FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001-2021

November 18, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2008-438-M
Petitioner	:	A.C. No. 13-02285-145467
	:	
	:	Docket No. CENT 2008-565-M
v.	:	A.C. No. 13-02285-149527-01
	:	
	:	Docket No. CENT 2008-785-M
	:	A.C. No. 13-02285-162467
JEPPESEN GRAVEL,	:	
Respondent	:	Mine: Jeppesen Pits

DECISION

Appearances: Jamison Poindexter Milford, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, on behalf of the Petitioner;
Jay A. Jeppesen, Sibley, Iowa, *pro se.*

Before: Judge Melick

These cases are before me upon petitions for civil penalty filed by the Secretary of Labor pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.,* ("Act"), charging Jeppesen Gravel (Jeppesen) with violations of mandatory standards and proposing civil penalties for those violations.[1] The general issue before me is whether Jeppesen violated the cited standards and, if so, what is the appropriate civil penalty to be assessed in accordance with Section 110 of the Act. Additional specific issues are addressed as noted.

Jeppesen Gravel is the sole proprietorship of Jay Jeppesen. His business primarily involves excavation, tree removal, demolition and the haulage of fill dirt and gravel. The record shows that during 2007, the calendar year at issue, he devoted only six hours to mining. At the initial hearings on August 25, 2009, Mr. Jeppesen stipulated to the violations charged in the citations and orders at issue herein. He further stipulated to the gravity, "significant and substantial", negligence and "unwarrantable failure" findings made therein. At hearings, Mr. Jeppesen also stated that he was, as a preliminary matter, first challenging the Secretary's jurisdiction under the Act to cite the

[1] A motion for partial settlement of a number of citations was submitted before hearings in which an 80% across-the-board reduction in penalties was approved based solely on the financial condition of the operator.

Caterpillar front end loader at issue. Alternatively, assuming that the Secretary has jurisdiction under the Act, he was challenging the amount of civil penalties proposed by the Secretary for these violations. In particular, he maintained that the proposed penalties for the five violations remaining at issue will effectively bankrupt him.[2]

Following the initial hearings and reviewing the evidence of record, it was apparent that additional evidence was necessary to determine whether all of the proffered stipulations were supported by evidence. In particular , it appeared that the unrepresented Respondent did not fully comprehend the complex legal concepts of "significant and substantial" and "unwarrantable failure." Accordingly, subsequent hearings were held to permit additional evidence limited to the issues of whether the violations were "significant and substantial" and whether the violation charged in Order No. 7840434 was the result of Respondent's "unwarrantable failure."

Jurisdiction

As noted, Respondent maintains that the Caterpillar model 966C front end loader cited in each of the charging documents at issue was not subject to the Secretary's jurisdiction as not within the scope of the Act. However, under Section 3(h)(1) of the Act, "coal or other mine" means (A) an area of land from which minerals are extracted in non-liquid form and ....(B) private ways and roads appurtenant to such area, and (C)...equipment, [or] machines...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in non-liquid form...."

Based on the undisputed allegations in the charging documents at bar as well as the corroborated testimony of Inspectors Jeffrey Hornback, James Hines, and William Owen of the Department of Labor's Mine Safety and Health Administration ("MSHA"), it is clear that the cited 966C front end loader was being used at the time of the issuance of these charging documents in a private way and/or road appurtenant to the area where a mineral (gravel) was extracted. It was loading processed gravel from the gravel stockpile into dump trucks for removal from the mine (Exhibit R-7). The front end loader was also "equipment" or a "machine" performing a function (loading) that resulted from the work of extracting a mineral . Respondent does not dispute that the cited loader was used in this manner and was located in the position depicted on Exhibit R-7 as "loader." Within this framework of evidence and law it is clear that the cited loader was being used in an area and in a manner bringing it within the scope of the Act. Accordingly, Respondent's claim that the Secretary lacked jurisdiction is denied.

In reaching this conclusion I have not disregarded Mr. Jeppesen's argument that he can, in essence, carve out or segregate his loading activities from his other operations. However the Commission specifically rejected such an approach in *Mineral Coal Sales, Inc.*, 7 FMSHRC 615 at 620-21 (May 1985) in which it held that:

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[2] These penalties were proposed by the Secretary in accordance with the mandatory minimum penalties prescribed by the 2006 Miner Act for "Section 104(d)" citations and orders. *See* Section 110(a)(3) of the Act.

> In examining the "nature of the operation" performing work activities listed in section 3(i), [of the Act], the operations taking place at a single site must be viewed as a collective whole. Otherwise, facilities could avoid Mine Act coverage simply by adopting separate business identities along functional lines, with each performing only some part of what, in reality, is one operation. This approach is particularly appropriate in the present case in view of the pervasive intermingling of personnel and functions among entities that sporadically operated at the facility, with little or no apparent regard for business or contractual formalities.

Within this framework of law I conclude that Jeppesen cannot carve out from the Secretary's jurisdiction under the Act his act of loading, with his own front end loader, his stockpiled gravel next to his processing plant into trucks for transport and sale. It is an integral part of his overall mining operation.

Alleged Violations

Citation Number 6198325, issued September 24, 2007, pursuant to Section 104(d)(1) of the Act alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130 (h) and charges that the violation was the result of "reckless disregard" negligence.[3] The citation charges

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[3] Section 104(d) of the Act provides as follows:

> (1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this Act. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those person referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in

as follows:

> The seat belt was not properly installed on the Cat 966 C front end loader S/N 76J3644. The seat belt order cited; date 08/24/2006 # 6181901 was abated for the front end loader being removed from the mine property. When the citation was terminated the mine operator was informed in writing by registered mail that the violation still existed but was being terminated because of the equipments removal from that mine site. Further, the operator was informed that they were required to repair the seat belt prior to working the machine at the mine site. The co-owner stated that this is the only loader they own and that there is [sic] no moneys available to repair or replace the machine. By returning this loader to the mine site and loading trucks from the stockpiles, the mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 56.14130(h), provides as follows:

> *Seat belts construction*. Seat belts required under this section shall meet the requirement of SAE J386, "Operator Restraint System for Off-Road Work Machines" (1985, 1993, or 1997), or SAE J1194, "Roll-Over Protective Structures (ROPS) for Wheeled Agricultural Tractors" (1983, 1989, 1994, or 1999), as applicable, which are incorporated by reference.

SAE J386 "Operator Restraint System for off-Road Work Machines" June 1985 provides at section 5.2.5 that "there must be no rupture release or other failure of any element in the operator's restraint system...."

MSHA Inspector Jeffrey Hornback testified that he issued the subject citation on September 24, 2007 when he observed that the safety belt on the cited CAT 966C front-end loader was improperly installed. According to Hornback, the retractor spring was broken outside of its housing and would not permit the seatbelt to pull freely from the retractor. As a result, the seatbelt would not pull up to latch.

The Secretary alleges that the violation was "significant and substantial". A violation is properly designated as "significant and substantial" if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission

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> such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provision of paragraph (1) shall again be applicable to that mine.

explained:

> In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard - - that is, a measure of danger to safety - - contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in injury and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also Austin Power Co. v. Secretary, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co.,* 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.,* 6 FMSHRC 1573, 1574 (July 1984). *See also Halfway, Inc.,* 8 FMSHRC 8, 12 (January 1986); *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-917 (June 1991).

In this regard, Inspector Hornback opined that, without an operable seatbelt, there was a reasonable likelihood that the operator would fall out of the cab and be injured. He noted that MSHA's statistics demonstrate that not wearing a seatbelt has resulted in many fatalities throughout the mining industry. More particularly, the inspector testified that if you are operating the loader on uneven ground traveling roadways that are not paved and not wearing a seatbelt, you could reasonably expect the operator could be injured during a roll over situation . He noted in this regard that the mine surface was not level and there were dips and valleys and a large ditch on the property. Hornback noted that when the loader operator is ejected, he is not thrown beyond the cab structure and thereby gets crushed by the loader. Within this framework of evidence, I conclude that, indeed, without an operable seatbelt, the loader operator was reasonably likely to be ejected from the cab of the loader and suffer serious if not fatal injuries. The violation was therefore "significant and substantial" and of high gravity.

In reaching this conclusion, I have not disregarded Mr. Jeppesen's testimony that on the date the citation was issued, September 24, 2007, the cited loader was being used only to load trucks from the stockpile. Jeppesen claims that at that time, the loader was not being driven up the feed ramp. While the loader was nevertheless available to drive up the feed ramp and since other hazards such as the uneven ground existed, it is clear that the violation charged herein was, under all the circumstances, "significant and substantial" and of high gravity.

The violation was also found to have been the result of Jeppesen's "unwarrantable failure" and high negligence. Unwarrantable failure is "aggravated conduct, constituting more than ordinary negligence, by a mine operator in relation to a violation of the Act." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care."

Id. at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (Feb. 1991). *See also Rock of Ages Corp. v. Secretary of Labor*, 170 F.3d 148, 157 (2d Cir. 1999); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). Moreover, the Commission has examined the conduct of supervisory personnel in determining unwarrantable failure and recognized that a heightened standard of care is required of such individuals. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) (section foreman held to demanding standard of care in safety matters); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Considering the prior citations and warnings issued to mine owner himself, the violation herein was clearly the result of his unwarrantable failure and high negligence.

Order Number 6198326, also issued on September 24, 2007, pursuant to Section 104(d)(1) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(a) and charges that the violation was the result of "reckless disregard" negligence. The order charges as follows:

> Roll Over Protection was not provided Cat 966 C front end loader s/n 76J3644. The ROPS order cited; date 08/24/2006 # 6181902 was abated for the front end loader being removed from the mine property. When the citation was terminated the mine operator was informed in writing by registered mail that the violation still existed but was being terminated because of the equuipments[sic] removal from that mine site. Futher[sic], the operator was informed that they were required provide Rops structure meeting all the requirements of this standard prior to working the machine at the mine site. The co-owner stated that this is the only loader they own and that there is [sic] no moneys available to repair or replace the machine. By returning this loader to the mine site and loading trucks from stockpiles, the mine operator has egaged [sic] in aggravated conduct constituting more than ordinary negligence.

This violation is an unwarrentable[sic] failure to comply with a mandatory standard.

The cited standard, 30 C.F.R. § 14130(a) provides, in relevant part, as follows: "(a) *Equipment included*. Roll-over protective structures (ROPS) and seat belts shall be installed on....(3) wheel loaders and wheel tractors....

According to Inspector Hornback, there was no "manufactured roll over protective structure" provided on the cited loader. The inspector acknowledged that there was a steel cab structure on top of the cited loader, but that it did not have a "certification" from the manufacturer. Hornback further acknowledged that he could not testify regarding the level of protection provided by the existing cab and that a structural engineer would be required to make that determination. Thus, while it is clear that the cab on the cited loader did not have the proper manufacturer's certification, I find that there was insufficient credible evidence presented by the Secretary to show what level of protection the

cab did in fact provide. Without such information, it cannot be determined whether the violation was indeed "significant and substantial." Accordingly, the violation is affirmed without "significant and substantial" findings. For the same reasons I find that the Secretary has not sustained her burden of proving a high level of gravity with regard to this violation. Order Number 6198326 must accordingly be modified to a citation under section 104(a) of the Act. However, because of the existence of prior charges and notice to the operator regarding the same violation on the same loader, I find the operator chargeable with high negligence.

Order Number 6198899 issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(h) and charges that the violation was the result of "reckless disregard" negligence. The order charges as follows:

> The seat-belt remains inoperable on the Caterpillar 966c front end loader serial #76J3644. On 08/24/2006 Citation #6181901 which addressed the inoperable seat-belt was terminated when the loader was removed from the mine site. On 09/24/2007 Citation #6198325 was issued when again the loader was brought to the mine site and again the seat-belt was inoperable and again terminated upon removal of the loader from the mine site. In both of these cases, upon termination, the mine operator was informed in writing that return of this loader to the mine site without repair of the cited condition could constitute a higher than ordinary negligence. On 11/15/2007 the loader was again found on mine property with evidence showing it to have recently ran [sic] and it again being the only loader on site to be used for truck and material loading. By again returning this loader to the mine site without repairing the cited condition, the mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with the mandatory standard.
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> The loader may not be operated on the mine site until the cited condtion [sic] has been repaired and the order lifted by an authorized representitve [sic] of MSHA.

MSHA Inspector James Hines issued this order on November 15, 2007 when he found that the seatbelt remained inoperable on the cited CAT 966-C loader. Hines testified that he tried to pull the seatbelt out but could not. The spring remained in a ball on the side of the seat and you could not move the seatbelt. (Gov. Ex.17). This is the same condition that had previously been reported. Hines followed the loader's tracks which showed the movement of the loader from the bank where the raw materials (sand and gravel) were removed. (Gov. Ex.18). The tire tracks from the loader were also observed between the processed material to the truck loading site. The tracks also indicated that the loader operated on a roadway passing an unbermed drainage ditch. The violation is clearly proven as charged.

The Secretary also alleges that this violation was "significant and substantial." Inspector Hines observed that the loader had been working on uneven ground and near drop-offs and that should the loader overtravel, it could roll the large machine over. Hines also noted that there were no berms on the feed ramps and as the loader proceeds up the ramp to feed materials into the plant,

the loader has to raise its bucket. As the bucket is lifted, the loader becomes more unstable and without a berm on the side of the feed ramps, it would be more likely to roll over. Hines opined that based on his experience, there was a reasonable likelihood that the operator would fall or be thrown out of the loader and sustain fatal injuries. Within this framework of evidence, it is clear that the Secretary has met her burden of proving that the violation was "significant and substantial" and of high gravity.

The Secretary also argues that the violation was the result of the Respondent's "unwarrantable failure" and high negligence. There were two violations for inoperable seatbelts on the subject loader, on August 24, 2006 and September 24, 2007. Jeppesen nevertheless continued to resume operation of the loader without an operable seatbelt. The violation herein was therefore clearly the result of unwarrantable failure and intentional misconduct.

Order Number 6198900, issued on November 15, 2007, pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(a) and charges that the violation was the result of "reckless disregard" negligence. The order charges as follows:

> Roll over protection has not yet been provided for the Caterpillar 966C front end loader Serial # 76J3644. This lack of ROPs was cited on 08/24/2006 and was terminated when the loader was removed from the mine site. On 09/24/2007 Citation #6198326 was issued when again the loader was brought to the mine site and again the ROPs system was not provided and again terminated upon removal of the loader from the mine site. In both of these cases, upon termination, the mine operator was informed in writing that return of this loader to the mine site without repair of the cited condition could constitute a higher than ordinary negligence. On 11/15/2007 the loader was again found on mine property with evidence showing it to have recently ran [sic] and it again being the only loader on site to be used for truck and material loading. By again returning this loader to the mine site without repairing the cited condition, the mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.
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> The loader may not be operated on the mine site until the cited condtion[sic] has been repaired and the order lifted by an authorized representitve[sic] of MSHA.

During his inspection on November 15, 2007, Inspector Hines also observed that the cited 966 loader did not have what he asserted was a roll over protection system. He concluded that it did not have "roll-over protection" because a roll-over protection system is a " fairly massive steel structure." The steel cab on the cited loader was, in Hines' opinion, simply to protect the operator from the dust, noise, rain and snow. Hines did not however test the existing structure in any way to see what level of protection it might have provided in a roll-over situation. It is also noted that Inspector Hornback had previously testified that it would be necessary for a structural engineer to test the cab to make such a determination. Since it is not disputed that Respondent violated the cited

standard, I find that there was a violation. However, without testing of the existing structure, it is not ascertainable what level of protection it did provide in the event of a rollover. Without such evidence, I cannot find that the Secretary has met her burden of proving that the violation was "significant and substantial" or of high gravity. Order No. 6198900 must accordingly be modified to a citation under section 104(a) of the Act.

I do find however that the violation was a result of gross intentional misconduct. The Secretary has shown that the same equipment on two prior occasions had been operated and cited for not having certified rollover protection.

Order Number 7840434, also issued pursuant to Section 104(d)(2) of the Act, alleges a "significant and substantial" violation of the standard at 30 C.F.R. § 56.14130(g) and charges that the violation was the result of "reckless disregard" negligence. The order charges as follows:

> The loader operator observed operating the Caterpillar 966C front end loader was not wearing a seat belt. The loader was under a 104d2 order at this time for lack of a working seat belt and at the time of this issuance the seat belt remains inoperable. The loader is used to load trucks as well as travel unbermed areas including a feed ramp approx. 5 foot in height. In addition, when cited, the left cab door was open increasing the level of danger to this operator and the likelihood if injury. These conditions expose this miner to the hazard of possibly over turning the loader or being thrown from the cab and being over traveled by this large machine.
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> The mine operator had knowledge of the inoperable seat belt and both citations and orders have been written to him requiring the correction of this dangerous condition. Currently the loader is under a 104d2 order and the operator aware the machine should not be ran [sic] (Order #6198899) until the seat belt is repaired. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence knowing the seat belt remains inoperable and the loader continues to be used on site.

The cited standard, 30 C.F.R. § 56.14130(g), provides, "(g) Wearing seat belts. Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt."

Inspector Hines issued this order on May 5, 2008 when he observed an individual operating the cited loader and not wearing a seatbelt. The loader operator was actually in the process of loading from the stockpile onto a truck. The door to the loader was latched opened and Hines had a clear view of the operator in the cab without a seatbelt. Upon close examination, Hines observed that the retractor spring was still in a ball as it had existed at the time of the prior violation and the seatbelt remained inoperable. (Gov. Ex.22). As the operator exited the cab, he told Inspector Hines "obviously I wasn't wearing it." The violation is clearly proven as charged. Based on the prior testimony regarding the hazards in failing to use a seatbelt at this mine site, I find that the violation was also "significant and substantial" and of high gravity. It is also clear that the violation was the result of Respondent's "unwarrantable failure" and gross negligence. As noted by Inspector Hines, the same condition had been cited at least four or five times but the Respondent would merely

remove the loader from the mine site to terminate the citations. Respondent would then later return the loader with the same inoperable seatbelt.

Civil Penalties

Under Section 110(i) of the Act, the Commission and its judges must consider the following factors in assessing a civil penalty: the history of violations, the negligence of the operator in committing the violation, the size of the operator, the gravity of the violation, whether the violation was abated in good faith and whether the penalties would affect the operators ability to continue in business. As noted, Jeppesen Gravel is the sole proprietorship of Mr. Jeppesen. The Commission has construed "the ability to continue in business" criterion as applied to sole proprietors as whether the proposed penalty would affect the proprietor's ability to meet his financial obligations. *Secretary v. Unique Electric*, 20 FMSHRC 1119, 1122 (October 1998). It is also noted that Section 110(a)(3) of the Act qualifies and may supercede the provisions of section 110(i) by imposing mandatory minimum penalties for violations of section 104(d).

The parties have stipulated as follows with respect to the civil penalty criteria:

> Jay Jeppesen is the sole proprietor of Jeppesen Gravel, and his only employee is his son, Alan. Mr. Jeppesen mines gravel, as needed, from a small gravel pit on property that he leases. Sometimes he runs the mined gravel through his plant to produce gravel for sale. He also produces gravel that is not processed in any way for use as ballast under concrete.
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> Respondent's History of Previous Violations:
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> Jeppesen has no history of previous violations, as defined by 30 C.F.R. § 100.3(c), with regard to any of the citations at issue in these consolidated dockets. Jeppesen was assessed no history penalty points with regard to calculating the penalty assessments in these cases.
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> Appropriateness of the Penalties to the Size of the Business of the Operator:
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> Jeppesen is a nonmetal mine. 30 C.F.R. § 100.3(b) provides that the size of a nonmetal mine is measured by hours worked. According to the evidence present by the Secretary, Jeppesen worked 16 hours in 2006, 6 hours in 2007, and 23 hours in 2008. Jeppesen was assessed no "size of operator" penalty points with regard to calculating the penalty assessments in these cases.

Demonstrated Good Faith of the Operator in Abating the Violations:

Jeppesen was given a 10% penalty credit/reduction for good faith abatement, as defined in 30 C.F.R. section 100.3(f), for the § 104(a) citations in Docket Nos. CENT 2008-438-M, CENT 2008-565-M, CENT 2008-566-M, CENT 2008-668-M, and CENT 2008-713-M.

Jeppesen was given no credit for good faith abatement for the citations in Docket No. CENT 2008-785-M.

The record shows that mining activities during the year in question (2007) were limited to six hours and it may reasonably be inferred that the cited front end loader was not being operated during the entire time. The size of Mr. Jeppesen's mine (calculated by hours worked) is also extremely small i.e. only six hours in 2007 and 23 hours in 2008. I further find that the proposed penalties would seriously affect Mr. Jeppesen's ability to meet his financial obligations. He has met his burden of proof in this regard through credible evidence (Ex. R-1). Indeed, in recognition of his financial condition, the Secretary agreed in the motion for partial settlement to reduce her proposed penalties for the settled citations by 80%. However, the mandatory minimum penalties set forth in section 110(a)(3) of the Act may supercede consideration of this factor.

ORDER

Citation No. 6198325 is affirmed as written and, pursuant to section 110 (a)(3) of the Act, Jeppesen Gravel is directed to pay the mandatory minimum penalty of $2,000.00 within 40 days of the date of this decision. Order No. 6198326 is modified to a citation under section 104(a) of the Act without "significant and substantial" findings and, in recognition of the reduced gravity and the serious financial conditions of the operator (in effect, stipulated to by the Secretary in basing her 80% reduction in penalties in the settlement motion). Jeppesen Gravel is directed to pay a civil penalty of $100.00 within 40 days of the date of this decision.

Order Number 6198899 is affirmed and, pursuant to section 110 (a)(3) of the Act, Jeppesen Gravel is directed to pay the mandatory minimum penalty of $4,000.00 within 40 days of the date of this decision. Order No. 6198900 is modified to a citation under section 104(a) of the Act without "significant and substantial" findings and, in recognition of the reduced gravity and the serious financial condition of the operator, Jeppesen Gravel is directed to pay a civil penalty of $100.00 within 40 days of the date of this decision. Order Number 7840434 is affirmed and, pursuant to section 110 (a)(3) of the Act, Jeppesen Gravel is directed to pay the mandatory minimum penalty of $4,000.00 within 40 days of the date of this decision

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

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/to