to having operated the mine in August 2012, the screen plant in November 2012, and the wash plant, including the cited John Deere tractor, during the two months preceding the July 2013 inspection. Tr. 72-74, 133-34, 138-39, 143, 150, 180, 269-70. He had been observed operating the excavator, wash plant and tractor upon the inspectors' arrival at the mine on July 22, 2013. Tr. 62, 71-72, 131, 134, 236-37, 252, 277, 285.

Therefore, the only issues remaining are the appropriate level of negligence and the proper penalty to assess.

A. Violations Fully or Partially Abated

Inspector Breon assessed each of the "working in the face of a withdrawal order" violations as high negligence violations.[11] His reasoning was that Jeppesen clearly knew of the hazardous conditions cited in the withdrawal orders and in many instances in a citation issued prior to the order, yet he then knowingly and intentionally ignored the orders and continued to operate the mine before they were terminated. Many of the conditions would have required only minimal effort on Jeppesen's part to make a telephone call for MSHA to terminate the orders.

The Secretary has acknowledged that Jeppesen had fully abated four of the violations and partially abated another three prior to MSHA's return visit on July 22, 2013. The Secretary concedes that Jeppesen's actions with regard to the relevant seven citations may be considered in mitigation of the high negligence, moderate negligence being more appropriate.[12] *See Sec'y's Post-Trial Closing Statement* 14.

Jeppesen has intentionally and repeatedly thumbed his nose at MSHA's authority and disregarded his responsibility to maintain a safe and healthful working environment, which is deserving of a high negligence designation. However, I agree with the Secretary's recognition that Jeppesen's eventual, although late and in some instances insufficient, efforts at compliance are a mitigating factor and I find moderate negligence is appropriate.

The citations modified to moderate negligence and the underlying facts are:

1. Citation No. 8737364/Ex. S-10

The original citation, No. 8667978/Docket No. CENT 2013-188-M, was issued on October 1, 2012 as a non-S&S 104(a) violation. The cited standard is 30 C.F.R. § 56.12008,

[11] High negligence is appropriate when an operator knew or should have known of the violative condition or practice, and there are no mitigating circumstances. 30 C.F.R. § 100.3, Table X.
[12] Moderate negligence is appropriate where "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.*

which requires that electrical cables enter metal frames outfitted with proper fittings or bushings. Ex. S-10d. When the inspectors returned on October 22, 2012, they found no attempt to abate the citation had been made within the time allotted and issued a 104(b) order taking the 480-volt power cable out of service. Ex. S-10e. Inspectors Van Wey and Breon testified that when they returned on July 22, 2013, they found that Jeppesen had abated the condition but could not say when.

2. Citation No. 8737367/Ex. S-13

The original citation, No. 8667980/Docket CENT 2013-188, was issued on October 1, 2012, as an S&S 104(a) citation. The citation was issued on the blue stacking conveyor for a violation of 30 C.F.R. § 56.14107(a) requiring moving machine parts be guarded to prevent persons from contacting fan blades, shafts, gears or any other similar parts that could cause injury. There were numerous pinch points found as a result of exposed moving parts. Ex. S-13d. On October 22, 2012 Breon found that nothing had been done to install guards and a 104(b) order was issued. Ex. S-13e. Having returned in July 2013, the inspectors found that a guard had been installed; Jeppesen claimed this had been accomplished in October 2012.

3. Citation No. 8737370/Ex. S-16

The original citation, No. 8668082/Docket CENT 2012-724, was issued on May 1, 2012 as an S&S 104(a) citation. The citation was issued on a John Deere tractor in violation of 30 C.F.R. § 56.14107(a), which requires moving machine parts be guarded to prevent persons from contacting fan blades, shafts, gears or any other similar parts that could cause injury. Abatement was due, as twice extended, by May 26, 2012. Ex. S-16d. On June 11, 2012, a 104(b) order was issued when Jeppesen would not permit the MSHA inspector to enter the mine to inspect the tractor for compliance with the citation. The tractor was withdrawn from service until an inspector could observe the tractor. Ex. S-16e. Upon the return visit in July 2013, the inspector found that a guard had been installed to protect the cooling fins and drive belt. Jeppesen stated it had been installed two years earlier, which is obviously not true, as the original citation was issued just 14 months earlier.

4. Citation No. 8737372/Ex. S-18

The underlying citation, No. 8668084/Docket 2012-724, was issued on May 1, 2012 as an S&S 104(a) citation under 30 C.F.R. § 56.11001 for a lack of safe access to the water source used to prime the dewatering pump. Ex. S-18d. On June 11, 2012, inspectors were refused access to the mine to observe the condition and a withdrawal order was issued for the dewatering pump. Ex. S-18e. When the inspectors returned in July 2013, Jeppesen had abated the condition at some unknown time by obtaining water using the excavator bucket rather than by hand.

5. Citation No. 8737365/ Ex. S-11

The underlying citation, No. 8667979/Docket CENT 2013-188, was issued to Jeppesen on October 1, 2012 as an S&S 104(a) violation of 30 C.F.R. § 56.11012 when Breon found the west side elevated travelway of the wash plant did not have a railing, barrier or cover over a large opening at a height of approximately seven feet above ground level. The top of the ladder accessing the area was also not protected in any way. Tr. 93-94; Ex. S-11c. On October 22,

2012 Breon found that nothing had been done to correct this hazard and he issued withdrawal order No. 8737209. Ex. S-11d. Jeppesen at some time prior to the inspector's return in July 2013 had placed a chain across the opening on the travelway, but Breon felt the chain was not sufficiently stable, and nothing had been done to protect the ladder. Tr. 97-98. Jeppesen has not fully abated the condition to this inspector's knowledge. Tr. 99.

6. Citation No. 8737368/Ex. S-14

The underlying citation, No. 8667976/Docket CENT 2013-188, was issued on October 1, 2012 as an S&S 104(a) violation of 30 C.F.R. § 56.14107(a) for failure to guard the drive belts and sheaves on the east and west side of the wash plant. Ex. S-14d. When Jeppesen failed to make any corrections, he was issued a withdrawal order on the drive belts and sheaves of the wash plant on October 22, 2012. Ex. S-14e. Jeppesen thereafter partially abated the violation by guarding the west side of the exposed parts but not the east side. Tr. 172-73.[13]

7. Citation No. 8737371/Ex. S-17

The first citation, No. 8668083/Docket CENT 2012-724, was issued on May 1, 2012 as an S&S 104(a) citation under 30 C.F.R. § 56.14107(a) for failure to provide a guard on the PTO shaft of the dewatering pump. Ex. S-17d. A withdrawal order was issued on this equipment for failure to abate on June 11, 2012 as a result of Jeppesen denying the inspectors entry to the mine to re-inspect the equipment. Tr. 231-32; Ex. S-17e. When Breon and Van Wey returned in July 2013, they found that Jeppesen had guarded part of the shaft by installing some expanded metal to cover the knuckle ends to some extent but not the shaft itself. Tr. 232-33.[14]

B. Unabated Violations

Each of the following violations was designated as high negligence for the same reasons as were all the other "working in the face of a withdrawal order" violations. Jeppesen has complete control and responsibility over all operations at the mine including correction of hazardous conditions. Tr. 160. Jeppesen knew of the hazards based upon the prior citations, yet as of July 2013 he had done nothing to correct them and he had not called MSHA to terminate the orders on the ones he had abated. Tr. 149-50. In many instances, the cost or effort involved to abate the condition was minimal at best. Tr. 75-76.

I agree with the Secretary's assessment of high negligence as stated above based upon Jeppesen's willful failure to abate longstanding hazardous conditions and his complete disregard for MSHA's authority and for safety at his mine with respect to the following citations:

[13] Jeppesen questioned the need for a guard on the equipment because he alleged that it was over seven feet above the ground. Tr. 174. However, the bottom part of the guarded area was clearly within easy arm's reach when standing on level ground. Tr. 175-77; Ex. S-14e photograph 344. The issue is, however, moot at this time as Jeppesen admitted to this violation in the December 11, 2013 settlement order referenced herein. Ex. S-37.

[14] Jeppesen questioned whether the shaft required a guard. However, the underlying violation was admitted by him and included in the December 11, 2013 settlement agreement and is therefore final. Tr. 233-34; Ex. S-37.

1. Citation No. 8737363/Ex. S-9

The first citation, No. 8667977/Docket CENT 2013-188, was issued on October 1, 2012 by Breon as a non-S&S violation 104(a) violation of 30 C.F.R. § 56.12018 because the main 480-volt electrical disconnect box for the wash plant was not labeled to show what it controlled. The termination due date was the following day. Ex. S-9d. When Breon returned 21 days later, the box was not labeled and a 104(b) withdrawal order was issued. Ex. S-9e. On July 22, 2013, the box was still not labeled, but as stated above, the mine including the wash plant had been in operation for approximately two months. Tr. 71-74. Eight minutes after this instant citation was issued, Jeppesen used a Sharpie® marker to label the electrical disconnect at the inspector's suggestion. Tr. 71, 74.

Breon noted that Jeppesen could have easily abated the violative condition earlier by simply using a marker to label the box but failed to do so in nine months. Tr. 75-76.

2. Citation No. 8737366/Ex. S-12

On May 1, 2012, Citation No. 8668095/Docket CENT 2012-724 was issued as a non-S&S 104(a) violation under 30 C.F.R. § 56.4201(a)(1)[15] for a failure to perform the yearly inspection on a fire extinguisher located in the office/electrical van. Ex. S-12d. A withdrawal order was issued on June 11, 2012 when Jeppesen refused the inspector's entry to the mine to verify compliance. Ex. S-12e. On July 22, 2013, the extinguisher had not yet been inspected but was still available for use. Tr. 158. Van Wey testified that many volunteer fire departments will send someone to perform the annual inspections free of charge. Small mine operators often purchase a new extinguisher at Walmart and put it into service on the abatement due date. Tr. 157. Jeppesen had done neither.

3. Citation No. 8737369/Ex. S-15

The original order, No. 8667985/Docket CENT 2013-284, was issued on October 2, 2012 under 30 C.F.R. § 56.9300(a) as a 104(d)(2) violation when Breon found there was no berm in numerous locations along the access road around the mine site. The order was issued as an S&S violation and an unwarrantable failure, apparently based upon the extensiveness of the violation, the number of previous violations, the open and obvious nature of the condition, and the likelihood and gravity of injury presented. Ex. S-15d. Jeppesen accepted responsibility for this violation as issued. Ex. S-37. When Breon returned to the mine in July 2013, he found that there were still extensive areas around the mine lacking berms. Tr. 183. Tire tracks were visible just feet away from the drop-off to the plant pond. Tr. 185-86. Jeppesen had the equipment and material on-site to easily build berms. There were locations where he could have simply lowered the blade of the excavator to the ground and pushed the material up into a berm. It would have taken him just a few hours to abate the violation. Tr. 182-83.

4. Citation No. 8737373/Ex. S-19

[15] The proper code section for this violation is § 56.4201(a)(2). However, the narrative portion of the citation clearly defines the violation and it was admitted by Jeppesen in the earlier settlement order. Ex. S-37.

The original order, No. 8668101/Docket CENT 2012-787, was issued on May 5, 2012 under 30 C.F.R. § 56.18002(a) as an S&S, unwarrantable failure 104(d)(1) violation for a failure to conduct an adequate workplace examination of the wash plant. Ex. S-19c. Notations on the pages of a calendar were being used to record examinations and several obvious and dangerous conditions that had been cited over a long period of time had not been addressed. The violation was assessed as S&S and unwarrantable failure. Ex. S-19c. Jeppesen admitted to the violation and it was incorporated into the December 11, 2013 settlement order. Ex. S-37. When Breon returned to the mine in July 2013, Jeppesen was still not conducting workplace examinations of the wash plant but continued to use it. Van Wey testified that the Small Mines Workbook is used by inspectors to educate new owners of small mines as to the requirements for workplace examinations, including the necessity of conducting and documenting these examinations. Tr. 240-41. The booklet sets forth the standard, suggests the manner in which the operator should document the results of the examinations, and informs the operator that the records should be maintained for one year on-site. Tr. 240-42. Based upon the volume of open and obvious violations found, it was readily apparent to Van Wey that Jeppesen had not been performing the examinations. Jeppesen could provide no documentation of having done them. Tr. 243.

5. Citation No. 8737374/Ex. S-20.

Jeppesen was initially issued Citation No. 8667986/Docket CENT 2013-188 on October 2, 2012 as a non-S&S 104(a) violation for using an indoor-rated 480-volt electrical cable to supply power to the screen plant in violation of 30 C.F.R. § 56.12004. This presented a danger of inner conductors being damaged due to weather and mechanical damage. Tr. 254-55. When Breon returned three weeks later, Jeppesen had not replaced the cable with an outdoor-rated one and a 104(b) order was issued. Tr. 255; Ex. S-20e. Nine months later, in July 2013, Breon found Jeppesen had still not replaced the cable. Instead he had sprayed the indoor cable with Flex Seal® rubberized coating, which is not designed to protect electrical cables from damage. The material came off in the inspector's hand when he touched it. Tr. 259; Ex. R-14. When confronted with this fact, Jeppesen laughed about it and said he had painted the cable black. Tr. 260.

6. Citation No. 8737375/Ex. S-21

The underlying citation, No. 8667983/Docket CENT 2013-188, was issued as a non-S&S 104(a) violation on October 2, 2012 for a violation of 30 C.F.R. § 56.4201(a)(1) because the fire extinguisher in the electrical van had not been visually inspected at least once each month to ensure it was fully charged and operational. Ex. S-21c. The tag on the extinguisher that is normally dated and initialed when the inspection is done was missing such demarcations for September and October 2012 and thereafter, which resulted in a 104(b) order being issued on October 22, 2012 for continued failure to make the visual inspections. Tr. 262-64; Ex. S-21d. Jeppesen still had not made the requisite visual inspections and admitted to having no documentation of having done any when the inspectors returned ten months later, which led to the issuance of the instant citation.[16] Tr. 265; Ex. S-21.

[16] As a reason for not having the inspections done, Jeppesen claimed he had not been operating the mine from July through October 2012. Tr. 266. However, he documented performing

7. Citation No. 8737376/Ex. S-22

The initial record-keeping citation, No. 8668099/Docket CENT 2012-724, was issued as a non-S&S 104(a) violation on May 1, 2012 for not having task training records in violation of 30 C.F.R. § 46.9(g). Ex. S-22d. Five weeks later inspectors returned and asked for the records and again Jeppesen could not produce them. Tr. 276. A 104(b) order was issued on June 11, 2012. Tr. 276; Ex. S-22e. Had Jeppesen mailed or faxed the required documents to MSHA, this order would have been terminated without a return visit. Tr. 276. However, he failed to do so and on July 22, 2013, when he still had no documentation available, the instant citation was issued. Tr. 277. Jeppesen had refresher training records for himself and his son, Alan, dated April 2013 but not task training records. Tr. 277-78. If an individual mine owner has no employees,[17] generally the equipment manufacturer will provide the initial task training. The mine owner could certify himself thereafter, but the documentation is still required. Tr. 280. When the inspectors returned again in July 2013, Jeppesen still had no task training records of any kind and several new pieces of equipment were observed on-site. Tr. 279; Ex. S-22.

8. Citation No. 8737377/Ex. S-23

The underlying violation, 104(d)(1) Order No. 8668102/Docket CENT 2012-782, was issued as an S&S, unwarrantable failure violation on May 2, 2012 in violation of 30 C.F.R. § 56.14100(a) for not performing adequate examinations of mobile equipment (the excavator). The order states that there were numerous longstanding hazardous conditions that were open and obvious and were capable of causing serious injuries for which several citations and/or orders had been issued in the past. Ex. S-23c. When Jeppesen continued to operate the mobile equipment without putting a pre-operation examination program into action, the instant citation was issued. Tr. 285.

9. Citation No. 8737378/Ex. S-24

On May 1, 2012 the initial 104(d)(1) order, No. 8668098/Docket CENT 2012-187, was issued under 30 C.F.R. § 56.9300(a) as an S&S and unwarrantable failure violation for failure to maintain berms. This violation encompassed one area that was 21 feet long with a drop-off of 4 feet and another that was 24 feet long with a drop-off of 4 feet. Tire tracks were observed in both areas, showing this violation posed a very serious hazard to miners. The same condition had been cited numerous times previously. Tr. 286-89; Ex. S-24d. Jeppesen was still operating mobile equipment without the berms when the inspectors returned in July 2013. Tr. 289.

In conclusion, upon the uncontradicted testimony of the inspectors as well as Jeppesen's admissions, I find each of the 16 violations has been established.

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workplace examinations in July, August and September of that year. Tr. 269-71. Additionally, he conceded this violation in the settlement agreement. Ex. S-37. His claim is not credible.

[17] Jeppesen admitted that Alan Jeppesen performs work for him at the mine and is paid $85.00 per hour for his work. Jeppesen is therefore required to complete the task training for Alan as well as himself.

IV. Penalties

Section 110(i) of the Mine Act delegates to the Commission and its judges the authority to assess all civil penalties *de novo*. 30 U.S.C. § 820(i). The Act requires that in assessing civil penalties the Commission and its judges shall consider the six statutory penalty criteria found in Section 110(i): 1) the operator's history of previous violations; 2) the appropriateness of such penalty to the size of the business of the operator charged; 3) whether the operator was negligent; 4) the effect on the operator's ability to continue in business; 5) the gravity of the violation; and 6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. *Id.*

The Secretary has assessed a special penalty for each of the violations in this docket based upon Jeppesen's repeated and persistent violations, his refusal to recognized MSHA's authority, his lack of respect for the health and safety of miners, and his continued use of withdrawn equipment and work areas.

History of Previous Violations

The Assessed Violation History Report demonstrates that Jeppesen has a long list of prior violations, which is particularly noteworthy for a small mine. Many of the violations are of the same mandatory standards cited here. *See* Exs. S-34, S-35. As set forth above, Jeppesen entered into an agreement in December 2013 in which he agreed to settle 37 outstanding violations including the 16 violations upon which the violations discussed herein are predicated. Ex. S-37. He has been found to have violated Section 103(a) for interfering with the Secretary's right of entry on numerous occasions prior to the violation on October 1, 2012.

I find the number of prior violations is extremely high for a part-time, small mine.

Gravity of the Violations

Because the 16 violations for working in the face of a withdrawal order were issued as a violation of the Act, by MSHA policy, they are marked non-S&S. Gravity is not relevant to these citations.

With respect to the interference with the right of entry citation, as stated above, I find Jeppesen's actions to have been most egregious and physically threatening to the two inspectors. The gravity is very high.

Negligence

The negligence has been assessed as stated in the discussion of the violations. The Secretary has argued that the negligence for Citation 8737374 in which Jeppesen spray painted the electrical cable should be assessed as reckless disregard because the violation reflected an attempt to disguise the lack of abatement. I decline to find reckless disregard. The violation was initially assessed by the inspector as moderate negligence and raised to high negligence upon finding that Jeppesen had sprayed the cable with a rubber sealant. It is not clear that this was

done in an attempt to fool the inspector. It was more likely an attempt on Jeppesen's part to not spend money on installing proper equipment and to intentionally flaunt MSHA's authority – his *modus operandi*. I give deference to the inspector's assessment and find high negligence is appropriate.

Demonstrated Good Faith in Rapid Compliance

As the nature of the violations herein makes abundantly clear, the thought of making efforts to rapidly comply with the mandatory standards has never troubled Jeppesen's mind. I find there has been no good faith effort to comply with the cited mandatory standards.

Appropriateness to the Size of the Business and the Ability to Continue in Business

I find that Jeppesen is a sole proprietor of a very small mine with several prior violations of section 103(a) of the Act during the relevant time period. I further find that he has one employee, Alan Jeppesen. Jeppesen argued in the instant matter that Alan Jeppesen is not an employee but an independent contractor whom he pays $85.00 per hour to perform manual labor. Van Wey testified that Alan had participated in at least two inspections he made. Alan was actively engaged in the attempt to prevent entry to the mine and Jeppesen had signed off on Alan's annual refresher training in 2013. Tr. 163; Ex. S-4, 257. Jeppesen entered into stipulated findings of fact before Commission Judge Melick in November 2010 that Alan was his employee. *See Jeppesen Gravel*, 32 FMSHRC 1749, 1758 (Nov. 2010) (ALJ). Judge Manning also determined that Alan Jeppesen was an employee in 2008. All of these factors lead me to the conclusion that Alan Jeppesen is and continues to be an employee of Jeppesen Gravel.

Regarding sole proprietorships, the Commission has held that ability to continue in business must take into account the effect of a penalty on the individual's ability to meet his financial obligations. *Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998). The Commission has also held that in the absence of proof that the imposition of authorized penalties would adversely affect the ability to continue in business, it is presumed that no such adverse effect will occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983).

Jeppesen asserts that the penalties proposed herein would hinder its ability to remain in business. Jeppesen submitted the "Client Copy" of his tax returns for 2013 and 2014 as proof of his claim. These uncertified, unfiled documents indicate he took substantial undefined deductions on his income taxes for various expenses including cost of goods sold, depletion, repairs, "other expenses," and supplies and depreciation (including over $23,000 in both years for unspecified "Cap Repairs") to reduce his gross income by more than $200,000. Exs. R-20, R-21. He offered no testimony, balance sheets, or evidence of liens with regard to his income and nothing relating to his income or expenses in 2015. He would not disclose how much of his past income and expenses were for the mining business. Tr. 314-15. He offered no explanation for why the mining business is part-time rather than full time and submitted nothing to document his financial familial obligations.

I find the evidence of Jeppesen's financial status is insufficient to prove an inability to continue in business. *See Spurlock Mining Co. et al.*, 16 FMSHRC 697 (Apr. 1994) (operator

failed to introduce "specific evidence" to show penalties would affect ability to continue in business); *Rock Express, Inc.*, 36 FMSHRC 2696 (Oct. 2014) (ALJ) (unaudited document with non-disclosed assets and future earnings did not meet burden); *Uehlin Quarries*, 36 FMSHRC 2281 (Aug. 2014) (ALJ) (summary allegations are not sufficient to reduce penalty even for small family-owned business); *Ikerd Mining Co., LLC*, 35 FMSHRC 3302 (Oct. 2013) (ALJ) (incomplete tax return with "other deductions" without specific testimony not sufficient to reduce penalties); *L&T Fabrication & Constr.*, 21 FMSHRC 71 (Jan. 1999) (ALJ) (unaudited financial records insufficient to reduce penalties).

Jeppesen has, to the contrary, been able to pay his son and Dave Nasters $85.00 per hour each for manual labor. Tr. 320-21. And, despite the sizeable deductions on his unverified income tax returns, based upon the unabated conditions the inspectors found that had existed for up to 14 months, he had not actually made any such expenditure he deducted as costs of goods sold, repairs, etc.

When looking at the initial citations and orders that led to the issuance of the withdrawal orders, it is readily apparent that many of the violative conditions could have been eliminated with little or no expense at all, making it even more apparent that Jeppesen's claim of financial hardship is a ruse. In one instance, he abated an electrical violation by using a black marking pen to label a junction box. In another he used a piece of equipment to gather water to prime a pump instead of a handheld bucket. He could have used the equipment on-site to push dirt up to form berms around his property but refused to do so. He told the MSHA inspector he did not have a guard on machinery because it was his right to put a hand in the fan tail pulley if he wanted to. Tr. 152. He could have performed monthly inspections of the fire extinguisher himself at no cost and had the annual inspection done at no charge by a fire department. Proper conduction of pre-operational examinations and completed training documentation obviously carried no expense as well.

In reaching a settlement for $28,500.00 in 2013, Jeppesen admitted that he had the ability to pay the penalties, yet he has not paid a dime. In fact, he has not paid any of the fines MSHA has ever assessed against him since 2004.[18]

The financial inability criterion under the Act is available to operators who at least in good faith try to comply with the mandatory standards of the Act but are limited in the ability to pay higher fines. In this instance, Jeppesen attempts to avoid paying any penalties for extremely hazardous conditions that have persisted for significant periods of time. In fact, he stated to the inspectors repeatedly that each of their citations would only cost him ten cents, apparently referring to the fact that another ALJ had significantly reduced the assessed penalties in the past. Tr. 145, 151-52.

I find that Jeppesen has not met his burden of proving that the proposed penalties will affect his ability to continue in business. I also find that the Secretary has made his case for enhanced specially assessed penalties against Jeppesen Gravel for the demonstrated lack of respect for MSHA, the Mine Act, the individual inspectors who are charged with carrying out

[18] This information is taken from the U. S. Department of Labor's Mine Data Retrieval System at http://www.msha.gov/drs/ASP/MineAction.asp.

lawful inspections of Jeppesen's mine, and the miners he employs as independent contractors or otherwise.

I assess the following penalties based upon the relevant criteria set forth in Section 110(i) of the Mine Act as discussed above:

1. Citation No. 6550468 – $4,000.00
2. Citation No. 8737364 – $1,000.00
3. Citation No. 8737367 – $1,000.00
4. Citation No. 8737370 – $1,000.00
5. Citation No. 8737372 – $1,000.00
6. Citation No. 8737365 – $1,000.00
7. Citation No. 8737368 – $1,000.00
8. Citation No. 8737371 – $1,000.00
9. Citation No. 8737363 – $1,000.00
10. Citation No. 8737366 – $1,000.00
11. Citation No. 8737369 – $5,000.00
12. Citation No. 8737373 – $3,000.00
13. Citation No. 8737374 – $1,000.00
14. Citation No. 8737375 – $1,000.00
15. Citation No. 8737376 – $1,000.00
16. Citation No. 8737377 – $3,000.00
17. Citation No. 8737378 – $3,000.00

## V. Order

For the reasons set forth above, the citations are **AFFIRMED** or **MODIFIED** as discussed above. Jay Jeppesen, doing business as Jeppesen Gravel, is **ORDERED TO PAY** the Secretary of Labor the sum of $30,000.00 within 60 days of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Priscilla M. Rae
Administrative Law Judge

Distribution:

Robert Alan Kelly, Esq., U.S. Department of Labor, Office of the Solicitor, Two Pershing Square, 2300 Main Street, Suite 1020, Kansas City, MO 64108

Jay A. Jeppesen, Jeppesen Gravel, 719 8th Street, Sibley, IA 51249