FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. DUKE'S SAND & GRAVEL, Respondent.	CIVIL PENALTY PROCEEDING Docket No. YORK 2012-97-M A.C. No. 19-01212-275527 Mine: Duke's Sand & Gravel

DECISION

Appearances: Laura I. Pearson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, CO, for Petitioner

John Duquette, Jr., Duke's Sand & Gravel, Adams, MA, for Respondent

Before: Judge Moran

Introduction

This case concerns 22 alleged violations, 21 citations and 1 order, issued to Duke's Sand & Gravel (DS&G) by the Mine Safety and Health Administration on October 19, 2011. Each of the citations was issued under Section 104(a) of the Mine Act, and the single order was issued under Section 104(g)(1). 30 U.S.C. § 814(a), (g)(1) (2012). John Duquette, the mine operator, appearing before the Court *pro se*, has essentially conceded the validity of each of the citations, *see* Tr. 107-08, but has contested the negligence and gravity designations associated with them, whether certain of the violations were significant and substantial, and the appropriateness of the proposed civil penalties sought by MSHA.[1]

A hearing was held in North Adams, MA, on April 8-9, 2014, at which MSHA Inspector Zane Burke and the mine owner, John Duquette, Jr., testified. Throughout the hearing, Mr. Duquette testified about his lack of knowledge of MSHA's standards. The Court credits the Respondent's testimony generally, but also notes that the Secretary took the operator's

[1] The Secretary proposed a total penalty of $3,514.00 for the twenty-two violations. For thirteen (13) of those, $100.00 was proposed, another eight (8) were assessed at $243.00, and one proposed at $270.00.

unfamiliarity with MSHA's requirements into account in assessing the negligence of each citation. In future proceedings, as the Court cautioned at the hearing, protestations that DS&G did not know about certain standards will not be well-received because it is the duty of mine operators to familiarize themselves with those requirements.

For the reasons that follow, the Court finds that each of the violations was established, but upon its independent application of the statutory criteria to the facts adduced at the hearing, the combined penalty has been modified to **$2,085.00.**

Penalty Assessments

The Commission has recently spoken to the subject of penalty assessments in *Hidden Splendor Resources, Inc.*, 36 FMSHRC ___, slip op., WEST 2009-208 (Dec. 23, 2014) ("*Hidden Splendor*"), wherein it noted that "[t]he Mine Act sets forth a bifurcated penalty scheme under which the 'Secretary proposes penalties before a hearing based on information then available to him and, if the proposed penalty is contested, the Commission affords the opportunity for a hearing and assesses [the] penalty.' *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1151-52 (7th Cir. 1984)." *Hidden Splendor* at 3. The Commission went on to observe that

> [t]he Secretary's regulations at 30 C.F.R. Part 100 apply only to the Secretary's penalty proposals, while the Commission exercises independent 'authority to assess all civil penalties provided [under the Act]' by applying the six criteria set forth in section 110(i). 30 U.S.C. § 820(i); *Sellersburg Stone Co.* v. *FMSHRC*, 736 F.2d at 1151-52 ('[N]either the ALJ nor the Commission is bound by the Secretary's proposed penalties . . . [W]e find no basis upon which to conclude that [MSHA's Part 100 penalty regulations] also govern the Commission."); *see also W.S. Frey Co. v. Sec'y of Labor*, 57 F.3d 1068, *5 (4th Cir. 1995) (unpublished) (citing *Sellersburg*, 736 F.2d at 1152) (holding that a Judge is authorized to determine a penalty amount *de novo* based on statutory criteria).[2]

Id. at 3-4.

The Commission then reminded that,

> [i]n a contested case, the amount of the penalty to be assessed by the Commission and its Judges is a *de novo* determination based on the criteria set forth in section

[2] Though the quoted language unmistakably sets forth the Commission's role, that body went on to add that "the Commission's Procedural Rules specifically state that, 'In determining the amount of penalty, neither the Judge nor the Commission shall be bound by a penalty proposed by the Secretary . . .' 29 C.F.R § 2700.30(b). Nor was the Judge bound by the Secretary's definition of 'high negligence' set forth in section 100.3(d). *See, e.g., Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 n.4 (Aug. 2014) ('We reject the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering whether [the operator] was negligent'); *Deshetty, emp. by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994)."

> 110(i), 30 U.S.C. § 820(i). *Sellersburg Stone,* 5 FMSHRC at 293. Penalties assessed by Commission Judges can be greater than, less than, or the same as those proposed by the Secretary. *Id.* However, when it is determined, based on further information developed in an adjudicative proceeding, that penalties should be assessed which substantially diverge from those originally proposed, Judges must sufficiently explain the bases underlying the penalties assessed. *Id.*; *Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000).

Hidden Splendor at 6. The Commission also noted that **"**the Judge did not offer any explanation for the divergence, for instance, by explaining whether he gave special weight to various criteria, and thus failed to provide the basis for meaningful review of the penalty by the Commission." *Id.*

Penalty criteria uniformly applicable to each of the citations and the single order

Although each alleged violation will be discussed, some observations regarding the penalty criteria apply uniformly to each of them. For perspective, it is first noted that for the 21 citations and 1 order involved with this docket, 13 were proposed at penalty amounts of $100.00 (one hundred dollars), 8 at $243.00 (two hundred forty three dollars) and the one order at $270.00 (two hundred seventy dollars). Therefore it is fair to note that MSHA itself proposed assessments that were on the very low range. After taking into account the 10% "Good Faith" discount it applied, 13 of the citations received the minimum penalty assessment that Part 100 allows.

MSHA cannot, under Part 100, assess a penalty less than $100.00 (one hundred dollars), but the Court is not so restricted by those provisions. Instead, as noted above, the Court's assessment is based upon the statutory criteria set forth at Section 110(i) of the Mine Act. For many of the matters in this litigation, the Court has determined that a penalty reduction below the proposed assessments is warranted upon considering:

The operator's history of previous violations, for which there is no previous history;

The appropriateness of the penalty to the size of the operator's business, which is a 1 (one) employee operation[3]; and

The demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations, which in this case, by any measure, could not have been more rapid and is fairly described as exemplary.[4]

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[3] As MSHA concedes, this mine is a one person operation. *See, e.g.*, Tr. 152, 170, 220.

[4] Mr. Duquette was also specifically advised that, as this was the first MSHA Inspection he has ever had, the Court could take that novice status into account, but that such a view would not be available for subsequent inspections as the mine operator could no longer assert ignorance of its mine safety and health obligations. Tr. 34. In contrast, the Secretary maintained that Mr. Duquette engaged in "willful ignorance" of his obligations. Tr. 36.

A fourth factor, **the effect on the mine operator's ability to continue in business**, is also applied uniformly to each established violation. DS&G conceded that it will be able to continue in business, even if all of the penalties in this case were to be assessed as proposed by the Secretary.[5] Tr. 414. Therefore this criterion does not impact the penalty assessment.

As appropriate, the remaining penalty criteria, negligence and gravity, are discussed for each individual citation and the one order.

Findings of Fact and Discussion of the remaining penalty criteria—negligence and gravity—to the citations and order

Negligence and Gravity

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, it considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *Jim Walter Res., Inc.*, 36 FMSHRC 1972,1975 (Aug. 2014). Mitigating circumstances play a role in the evaluation of negligence.

The gravity penalty criterion contained in section 110(i) of the Mine Act requires an evaluation of the seriousness of the violation. In evaluating the seriousness of a violation, the Commission has focused on "the effect of the hazard if it occurs." *Consolidation Coal Co*., 18 FMSHRC 1541, 1549-1550 (Sept. 1996); *Sellersburg Stone Co*., 5 FMSHRC 287, 294-95 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Background

On October 19, 2011, MSHA Inspector Zane Burke[6] arrived at Duke's Sand & Gravel in Adams, MA, in response to a complaint that a sand and gravel mine was operating without a Mine I.D. and with multiple safety violations existing at the site. Tr. 50, 53-54. Upon arriving at Respondent's mine, Inspector Burke found only a single employee present, a loader operator. Tr. 65. The Inspector noted that the operation had a double deck screen plant and a jaw crusher and he determined that the mine was under MSHA's jurisdiction. Tr. 67-68,74. The Court agrees that Duke Sand and Gravel is properly characterized as a mine due to the excavation, crushing, and milling of gravel that takes place at the site. *See* 30 U.S.C. § 802(h)(1). Respondent does not contend that MSHA lacks jurisdiction.

[5] Since these three factors are common to all of the citations and the order, the Court incorporates them into the penalty assessment for each violation.

[6] At the time of the hearing, Inspector Burke had been with MSHA for ten years. Tr. 45. Prior to his time at MSHA, he worked for ten years for a sand and gravel operation. Tr. 45. Inspector Burke also had a journeyman electrician's license, which he used to perform electrical work on crushers and screen plants. Tr. 45-46.

Citation No. 8654122[7]

Failure to notify MSHA of legal identity

Section 104(a) Citation No. 8654122 alleges that Duke's Sand & Gravel failed to notify MSHA of its legal identity, in violation of 30 C.F.R. § 41.11(a), which states in part:

> Not later than 30 days after . . . the opening of a new mine . . . the operator of a coal or other mine shall, in writing, notify the appropriate district manager of the Mine Safety and Health Administration in the district in which the mine is located of the legal identity of the operator.

DS&G had been operating for approximately five months at the time the citation was issued, a period of time which is well beyond the thirty day requirement in the regulation. DS&G concedes the fact of the violation, but contests the penalty amount. DS&G abated the citation by filling out a Mine I.D. application. Tr. 88, Ex. P-3. Mr. Duquette did tell the Inspector at the time of the citation's issuance that he tried to call the MSHA field office in Albany. Tr. 89. However when the Inspector attempted to verify that claim, no message from Mr. Duquette was found. Tr. 90. The Inspector considered the matter to be a paperwork violation and therefore listed "no likelihood of injury" for the gravity.

The Secretary alleges that the violation occurred as a result of moderate negligence. Section 100 defines an operator as moderately negligent when he "knew or should have known of the violative condition or practice, but there are mitigating circumstances." 30 C.F.R. § 100.3(d). The Inspector's notes reflect that the operator told him that he had spoken with other mine operators and thought that MSHA would come to him and give him an ID with no fine. Tr. 91-92, Gov. Ex. P-3. The Inspector's position was that Mr. Duquette would have had to assert that he didn't know anything about MSHA to qualify for low negligence. Tr. 92.

The Inspector acknowledged that, at the time of issuing the citation, Mr. Duquette showed him another MSHA Inspector's business card, which had been handed to him by another mine operator. Tr. 96. Mr. Duquette alleged that he called the number listed on that card to become informed about his MSHA responsibilities. Tr. 97. Mr. Duquette only called the number on that card; he did not call any other MSHA telephone numbers. Tr. 112. He stated that he called that one inspector and left at least one message, inquiring about MSHA, prior to the October 18, 2011, inspection. Tr. 113. While he knew that MSHA existed and that it had the authority to fine gravel mines, Mr. Duquette was not aware of much beyond that. In fact, he believed that MSHA would function in a manner similar to OSHA, where an inspection could occur but without any pre-existing obligation to register with it. *See* Tr. 109, 119-20. He did not know the full extent of the regulatory scheme, nor was he aware that he had a duty to notify MSHA that he was operating a gravel mine. Tr. 121-22.

[7] As a point of reference only, as penalties are assessed by the Court on the basis of the statutory criteria, the proposed penalty under Part 100 is listed for each section 104(a) citation. For Citation No. 8654122, $100.00 was proposed.

As the Court noted at the hearing, if it were to find that Mr. Duquette did try and call MSHA that effort could impact the evaluation of negligence on his part. Tr. 100. Mr. Duquette also stated that he immediately obtained the required I.D. after receiving the citation and that there was no foot-dragging on his part. In fact, the Secretary stipulated that Mr. Duquette filled out the required form while the Inspector was still on the mine property. Tr. 124-125.

Determination of the Court

When assessing a penalty, the Court must consider the following factors provided in section 110(i) of the Mine Act:

> the operator's history of violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). Additionally, while the Secretary has proposed a penalty, a judge's determination is not restricted by the amount of the proposed penalty. 29 C.F.R. § 2700.30(b).

As noted above, three of the six factors have shared determinations, which are applied uniformly to each of the established violations. A fourth factor, ability to continue in business, also discussed previously, applies uniformly to each of the established violations as well, although that factor does not impact the penalty assessments in the only way it potentially could, by reducing a penalty, because DS&G concedes that, even as proposed, imposition of the penalties would not threaten its ability to continue in business.

It has also been mentioned, and MSHA has acknowledged, Mr. Duquette's good faith in addressing each citation with exemplary promptness.[8] *See also* Exhibit A. Each penalty assessed in this case arose out of the one inspection carried out on October 19, 2013, and Mr. Duquette worked to rapidly achieve compliance with a necessarily demanding regulatory regime. Accordingly, the Court finds that, for each of the twenty-two violations in this case, DS&G exhibited good faith in achieving rapid compliance.[9] As it pertains to this citation, Mr. Duquette's good faith in achieving rapid compliance could not have been faster.

As for negligence, Mr. Duquette's unfamiliarity with MSHA and the requirements imposed on gravel mine operators mitigates a finding of high negligence, as does his attempt to contact a mine inspector, although his efforts in that regard should have been greater. While a mine operator has a responsibility to familiarize himself with the regulations, and asserted ignorance of a regulation is not a defense to penalty enforcement, in this case, the Court finds that Mr. Duquette's lack of familiarity with MSHA warrants lowering the negligence of this citation somewhat. Mr. Duquette is not a sophisticated operator in this industry. As noted at the

[8] For the lone order in this docket, MSHA did not apply a percentage reduction for good faith.
[9] The Court incorporates its determination of DS&G's good faith for each of the 22 litigated matters.

time of the inspection, he had one employee, had only been in business for a manner of months, and had yet to even sell any of the gravel he was making.

The gravity of this citation was listed by the Inspector at its lowest possible level, with no likelihood of injury and no lost workdays. DS&G was in operation for five months before MSHA was aware of its existence. While the likelihood of injury is nonexistent in this citation (this is a paperwork violation), failing to file for a Mine I.D. subjected the single employee in this case to dangers that could have been prevented by safety inspections. Without knowing of the existence of a mine, MSHA cannot perform its duty of protecting miners from needlessly unsafe working conditions.

Upon consideration of the penalty criteria, the Court assesses a civil penalty of **$50.00** for Citation No. 8654122.

Citation No. 8654123[10]

Failure to notify of commencement of operations

Section 104(a) Citation No. 8654123 alleges that Duke's Sand & Gravel "failed to notify the nearest MSHA field office . . . of the crushing & screening operation" in violation of 30 C.F.R. § 56.1000. Ex. P-5. Section 56.1000 requires that mine operators notify MSHA of the date that a mining operation will commence. The Secretary alleges that the violation occurred as a result of moderate negligence, but that there was no likelihood of injury since it was a paperwork violation. Ex. P-5; Tr. 134. The Inspector testified to that effect, stating that he was "trying to give the operator the benefit of the doubt that he wasn't fully aware of the . . . [56.1000] criteria." Tr. 134. DS&G abated the citation by filing the correct paperwork with MSHA. Tr. 135. The Inspector distinguished this citation from the legal identity violation, in that by MSHA learning about an operation's start-up, it can schedule its inspections. Not knowing of that, he stated, exposes miners to the potential of accidents or injuries that an inspection might uncover. Tr. 129. As a seasonal or intermittent operation, the Respondent is required to complete this form when they start and stop operation. As with the previous citation, this was another obligation about which Mr. Duquette was unaware. Tr. 134. Employing the same rationale as for the failure to notify MSHA of its legal identity, the Inspector ascribed moderate negligence to the violation. Tr. 134.

In response to the Inspector's testimony, Mr. Duquette stated he did not know about any of the violated regulations at issue in this case; if he had, he would have complied with the requirement. Tr. 135.

Determination of the Court

The negligence associated with this violation is mitigated in the sense that the failure to notify of commencement of operations and the previously-discussed violation for failure to notify MSHA of legal identity arose out of the Respondent's ignorance of the requirements. The Court views this violation as essentially finding more than one violation stemming from the same

[10] The proposed assessment was $100.00.

lack of knowledge of the regulatory duties. When considered along with the one-employee nature of the mine, a lesser penalty, for a first offense, seems more appropriate for this paperwork violation.

Upon consideration of the penalty criteria, including those which, as previously discussed, apply to each of these matters, the Court assesses a civil penalty of **$50.00** for Citation No. 8654123.

Citation No. 8654124[11]

Lack of guard on screening plant

Section 104(a) Citation No. 8654124 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.14112(b), which states that "[g]uards shall be securely in place while machinery is being operated." DS&G was cited under this standard because the screen plant was missing a guard on the small aggregates belt, leaving the tail pulley fully exposed. Ex. P-9. The Inspector stated that there was an exposed tail pulley that was within "hands-reach," creating an entanglement or pinch-point hazard where one could get pulled into the pulley. Tr. 143. Thus, he found that there was a danger of entanglement of human extremities, that such an occurrence would be fatal, albeit unlikely, and that DS&G's negligence in this instance was moderate. Ex. P-9.

DS&G abated the citation within the time given by the Inspector by fabricating and attaching a mesh guard to prevent people from making contact with the pulley. Tr. 165. The Inspector agreed that the mine's sole employee, the loader operator would not be exposed to the pinch point unless he got off the loader. Tr. 146. He also stated that the likelihood of an injury was "unlikely" because Mr. Duquette advised that the machine is shut down when work is done on it and, when it is operating, persons are not near it. Tr. 151. As this is a one-person operation, only one person would be exposed to the hazard. Tr. 151. The opening was eight to nine inches long and three to four inches wide. Tr. 158-159. Thus it is fair to observe that the opening was small. While any injury would be serious, the Inspector's testimony did not support his claim that it would likely be fatal, but rather that it would be permanently disabling. Tr. 161.

The Inspector marked the negligence as moderate on the basis that Mr. Duquette instructed that employees are not to travel in that area when the machine is operating. Tr. 163. The Inspector's MSHA training was that, in evaluating the negligence of a violation, they are to start with the presumption that the negligence is high and then work down from that designation if there are mitigating circumstances. Tr. 163. The Court does not analyze negligence under such an approach. It decides the appropriate negligence based on the evidence at hearing, without any presumption one way or the other. In terms of abatement, the screen mesh guard was installed "shortly after the citation was [] written." Tr. 164-165. The Inspector agreed that Mr. Duquette instructed that the guard be fixed "A.S.A.P." at the time it was cited and that this involved his calling the Berkshire County Construction Company. Tr. 165. Again, Mr. Duquette emphasized that this is a one-employee operation.

[11] The proposed assessment was $100.00.

During his testimony, Mr. Duquette maintained that contact with the opening was implausible because, when it is running, rocks are being tossed out all over the place from its operation and therefore the idea that one would be able to get near that pinch point was not realistic. Tr. 170. He added that his employees are trained to not go near the machine. As he put it, even his two year old daughter would realize the need to stay away from the machine due to the falling rocks and therefore no one would be near the cited opening. Tr. 170-171.

The violation of section 56.14112(b) occurred on an Extec 5000 screen plant, which is used to separate various sizes of mined stone and gravel from one another. Tr. 143-144. The side pulley missing the guard stood about three feet from the ground, and the opening that required a guard was three to four inches high and eight to nine inches wide. Tr. 146, 158.

When the screening plant is actively sorting material, an employee running the plant would not generally be subject to any danger of entanglement because the employee would be loading the plant, in this case with a front-end loader. Tr. 145. But, if the employee were to exit the cab of the front-end loader and interact with the area of the screen plant near this tail pulley, he may become entangled. Tr. 146.

Inspector Burke testified that entanglement could result in a fatality. If a hand got caught in the belt, the belt may pull the person in all the way up to the neck, possibly snapping that person's neck. Tr. 149, 153. He further testified that he had seen fatalgrams (MSHA reports of fatal mining accidents) of this type of accident, but he did not know whether the opening in those cases was the same size as the opening in this case. Tr. 150, 162.

Based on his conversation with Mr. Duquette, the Inspector found that an injury would be unlikely because the machine would be off when the operator or his employee would perform maintenance, and when the machine is running, the employee would not be around that area. Tr. 151. Furthermore, because DS&G has only one employee, if the person running the screen plant is loading it, there is no one else exposed to the dangerous condition. Tr. 151.

Finally, the Inspector assessed that the violation was a result of moderate negligence because, first, Mr. Duquette had told his employee not to travel in the dangerous area while the machine is in operation, and, second, this was Mr. Duquette's first inspection. Tr. 163.

Mr. Duquette testified that, when the machine is running, rocks are falling down out of the hopper and onto the belt, and a competent person would know not to go near the dangerous area. Tr. 170. Because the danger is so obvious, it is extremely unlikely that any injury would occur. Tr. 171. In abating the citation, Mr. Duquette further testified that he promptly called employees from his other company to fabricate the guard. Tr. 172.

Determination of the Court

The Court finds that DS&G's negligence in this instance was lower than the government contended, as was the gravity. While a fatality could occur if a miner came into contact with the unguarded tail pulley, the possibility of a person becoming caught in the exposed area, due to the small size of the opening and the obviousness of the hazard, is low. Also, since only DS&G only

employs one miner, no person should ever be exposed to the hazard because when the machine is running, the miner should be in the cab of the front end loader, loading the screen plant with material to sort.

Upon consideration of the penalty factors, the Court imposes a penalty of **$50.00** for Citation No. 8654124.

Citation No. 8654125[12]

Missing inspection plate on jaw crusher[13]

Section 104(a) Citation No. 8654125 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.12032, which states 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." DS&G was cited under this standard because the 1538 Telsmith Jaw Crusher was missing a seal on the motor starter control panel. Ex. P-11. The Inspector found that debris, moisture, and rodents could cause short circuits or stray current paths, creating an electrical shock hazard, that such an occurrence would be fatal, albeit unlikely, and that DS&G's negligence in this instance was moderate. Ex. P-11. The operator abated the citation by placing a knockout seal on the box. Tr. 182. A *one inch* seal was missing from the motor control and that allowed the mentioned dirt, debris, moisture, etc., to enter through that opening. Tr. 175. The seal is simply a plug to cover the opening. Tr. 176.

The crusher in question had a voltage of four hundred and eighty volts. Tr. 179. If something were to get into the control panel and create a short circuit or stray current path, Inspector Burke stated that the resulting electric shock could be fatal, depending on where the current entered the body. Tr. 178, 181. Such electrocution could happen in different ways. Rodents could chew on the wires, for example, or dust could enter the box's insulating wires, creating a current through condensation. Tr. 180. However, Inspector Burke testified that there was no sign of moisture, foreign objects, or rodent activity in the control panel, and, accordingly, characterized the likelihood of injury as unlikely. The Inspector also did not see any internal damage to the conductors. Tr. 178. He also did not see any deterioration inside the box. Tr. 185.

Inspector Burke also found that the negligence was moderate, while asserting that Mr. Duquette expressed the view that a hole of that size in the control panel was not a problem. Tr. 182. Mr. Duquette contradicted the Inspector in that aspect, testifying that he did *not* claim that a hole in a control panel was not a problem. Tr. 186. Instead, he asserted that it was the operator of the machine who made that claim. In fact, Mr. Duquette agreed that the hole needed to be plugged, and that if an injury occurred due to electrical shock from this machine it could be fatal. Tr. 186-87.

[12] The proposed assessment was $100.00.
[13] Also known as missing knock out seals, as described by the Secretary's attorney. Tr. 173-174.

Determination of the Court

The Court notes that the opening was minimal, being only one inch in diameter and that, as the Inspector testified, there was no sign of moisture, foreign objects, or rodent activity in the control panel. Therefore it agrees that the likelihood of injury was appropriately marked as unlikely. There was no testimony that this condition had been long-existing. The Court also finds that the negligence was low, not moderate, and along with consideration of the other statutory criteria, finds that a penalty of **$50.00** is an appropriate penalty assessment for Citation No. 8654125.

Citation No. 8654126[14]

Exposed conduits on the jaw crusher

Section 104(a) Citation No. 8654126 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.12004, which states that "[e]lectrical conductors exposed to mechanical damage shall be protected." DS&G was cited under this standard because a conduit was exposed at two locations on the crusher. Ex. P-14. The Inspector found that the condition created an electrical shock hazard, that such an occurrence would be fatal and reasonably likely to happen, that DS&G's negligence in this instance was moderate, and that the violation was significant and substantial. Ex. P-14. The citation was abated by putting the conduit and strain relief connector back together. Tr. 197.

On the feeder belt of the jaw crusher, the Inspector observed that the flex conduit was pulled out of the strain relief connector, and the electric metal tubing (E.M.T.) conduit was pulled out of its rain-tight connector. Tr. 189. The flex conduit likely became exposed because normal vibrations of the crusher caused a clamp to slide down. Tr. 190-191.

However, even though the flex conduit was pulled out of the strain relief connector, no bare wires were exposed. Tr. 200. In order to be injured, the wires inside the conduit would have to be worn bare. At the time of the citation, they were still insulated. Additionally, even if the bare wires were exposed, Inspector Burke testified that the person touching the wires, in order to be electrocuted, would have to be a better ground than the grounding system. Tr. 201-202. During his inspection, he "didn't see anything that would indicate the grounding system was at fault," and the metal crusher frame was touching the dirt, creating a natural ground." Tr. 202. Should each of these requirements be met, however, the Inspector testified that an electrical shock from contact with the machine could be fatal. Tr. 195. The Inspector also found that Mr. Duquette's negligence was moderate, because Mr. Duquette stated that he did not see the condition before the Inspector discovered it. Tr. 196.

The strain relief connector holds the flex conduit in place. To fix the problem, the conduit and the strain relief connector were simply reconnected. Tr. 197. However, the Inspector based his conclusion that an injury was reasonably likely on the basis that he "didn't perceive it being fixed right away," but he offered no rationale to support that view. Tr. 191. He stated that the condition was obvious and he marked it as S&S because "of the exposed wires." Tr. 194. Yet,

[14] This citation was assessed at $243.00.

he marked the negligence as moderate because the operator didn't see the condition. Tr. 196. The Inspector agreed with the Court that because there were no bare wires, if one were to touch those wires no harm would result. Tr. 200. This was true with regard to both of the conditions the inspector observed. Tr. 200. Further, the Inspector did not observe any deterioration in those wires. Tr. 200. The inspector said had he observed such a problem he would have noted bare or chafed wires in his citation. Tr. 200. As he put it, "*those wires were probably in pretty good condition.*" Tr. 200-201 (emphasis added). In addition, the Inspector effectively conceded that, as he saw nothing to indicate that there was anything wrong with the grounding system, it was less likely that one would be shocked. For his part, Mr. Duquette testified that because a flex pipe is present, there would not be any steel rubbing on steel and the flex tubing is a silicone base, and for those reasons he believed it was unlikely that shaved wires would result. Tr. 204. In short, Mr. Duquette believed it was very unlikely for the wires to become bare under those conditions. Tr. 206. Also, as to the second condition, Mr. Duquette stated that the equipment was not then in service and that it was not connected, electrically, inside the box. Tr. 206. He did not relay this information to the Inspector at the time of the citation because he did not know at the time that power was not running through the conduit. He had recently bought the equipment used, and had not fully inspected it. Tr. 211.

Determination of the Court

The Secretary has alleged that this violation was significant and substantial, which denotes a more serious violation. In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission explained that in order to find a violation significant and substantial,

> the Secretary of Labor 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 in question will be of a reasonably serious nature.

Id. at 3-4 (internal citation omitted).

As noted above, the applicable portion of the cited standard provides that "[e]lectrical conductors exposed to mechanical damage shall be protected." The testimony from the Secretary's witness established that there were wires present and that they were exposed.

"Conductor" is defined in section 56.2 as "a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." Although Mr. Duquette provided unchallenged testimony that the wires at issue were not carrying a current at the time of the inspection, nor did they carry a current after the inspection, he did not assert that claim until long after the citation was issued and it cannot be credited. While the violation was established, the condition of the wires, and the grounding system contradicts the Inspector's S&S conclusion. Finding that the violation was somewhat less than "reasonably likely" to result in an injury or illness under the accepted facts, the Court reduces the penalty to **$143.00**.

Citation No. 8654127[15]

Missing guard on crusher

Section 104(a) Citation No. 8654127 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.14112(b), which states that "[g]uards shall be securely in place while machinery is being operated." DS&G was cited under this standard because the crusher was missing a guard. Ex. P-15. The Inspector found that the condition created an entanglement hazard, that such an occurrence would be fatal, albeit unlikely, and that DS&G's negligence in this instance was moderate. Ex. P-15. The citation was abated by bolting corrugated screen cloth on the access point on each side of the crusher. Tr. 220.

Inspector Burke issued this citation because the "under jaw main belt conveyor was found to have the rib tail pulley fully exposed at ground level." Tr. 215. The part of the machine that required a guard was the area of the belt beneath the jaw that received crushed material and carries it forward. Tr. 216. The Inspector thought that injury from being caught in the belt would be a fatal neck injury, through dismemberment from being pulled into the machine. Tr. 217-18. He considered it unlikely, however, because the dangerous area is underneath the crusher and not easily accessed, but a worker may access it in order to adjust the belt or shovel a clog underneath the belt. Tr. 219. He described the negligence as moderate because the operator had told his employee to turn off the crusher before working on it. Tr. 220. On cross-examination, Inspector Burke agreed that in order to get into the belt area and be caught in it, a miner would have to squeeze into the area. Tr. 221.

Mr. Duquette testified that he trained his employee not to go near the belt area when the machine was running. Tr. 224. The employee, before working on the machine, is supposed to turn off the machine and lock it. Tr. 224. Mr. Duquette also testified that it was extremely unlikely that an injury would occur because of the difficulty of getting under the crusher and into the dangerous area. Tr. 229.

Determination of the Court

Getting caught in the belt could lead to death, but the chance of an injury occurring was so remote as to warrant lowering the penalty. The employee would need to squeeze into the area for access. The Court also lowers the negligence in this instance because the danger, involving difficult access to the hazard, was not obvious and the employee had been instructed how to safely work on the machine. Considering all of the penalty factors, the Court imposes a penalty of **$50.00** for Citation No. 8654127.

[15] The proposed assessment was $100.00.

Citation No. 8654128[16]

Failure to perform ground continuity test

Section 104(a) Citation No. 8654128 alleges that DS&G violated 30 C.F.R. § 56.12028, which states that "[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on request by the Secretary or his duly authorized representative." DS&G was cited under this standard because the motors on the jaw crusher and the remote generator had not been tested. Ex. P-16. The Inspector found that the condition created an electric shock hazard, that such an occurrence would be fatal and reasonably likely to occur, that the violation was significant and substantial, and that DS&G's negligence in this instance was moderate. Ex. P-16. A licensed electrician performed the continuity resistance test, thus abating the citation. Tr. 245.

Continuity and resistance tests are performed to ensure that ground systems are functioning to eliminate fault currents that can energize metal parts of machines. Tr. 232. If the system is faulty, it can create a fatal electric shock hazard. Tr. 232. An operator is required to keep a record of the most recent test; Mr. Duquette did not have a record of the most recent test, because the equipment had never been tested. Tr. 236. The Inspector stated that Mr. Duquette "did not know there was such a thing" as a continuity and resistance test. Tr. 238.

Inspector Burke testified that an injury from this violation could reasonably be expected to be fatal because a current of electricity would be traveling through the body. Tr. 240. The lack of testing contributes to the hazard of an ungrounded machine because there are several ways a machine can be improperly or inadequately ground—for example, there could be corrosion, broken wires, dirt in connections, or the soil could be a poorer conductor than a human body. Tr. 240-241. He thought that an injury was reasonably likely because of the unknown history of the machine, which he estimated to be fifteen to twenty years old, and because he noticed broken conduits and exposed wires. Tr. 241. Inspector Burke designated the negligence as moderate because the operator did not know he was required to perform a ground test, but stated that the negligence was not low because the operator knew enough about MSHA that he should have inquired into the regulations. Tr. 244. The Inspector stated that the only time he would have found the negligence to be low would if the operator had said that he had no idea what MSHA was about. Tr. 259.

The Inspector also testified that if he had not cited the operator for any violations on the equipment, he would have marked this citation non-S&S. Tr. 247. Upon further questioning, he admitted that, other than the exposed conduits (which were non-functioning) and the knockout seal, everything on the machine appeared to be in working condition, but that he could not know the internal condition of the motors. Tr. 248.

[16] This citation was assessed at $243.00.

Determination of the Court

Under the *Mathies* criteria, the Secretary established a violation (failure to perform continuity and resistance tests), a discrete safety hazard (an ungrounded or improperly grounded machine), and that such hazard is reasonably likely to result in a reasonably serious injury, but the Court finds that the reasonable likelihood element was not established, on the evidence of record, because the attending circumstances did not support that conclusion. Because the ground continuity test is important, however, a penalty of **$200.00** is imposed for this violation.

Citation No. 8654129[17]

No employee present at the mine trained in first aid

Section 104(a) Citation No. 8654129 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.18010, which states that "[a]n individual capable of providing first aid shall be available on all shifts." DS&G was cited under this standard because the operator's only employee, William Videll, was not trained in first aid. Tr. 267. Mr. Duquette was not aware of the requirement. Tr. 268. The Inspector found that the violation created a risk of death, but that the injury was not reasonably likely, and the operator's negligence was moderate. Ex. P-18.

Inspector Burke had originally issued the citation as "reasonably likely" and "significant and substantial," but lowered the likelihood when he learned that the employee had received some first aid training in the past. Tr. 271. Mr. Duquette abated the citation by enrolling his employee in a first aid training program, and he exceeded the minimum requirements by also enrolling in the training program. Tr. 273-74.

Determination of the Court

The Court agrees with the Secretary's characterization of the violation, but finds that Mr. Duquette's abatement, which exceeded good faith, warrants a reduction in the proposed penalty. The Court imposes a penalty of **$50.00** for Citation No. 8654129.

Citation No. 8654130[18]

No fire extinguishers on site

Section 104(a) Citation No. 8654130 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.4200(a)(1), which states that mines are required to have "[o]nsite firefighting equipment for fighting fires in their early stages." DS&G was cited under this standard because it did not have any fire extinguisher at the mine site. Ex. P-20; Tr. 275-76. The Inspector originally found that injury was reasonably likely to occur and result in lost workdays or restricted duty, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-20. He later reduced the likelihood to unlikely and dropped the significant and

[17] The proposed assessment was $100.00.
[18] The proposed assessment was $100.00.

substantial designation. Ex. P-20. The operator abated the citation by purchasing fire extinguishers for the mine. Ex. P-20.

The Inspector stated that the mine contained several possible sources of fire, including diesel-operated vehicles, electric motors, and hydraulic pumps on the equipment. Tr. 276-77. Mr. Duquette told the Inspector that there were no fire extinguishers at the mine. Tr. 277. The Inspector found that smoke inhalation and burns were possible injuries, and that they would result in lost workdays or restricted duty. Tr. 278. He also testified that had originally intended to mark the likelihood as unlikely. Tr. 278-79. The injury was marked as unlikely because the Inspector saw few heat sources, such as torches or smoking employees, near the equipment. Tr. 279. The Inspector designated the operator's negligence as moderate because the Inspector thought that there was a fire extinguisher located on the property, but there was not. Tr. 279.

Mr. Duquette testified that, although the citation states that he purchased three fire extinguishers to abate the citation, he actually purchased eleven. Tr. 283. The Inspector had previously testified that even purchasing three would have exceeded the operator's obligation under the regulation. Tr. 281. Mr. Duquette stated that every piece of equipment at the mine now has a fire extinguisher. Tr. 282.

Determination of the Court

The Court agrees that an injury was unlikely, the operator's negligence was moderate, and the likely injury would have resulted in lost workdays or restricted duty. Mr. Duquette demonstrated good faith in abating this citation far beyond his obligation. Reading the statutory penalty criteria, one could argue that negligence and gravity, by their nature, reflect more serious penalty factors. The Court would agree that, in the majority of instances, those factors are, relatively speaking, more significant. But Congress did not so designate, elevate, or rank the various penalty factors. This may attributable to a recognition that, in a given instance, the particular facts may warrant giving additional credit, and therefore reducing a penalty, because of a mine operator's actions when cited for a violation. Here, the Court finds that such an enhanced weighting is appropriate, given Mr. Duquette's salutary reaction in purchasing far more fire extinguishers than required for this one employee operation. The Court imposes a penalty of **$25.00** for Citation No. 8654130.

Order No. 8654131[19]

No newly hired experienced miner training or new miner training

Section 104(g)(1) Order No. 8654131 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 46.6(a),[20] which states that mines are required to "provide each *newly* hired experienced miner with training as prescribed by paragraphs (b) and (c)" of the section. 30 C.F.R. § 46.6(a)

[19] At $270.00, this Order was the highest of the proposed penalties in this docket.

[20] At the hearing and in his post-hearing brief, the Secretary admitted uncertainty as to whether the miner was a newly hired experienced miner, whose training is governed by § 46.6, or as simply a new miner, whose training is governed by § 46.5. Sec'y's Post-Hearing Br. 15-16. As noted, DS&G did not meet either standard's requirements.

(emphasis added). DS&G was cited under this standard because it only provided task training to its lone employee, Mr. Videll. Ex. P-22; Tr. 284. Pursuant to section 104(g)(1), Inspector Burke issued a withdrawal order. Ex. P-22. The Inspector found that injury was reasonably likely to occur and that it could reasonably be expected to be fatal, that the violation was significant and substantial, and that the operator's negligence was moderate. Ex. P-22. The operator abated the citation by giving the employee newly hired experienced miner training. Ex. P-22.

Inspector Burke interviewed the employee, who stated that he had only received task training. Tr. 286. The Inspector determined that the employee was an "experienced miner," apparently on the basis that he had received task training and also based on that employee's disclosure to the Inspector of his former work experience. Tr. 284, 286-287. He determined that an injury contributed to by the violation could reasonably be expected to be fatal because of the multiple violations he had already seen at the mine site and the mine conditions, such as electrical shock hazards, roll over hazards, and entanglement hazards. Tr. 291.

Mr. Duquette testified several times that the employee had received the required training prior to the issuance of the citation, and that he just did not fill out the required form. Tr. 303-07. He also stated, however, that the employee underwent eight hours of training following the issuance of the citation in order to abate it. Tr. 307. On cross-examination, Mr. Duquette also stated that he did not train the miner on his statutory rights under the Mine Act, among other things. Tr. 314.

Determination of the Court

30 C.F.R. §§ 46.5 and 46.6 require, respectively, that mine operators train new miners and newly hired experienced miners. Both sections require the following training before work begins or within 60 days of working at a mine: introduction to the work environment; training on electrical and other hazard recognition; review of emergency medical procedures, escape plans, and firefighting procedures; instruction on health and safety standards related to tasks; instruction on HazCom program; instruction on miners' statutory rights; review of supervisory structure and miners' representatives; introduction to hazard reporting procedure; demonstration of self-rescue and respiratory devices. 30 C.F.R. §§ 46.5, 46.6. Mr. Duquette did not challenge the Inspector's designation that the employee was a newly hired, *experienced* employee, *and assert that he was only a new* employee, nor would it have made sense to do so. Therefore the Court finds that, on this record, the violation of 30 C.F.R. § 46.6(a) was established. Further, at least as applied in this instance, the proper classification of the miner, as a "new miner" or a "newly hired experienced miner," is not critical, as the miner lacked the appropriate trainer under either classification.

Mr. Duquette, at the time of the inspection, was all but unaware of the existence of MSHA. He had little to no knowledge of the depth and breadth of the Mine Act's enforcement scheme, as he readily admitted. He did not have a HazCom program, so he could not train his employee on a HazCom program. He had no fire extinguishers at the mine, so he could not train his employee on firefighting procedures. He had no knowledge of the Mine Act, so he could not train his employee on his rights under the Act. Accordingly the Court concludes that Mr.

Duquette failed to train his employee fully under either standard and that this was not solely a paperwork violation.

The Court also finds that this violation was significant and substantial. The violation contributes to a host of hazards (shock hazards, roll over hazards, and entanglement hazards, for example) that are reasonably likely to result in a reasonably serious injury. After considering the 110(i) factors, the Court imposes the penalty assessed by the Secretary for Citation No. 8654131: **$270.00**. An untrained miner "can expose himself to unsafe conditions and may create an accident or an injury." Tr. 287. Mr. Duquette's lack of knowledge notwithstanding, this is a serious violation and goes to the core of MSHA's mission—the health and safety of miners.

Citation Nos. 8654132, 8654133, 8654134, 8654135, and 8654136[21]

No berms provided on ramps at mine site

Section 104(a) Citation Nos. 8654132, 8654133, 8654134, 8654135, and 8654136 each allege that DS&G violated 30 C.F.R. § 56.9300(a), which states that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." Berms are an "impeding device constructed on an elevated roadway or ramp . . . to let the operator [of a vehicle] know he's too close to the edge." Tr. 323. They can be made of various materials—"gravel, stone, large stones, concrete blocks, [or guard rails]—but they have to be tall enough to reach mid-axle height of the vehicles traveling on the elevated roadway or ramp. Tr. 323. DS&G was cited under this standard because berms were not provided on several ramps at the mine site. Ex. P-24. For each citation, the Inspector found that the lack of berms was reasonably likely to cause a fatality, that DS&G's negligence was moderate, and that the violation was significant and substantial. Ex. P-24; Ex. P-26; Ex. P-27; Ex. P-28; Ex. P-29. The Court will discuss each citation in turn.

Citation No. 8654132 concerns the jaw crusher feeder ramp. The ramp measured 33 feet long, 31 feet wide, and had a 12 foot drop-off on each side. Ex. P-24. The loader that would travel on the ramp (and all the other ramps at issue in these citations) had a mid-axle height of 26 inches. Ex. P-24. The citation was abated by constructing berms on both sides. Tr. 336.

Inspector Burke testified that the loader would travel on the ramp multiple times during each shift, and that, without berms, there was a heightened risk that fatal injuries would occur due to a rollover accident. Tr. 327. A fatality could occur due to a fatal neck injury if the loader overturned. Tr. 328. Inspector Burke also testified about fatalgrams relating to overturned vehicles in which there was no berm in place. Tr. 329; Ex. P-50; Ex. P-51. Relating to negligence, he stated that he characterized the negligence as moderate because the operator stated that he was never told about berms, but it was the Inspector's understanding that the operator had been on mine sites in the past. Tr. 335. As for the S&S designation, the Inspector stated that he found it to be S&S because the ramp was traveled on multiple times a day, the tracks were close to the sides, and the drop off was dangerous, making a fatal injury reasonably likely. Tr. 328-29. Also, when the loader is in operation and the bucket is raised, the bucket

[21] Each of these five listed citations had proposed assessments of $243.00.

may block the driver's vision, making a roll-over more likely. Tr. 341. He also stated that, for each of the berm-related citations, the reasoning underlying negligence, injury, likelihood, and S&S designation were all the same.[22] Tr. 330.

Mr. Duquette testified that the ramp was sufficiently wide that the loader falling off the side was unlikely. The Inspector did not agree. Tr. 341. He stated that the loader would have six to eight feet on either side of it when it was going up the ramp. Tr. 352. The loader in question is seven to eight feet wide. Tr. 358. The government did not challenge Mr. Duquette's assessment of the number of feet on each side of the loader as being six to eight feet. Tr. 353. Inspector Burke had previously testified that the tracks made by the loader were close to the edge, Tr. 328-29, but it is unclear if that assessment is at odds with Mr. Duquette's six to eight feet estimation. Mr. Duquette also stated that he had no knowledge of the berm requirement, Inspector Burke's statements to the contrary notwithstanding. He asserted that construction sites, as distinct from mining sites, are not required to have berms, and on all of the jobs he had worked on, no stockpile of material had ever been big enough to require a ramp. Tr. 350-51.

Citation No. 8654133 concerns the sand stockpile ramp. The ramp was 50 feet long, 12 feet wide, and had a 14 foot drop off on both sides. Ex. P-26. When the screen plant is running, the loader operator would drive up the ramp to the top of the stockpile, and then dump its load of sand. Tr. 357. The operator abated the citation by barricading the stockpile so that the loader could no longer drive up the ramp. Tr. 360; Ex. P-26.

Mr. Duquette stated that the Inspector's measurement of the ramp was too narrow. He asserted that the Inspector measured from track to track, not to the edges of the ramp, which would have made the ramp 14 feet wide. Tr. 366. Mr. Duquette also stated that the loader falling off of either side was not as likely as the Inspector seemed to think, since there were three to four feet on either side of the loader. Tr. 364, 367.

Citation No. 8654134 concerns the two inch crushed gravel stockpile ramp. The ramp was 27 feet long and 12 feet wide, with a 10.5 foot drop-off on both sides. The citation was also abated by barricading the stockpile. Tr. 368-69; Ex. P-27. Mr. Duquette testified that even though Duke's Sand & Gravel had been "operating" for five months, actual mining operations had only been occurring for about thirty days. Tr. 372. At the time of the inspection, he had yet to even sell any material. Tr. 376.

Citation No. 8654135 concerns the two inch stone stockpile elevated ramp, measuring approximately 35 feet long and 12 feet wide, with an 11 foot drop off. Tr. 377-78; Ex. P-28. The citation was abated by barricading the ramp. Tr. 378. Mr. Duquette asserted the same arguments that he made with regard to the previous berm-related citations. Tr. 380.

Citation No. 8654136 concerns the three inch stone stockpile ramp, which measured approximately 50 feet long and 12 feet wide, with a 12 foot drop-off on both sides. To abate the citation, access to the stockpile ramp was barricaded. Tr. 382.

[22] For that reason, the Court will consider and incorporate such reasoning with respect to each berm-related citation.

Determination of the Court

The Court agrees with the Secretary's determination of negligence and S&S determinations for all but one of the citations. With respect to Citation No. 8654132, the Court finds that injury was unlikely due to the width and relatively short length of the ramp. It was 31 feet wide and 33 feet long. The eight foot loader, driving up the middle of the ramp, would have 11.5 feet on either side. Furthermore, there is not much length over which the loader operator could drift toward one side or the other. Because the Court finds that injury was unlikely to occur, the Court also finds that the violation was not S&S.

However, with respect to the other citations, the width of the ramps left only two to three feet on either side of the ramp. The lack of berms on these ramps contributed to a roll-over hazard that was reasonably likely to cause a fatal or other serious injury. Apart from that finding, the Court finds that there were mitigating circumstances that warrant reduction of each of these penalties from the amounts proposed. First, the loader operator is the only person using these ramps. This mine is not a highly trafficked area, so injury is somewhat less likely to occur. The Court also credits Mr. Duquette's testimony that he had no knowledge of the berm requirement as somewhat mitigating his negligence in this instance.

Negligence and gravity represent but two of the six criteria that are to be evaluated in assessing any penalty. Although negligence and gravity appear, by their nature, to be the more serious factors, Congress did not elevate any particular criteria over another. By not so weighing those factors in the statute itself, it is reasonable to deduce that Congress left it to the Commission, guided by the particular facts surrounding a violation, to make an individualized determination as to the relative weighing of the criteria. The Commission has recognized this principle, noting that "Judges have discretion to assign different weight to the various factors, according to the circumstances of the case." *Lopke Quarries, Inc*., 23 FMSHRC 705, 713 (July 2001).

As alluded to above, in this instance the Court has determined that Duke Sand & Gravel's absence of any history of violations, the appropriateness of a penalty to the size of this one person operation and the extraordinary efforts it made in abating the violations, all operated to lower the penalties from the amounts proposed by the Secretary.

Accordingly, for Citation No. 8654132, the Court imposes a penalty of **$100.00**. For Citation Nos. 8654133, 8654134, 8654135, and 8654136, the Court imposes a penalty of **$143.00** each.

Citation No. 89654137[23]

No dump site restraint on sand stock pile

Section 104(a) Citation No. 8654137 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.9301, which states that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or

[23] The proposed assessment was $100.00.

overturning." DS&G was cited under this standard because no dump site restraint was provided at the top of the sand stockpile ramp, which, as previously stated, measured 14 feet high. Ex. P-30. The Inspector originally found that injury was reasonably likely to occur and result in lost workdays or restricted duty, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-30. He later reduced the likelihood to unlikely and dropped the significant and substantial designation. Ex. P-30. The operator abated the citation by barricading the ramp. Ex. P-30.

A dumpsite restraint is effectively a berm placed at the end of a ramp to provide a warning to a vehicle operator that he is approaching the edge. Tr. 386. The ramp at issue would be traveled multiple times per shift. Tr. 387. The Inspector thought any injury would result in lost workdays or restricted duty because, in the event that the loader went past the end of the ramp, he thought that it would not turn over but instead that it would "probably jar the operator . . . quite a bit to where he could receive cuts, bruises, whiplash, that type of injury." Tr. 388. He cited the operator for moderate negligence because "the operator wasn't aware of the standard[, h]e thought the end travel would be slow[, and h]e thought there was a restraint in place." Tr. 391. Mr. Duquette testified that a loader operator knows not to drive to the edge of the ramp. Tr. 395.

Determination of the Court

The Court agrees with the Secretary's characterization regarding negligence, likelihood, and injury, but upon factoring the other statutory criteria imposes a penalty of **$75.00** for this violation, Citation No. 89654137.

Citation No. 8654138[24]

Overhang on north sand pit

Section 104(a) Citation No. 8654138 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.3131, which states:

> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

DS&G was cited under this standard because a protruding overhang existed on the north sand pit face with loader track and bucket dig marks underneath it. Ex. P-32. The Inspector found that injury was reasonably likely to occur and result in a fatality, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-32. The citation was abated by taking an excavator to the top of the wall and pushing the material down. Tr. 429.

[24] This citation was proposed at $243.00.

Inspector Burke testified that the loader operator told him that he was digging into the sand face to try to get the overhang to fall down. Tr. 422. The material is dangerous because, if the loader is working beneath it, the material can fall on top of the loader. Tr. 422. The face of the wall was twenty feet high, and the amount of material that was at risk of falling was about "five or six dump truck loads." Tr. 423. Consequently, if the loader was attempting to take down the overhang from underneath it, it would "inundate a loader cab or an excavator cab, coming through the windows and creating body crushing injuries." Tr. 427. Such an injury is reasonably likely to occur due to the unpredictability of the sand and the loader operating underneath the pile for the duration of a shift. Tr. 428.

Mr. Duquette testified that he informed the Inspector at the time of the citation that this part of the mine was inactive. Tr. 434. Although his employee had been over there attempting to bring down the overhang, Mr. Duquette stated that he did not tell the employee to do so, and the employee should have known not to operate under the overhang. Tr. 434, 438. He stated that the part of the wall with the overhang was made of "pond sand," which "nobody really wants," so there would be no reason for his employee to be over there. Tr. 442. On cross-examination, the Secretary elicited testimony creating an inference that, due to poor training, the employee did not know to avoid the area with the overhang. Tr. 439.

Determination of the Court

The Court upholds the violation, and crediting the Inspector's testimony, assesses, upon consideration of each of the statutory criteria, a civil penalty in the sum of **$200.00**.

Citation No. 8654139[25]

Failure to post stop sign and speed limit sign

Section 104(a) Citation No. 8654139 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.9103, which states that "[r]ules governing speed, right-of-way, direction of movement, and the use of headlights to assure appropriate visibility, shall be established and followed at each mine." DS&G was cited under this standard because it did not post a stop sign at the end of the mine road abutting a state highway, and it did not post a speed limit sign for the mine road. Ex. P-34. The Inspector originally found that injury was reasonably likely to occur and result in a fatality, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-34. He later reduced the likelihood to unlikely and dropped the significant and substantial designation. Ex. P-34. The operator abated the citation by posting signs. Ex. P-34.

The Inspector stated that Route 8, to which the mine road leads, is a heavily traveled, two-lane state highway. Tr. 444. There was no stop sign directing vehicles exiting the mine. Tr. 445. He characterized the injury as fatal because any passenger car that collided with a dump truck exiting the mine would do so at a speed of 45 to 50 miles per hour. Tr. 445. He adjusted the likelihood to unlikely, however, because only the Inspector, Mr. Duquette, and Mr. Duquette's service pickup were accessing the road—the employee did not have a vehicle. Tr.

[25] The proposed assessment was $100.00.

446. Inspector Burke assessed the negligence as moderate because Mr. Duquette said that he had not considered putting a sign up, but he thought that it was a good idea. Tr. 447.

Determination of the Court

The Court agrees with the Secretary's determination of negligence, likelihood, and injury, but finds that not only was such an injury unlikely, it was so unlikely as to warrant a reduction in the penalty. The Court imposes a penalty of $50.00 for Citation No. 8654139.

Citation No. 8654140[26]

Section 104(a) Citation No. 8654140 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.20008(a), which states that "[t]oilet facilities shall be provided at locations that are compatible with the mine operations and that are readily accessible to mine personnel." DS&G was cited under this standard because it did not have any toilet facilities. Ex. P-36. The Inspector originally found that injury was reasonably likely to occur and result in lost workdays or restricted duty, the violation was significant and substantial, and the operator's negligence was moderate. Ex. P-36. He later reduced the likelihood to unlikely and dropped the significant and substantial designation. Ex. P-36. The operator abated the citation by providing a portable toilet. Ex. P-36.

Inspector Burke stated that there were no toilet facilities at the mine site. Tr. 453. Instead, the employee would go to McDonald's (a mile away) or a nearby hobby store (half a mile away). Tr. 454-55. The Inspector stated that he thought an injury/illness due to the violation could result in lost workdays because the employee would go into the woods to relieve himself, rather than going to McDonald's, would not wash his hands, and may be exposed to poison oak, poison sumac, or poison ivy. Tr. 457. The Inspector found that the operator was moderately negligent because the operator thought that the McDonald's was close enough. Tr. 461.

Determination of the Court

The Court agrees with the Secretary's determination that injury was unlikely and DS&G's negligence was moderate. But, as the Court stated in the hearing, Tr. 457-58, the injury that would reasonably be expected would be so minor as to result in no lost workdays. Based on the 110(i) factors, the Court imposes a penalty of **$25.00**.

Citation No. 8654141[27]

Failure to record workplace examinations

Section 104(a) Citation No. 8654141 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 56.18002(b), which states that "[a] record that [daily workplace] examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for

[26] The proposed assessment was $100.00.
[27] The proposed assessment was $100.00.

review by the Secretary or his authorized representative." DS&G was cited under this standard because it did not record workplace exams prior to the inspection. Ex. P-38. Since this was a paperwork violation, the Inspector found no likelihood of injury, but assessed the negligence as moderate. Ex. P-38. The operator abated the citation by recording a workplace exam. Ex. P-38.

A workplace exam is a daily inspection. Tr. 466. An operator or a designated "competent person" should look at the entire area, including the equipment, for unsafe or hazardous conditions. Tr. 467. The Inspector designated the negligence as moderate because he thought that if the operator inspects other equipment he has, such as dump trucks and service trucks, "why wouldn't he inspect the rest of the stuff on the mine site?" Tr. 469. Mr. Duquette testified that he performed workplace exams, but he didn't know the terminology or about the recording requirement in the regulations. Tr. 471.

Determination of the Court

The Court agrees with the characterizations of the Secretary, but the operator's lack of knowledge of the recording requirement warrants a lower penalty than that assessed by the Secretary. For much the same reasoning as that stated in the determination of the penalty for Citation No. 8654123, the Court imposes a penalty of **$25.00** for Citation No. 8654141.

However, Mr. Duquette is again advised that in future Mine Act litigation, the Court's indulgence, as reflected in the civil penalty reductions it has imposed in this instance, and owing to the special circumstances of DS&G's first inspection, should not be presumed. Each case and each alleged violation stands on its own, but the history of violation will of necessity be different in future cases and the evaluation of the other factors, depending on the particular facts, may be less forgiving as well. Any notion that merely invoking the right to a hearing will result in reduced penalties is not sound, as the findings of fact may prompt the Court to adopt, lessen *or increase*, penalties where a violation is established.

Citation No. 8654142[28]

Failure to develop and implement a HazCom program

Section 104(a) Citation No. 8654142 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 47.31(a), which states that operators must "[d]evelop and implement a written HazCom program." DS&G was cited under this standard because it did not have such a program. Ex. P-40. The Inspector originally found that injury was reasonably likely to occur and would be permanently disabling, the violation was significant and substantial, and the operator's negligence was moderate, but later reduced the likelihood to unlikely and removed the S&S designation. Ex. P-40. The operator was given a generic HazCom plan, abating the citation. Ex. P-40.

A Hazard Communication (HazCom) program at a single-operator mine like Duke's Sand & Gravel must include a statement of how the program is put into practice, material safety data sheets (MSDSs) available for miners, and a list of all hazardous chemicals at the mine. 30

[28] The proposed assessment was $100.00.

C.F.R. § 47.32(a), (b). The MSDSs contain firefighting and first aid information for the hazardous chemicals at the site. Tr. 477.

At Duke's Sand and Gravel, the operator had "diesel fuels, gas-operated pick-ups, [and] certain greases, [and] lubricants." Tr. 477. The Inspector found that injury was unlikely because there were few chemicals at the mine, Tr. 478, but that injury would be permanently disabling because if "any of the oils or greases . . . contacted the eyes or [were] ingested, the proper first aid treatment may not have been given," which would exacerbate any injuries. Tr. 478. The Inspector characterized the negligence as moderate because the operator did not think there were any hazardous chemicals at the mine site. Tr. 479. Inspector Burke also testified that any "hazardous materials" at the mine site could be found in somebody's garage at their home or at businesses other than mine sites. Tr. 488.

Determination of the Court

The Court agrees that an injury from this violation could reasonably be expected to be permanently disabling, but that any injury would be unlikely. Not only are the chemicals at the mine site common ones, there are so few chemicals stored at the mine site that injury from them and exacerbated by the lack of an MSDS would be quite unlikely. Based on this and the other 110(i) factors, the Court assesses a penalty of **$50.00** for Citation No. 8654142.

Citation No. 8654143[29]

Failure to develop and implement a written training plan

Section 104(a) Citation No. 8654143 alleges that Duke's Sand & Gravel violated 30 C.F.R. § 46.3(a), which states that operators must "[d]evelop and implement a written plan, approved by [MSHA], that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training." DS&G was cited under this standard because it did not have such a program. Ex. P-42. The Inspector found that injury was unlikely to occur and would result in lost workdays or restricted duty, and the operator's negligence was moderate. Ex. P-42. The operator was given a generic training plan, abating the citation. Ex. P-42.

For sand and gravel operators, the plan does not have to be filed with MSHA. Tr. 493. Instead, inspectors ask to see the plan when they inspect the mine. Tr. 493. Mr. Duquette did not have a training plan implemented at the mine, but the Inspector found that he did provide task training to his employee, so injuries were unlikely to occur. Tr. 493-94. He characterized the negligence as moderate because Mr. Duquette attempted to contact MSHA but did not know that a training plan was necessary. Tr. 494. Mr. Duquette testified that he had no knowledge of the training plan requirement; if he had, he would have implemented one. Tr. 497.

[29] The proposed assessment was $100.00.

Determination of the Court

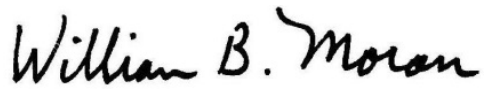
The Court disagrees with the Secretary's characterization of this citation, but finds that it was nevertheless violated. The Court instead views this as a paperwork violation. The operator failed to have a plan in place, and the citation was abated when the Inspector gave Mr. Duquette a generic training plan. Abatement of the citation did not require the operator to actually train his employee. Consequently, the Court finds no likelihood of injury. Any injury that might occur would result from the operator's failure to *actually train* its employee, for which the operator was already cited. The Court assesses a penalty of **$50.00** for Citation No. 8654143.

ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the Court assesses the following penalties for the citations and order discussed above:

Citation/Order No.	Assessment
8654122	$50.00
8654123	$50.00
8654124	$50.00
8654125	$50.00
8654126	$143.00
8654127	$50.00
8654128	$200.00
8654129	$50.00
8654130	$25.00
8654131	$270.00
8654132	$100.00
8654133	$143.00
8654134	$143.00
8654135	$143.00
8654136	$143.00
8654137	$75.00
8654138	$200.00
8654139	$50.00
8654140	$25.00
8654141	$25.00
8654142	$50.00
8654143	$50.00
Total:	**$2,085.00**

It is **ORDERED** that the operator pay a penalty of $2,085.00 within 30 days of this order.[30] Upon receipt of payment, this case is **DISMISSED**.



William B. Moran
Administrative Law Judge

[30] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution:

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