

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 19, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-219-M
Petitioner	:	A.C. No. 12-02399-139528-01
	:	
v.	:	Docket No. LAKE 2008-220-M
	:	A.C. No. 12-02399-139528-02
D & H GRAVEL,	:	
Respondent	:	D & H Gravel

DECISION

Appearances: Wayne L. Lundquist, Conference & Litigation Representative, Mine Safety and Health Administration, Duluth, Minnesota, for Petitioner; James R. Salts, Owner/Operator, D & H Gravel, Williamsport, Indiana, for Respondent.

Before: Judge Manning

These cases are before me on two petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against D & H Gravel pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve 21 citations issued by MSHA on July 24, 2007, under section 104(a) of the Mine Act and 1 order of withdrawal issued under section 104(g)(1). The parties presented testimony and documentary evidence at the hearing held in Lafayette, Indiana.

At all pertinent times, D & H Gravel operated a quarry in Warren County, Indiana. D & H Gravel is a sole proprietorship owned by James R. Salts. (Tr. 102). The quarry mines sand and gravel on an intermittent basis. The quarry operates in the summer months only with one hourly employee, Brian Powell, who works no more that 20 to 30 hours a week. (Tr. 103). The quarry mines material and then screens it. The quarry has been in operation for only a few years. (Tr. 104). Mr. Salts is also a federal employee. (Tr. 108-09, 130). He stated that paying a large civil penalty will have an adverse affect on his business. (Tr. 129-30). He further stated that in 2006 he did about \$31,000.00 worth of business and that, when the bills were paid, he “may have broken even.” (Tr. 130).

Mr. Salts testified that he did not know anything about MSHA until Inspector Jerry Spruell arrived at the mine on July 24, 2007, to inspect the quarry. (Tr. 104). At the hearing, Salts questioned why MSHA did not send him a letter to advise him that he was subject to inspection by the agency. He said that Inspector Spruell was aware of his quarry before he

arrived to inspect it on July 24; he drove by the quarry to inspect other mines and yet he did not attempt to tell Mr. Salts that the quarry was subject to inspection by MSHA. (Tr. 21).

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Discussion of General Issues

D & H Gravel is a very small, seasonal operation. It employed one part-time miner besides Mr. Salts. I credit the testimony of Mr. Salts that he was unaware of MSHA's jurisdiction over the quarry and that he did not have personal knowledge of the Secretary's regulations and safety standards. As set forth below, the Mine Act imposes strict liability on mine operators so I cannot vacate citations on that basis. I affirm all of the citations except as discussed below. I find, however, that the operator's negligence was low in each citation, except where noted. Mr. Salts acted in good faith when he learned about MSHA's requirements and he corrected the cited conditions.

The Secretary proposed a penalty of \$100.00 for each citation and a penalty of \$112.00 for Order No. 7810806. I have substantially reduced the penalties primarily because the quarry is a small, intermittent operation and I have determined that the operator's negligence was low in most instances. Information at MSHA's website indicates that the mine has been "abandoned" and that the citations at issue are the only ones ever issued at the quarry.

The Federal Mine Safety and Health Review Commission and the courts have uniformly held that mine operators are strictly liable for violations of safety and health standards. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. In addition, the Secretary is not required to prove that a violation creates a safety hazard, unless the safety standard so provides.

The [Mine Act] imposes no general requirement that a violation of MSHA regulations be found to create a safety hazard in order for a valid citation to issue. If conditions existed which violated the regulations, citations [are] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great.

The Commission interprets safety standards to take into consideration "ordinary human carelessness." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.*

Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee's clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. This principle applies to all violations of safety standards that could potentially injure a miner. The fact that no employee has ever been injured at the D & H Quarry is not a defense because there is a history of such injuries at quarries throughout the United States. "Even a skilled employee may suffer a lapse of attentiveness, either from fatigue or environmental distractions. . . ." *Great Western Electric Co.*, 5 FMSHRC 840, 842 (May 1983).

B. Contested Citations and Order

1. Inspector Jerry Spruell issued Citation No. 7810801 alleging a violation of section 56.18013. The citation alleges that there was no communication system at the mine to obtain assistance in the event of an emergency. The citation states that the quarry was about five miles from the nearest town and there was only one person working at the mine. Inspector Spruell determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not of a significant and substantial ("S&S") nature and that the negligence was moderate. The safety standard provides that a "suitable communication system shall be provided at the mine to obtain assistance in the event of an emergency."

Inspector Spruell testified that there was no phone at the mine. (Tr. 13). An accident was unlikely because there were no immediate hazards present at the mine. The inspector recognized that Mr. Salts and his wife lived about 500 feet from the quarry. (Tr. 15). He marked the negligence as moderate because the operator should have known that a phone was required. (Tr. 17). Mr. Salts testified that his home is about 500 feet away from the mine and his wife is always there. (Tr. 105, 108). She can see down into the mine and see anything that happens. Thus, a communication system was present because, if a miner were hurt, someone could go to the house or the injured person could signal to his wife. He also testified that when he is at the mine, his cell phone is available in the event of an emergency. (Tr. 107).

I find that the Secretary established a violation. There was no way to directly contact emergency personnel in the event of an accident. The means suggested by Mr. Salts is clearly not sufficient. A penalty of \$20.00 is appropriate.

2. Inspector Spruell issued Citation No. 7810802 alleging a violation of section 46.3(a). The citation alleges that the operator failed to develop and implement a written training plan for his employee. The mine has been in operation for more than a year and the operator did not notify MSHA. Inspector Spruell determined that there was no likelihood that there would be an injury. He determined that the violation was not S&S and that the negligence was low. The regulation requires that every mine "develop and implement a written [training] plan approved by" MSHA.

The inspector testified that the operator advised him that he was not aware of the requirement of have a training plan for his employee. (Tr. 19). Mr. Salts testified that if MSHA had notified him that such a plan was required, he could have had a plan in place. (Tr. 108). He also stated that his employee was experienced and well trained. Inspector Spruell knew about the D & H Gravel operations for some time and he could have made a courtesy call to the pit to advise him of the requirements of the Mine Act. The inspector was more interested in issuing citations than improving the safety of miners. (Tr. 109).

I find that the Secretary established a violation. A penalty of \$20.00 is appropriate.

3. Inspector Spruell issued Citation No. 7810803 alleging a violation of section 41.11(a). The citation alleges that the operator failed to submit a completed legal identity form to the nearest MSHA office within 30 days after it opened the quarry. Inspector Spruell determined that there was no likelihood that there would be an injury. He determined that the violation was not S&S and that the negligence was low. The regulation provides that an operator of a mine “shall, in writing, notify the appropriate [MSHA] district manager” of the legal identity of the operator.

Inspector Spruell testified that the quarry had been open for a little over a year. (Tr. 24). The operator was not aware of the requirement of this regulation. As with the previous citation, Mr. Salts testified that if he had known that he was subject to inspection by MSHA, he would have filed an identity report. Inspector Spruell had driven by this operation prior to July 24, 2007, and he could have told him about MSHA. (Tr. 109). Salts testified that he was not trying to skirt the law, he just did not know about the Mine Act and its requirements.

The Secretary established a violation. A penalty of \$10.00 is appropriate.

4. Inspector Spruell issued Citation No. 7810804 alleging a violation of section 56.15001. The citation alleges that adequate first-aid materials, including a blanket, a stretcher, and a first-aid kit, were not provided at the mine. Inspector Spruell determined that an injury was unlikely but that any injury would result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that “[a]dequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas.”

The inspector did not find any first-aid supplies at the mine. (Tr. 27). Mr. Salts testified that he was trained in first aid at his other job and he had a first-aid kit in his truck. (Tr. 109). He was not aware of the requirements of this safety standard.

The Secretary established a violation. A penalty of \$20.00 is appropriate.

5. Inspector Spruell issued Citation No. 7810805 alleging a violation of section 56.18010. The citation alleges that an individual trained to provide first aid was not available at the mine. Inspector Spruell determined that an injury was unlikely but that any injury would

result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that an “individual capable of providing first aid shall be available on all shifts.”

Inspector Spruell testified that no employee was trained to provide first aid. (Tr. 28). Mr. Salts testified that he was trained in first aid but that he was not always at the mine. His employee was trained, but his certification was not current. (Tr. 110).

I find that the Secretary established a violation. A penalty of \$20.00 is appropriate.

6. Inspector Spruell issued Order No. 7810806 under section 104(g)(1) of the Mine Act alleging a violation of section 46.5(a). The order alleges that Bruce Powell, a new miner, had not been given any new miner training before being employed as a miner at the quarry. Inspector Spruell determined that an injury was reasonably likely and that any injury would result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was low. The safety standard provides that each new miner must receive not less than 24 hours of training prior to working at a mine

The inspector testified that history has shown that miners who are properly trained have fewer accidents. (Tr. 31). There were no training records at the mine. He determined that the violation was S&S because it was reasonably likely that an untrained miner would be seriously injured. Mr. Salts testified that his employee had “a lot of training, but it wasn’t on paper to meet the citation.” (Tr. 110). The employee has been working with heavy equipment all of his life and he has been operating the loader at the mine for over a year. Salts believes that because the employee was well trained, the citation should not be designated as serious and S&S.

I find that the Secretary established a violation. Mr. Salts did not offer any testimony that specifically described the training the Mr. Powell received. It is highly unlikely that Powell received the safety training required by the Secretary in Part 46. On that basis, I also find that the Secretary established that the violation was S&S. A violation is classified as S&S “if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, 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. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). In this instance, it was reasonably

likely that, assuming continued mining operations, Powell's lack of training would result in an injury of a reasonably serious nature. A penalty of \$50.00 is appropriate.

7. Inspector Spruell issued Citation No. 7810807 alleging a violation of section 56.14132(a). The citation alleges that neither the horn nor the backup alarm were operational on the Caterpillar 988 loader. When the transmission was placed in reverse no alarm sounded and the manually-operated horn would not work. Inspector Spruell determined that an injury was unlikely but that any injury would likely be fatal. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition."

Inspector Spruell testified that when these safety devices were tested, they did not work. (Tr. 35). He said that an injury was unlikely because there was usually only one person working at the quarry. Salts testified that there was a horn button in the loader, but it was apparently not working. (Tr. 112). He did not know that these audible warning devices were not working properly.

The Secretary established a violation. Although the cited condition was not S&S it presented a safety hazard. The operator's negligence was moderate. A penalty of \$40.00 is appropriate for this violation.

8. Inspector Spruell issued Citation No. 7810808 alleging a violation of section 56.14103(b). The citation alleges that the right front windshield on the Caterpillar 988 loader was not replaced or removed after it had become damaged about a month earlier. There was a spider-web-type break in the glass. The equipment operator could have cut his hand while trying to clean this section of the window. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that "[i]f damaged windows obscure visibility necessary for safe operation, or create a hazard to the equipment operator, the windows shall be replaced or removed."

Inspector Spruell testified that the hazard presented to the loader operator was the risk that he could cut his hand while cleaning the window. (Tr. 39; Ex. G-1). The cracks also partially obstructed the loader operator's view. Mr. Salts testified that the cracks would not obscure the view of the operator and the chance of anyone cutting his hand on the cracks was minimal. (Tr. 113-14).

I credit the testimony of Mr. Salts. The photograph shows that the cracked window did not present a hazard. (Ex. G-1). The cracks were at the edge of a side window. The loader operator could easily see through the window. The risk of someone cutting his hand when cleaning the window was pretty insignificant. This citation is vacated.

9. Inspector Spruell issued Citation No. 7810809 alleging a violation of section 56.14130(a). The citation alleges that, although there were seat belts in the Caterpillar 988 loader, they were not installed in a way that would allow them to function. The original seat belt was stuck beneath the operator's seat and was not functioning because the ends could not be latched. An additional seat belt was present but the right half of the belt was not connected to the bracket. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that seat belts shall be installed in wheel loaders.

The inspector testified that it was obvious that the seat belt was not being used on the loader because the belt was damaged so that it could not be used. (Tr. 41, 43). The ends of the original seat belt could not be connected and latched. The belt was stuck underneath the seat, which indicated to the inspector that it had not been used. (Tr. 46). At some point in time another seat belt was installed, but could not be used as well. (Tr. 44). The inspector did not personally observe the loader operator using the equipment without wearing a seat belt. It was reasonably likely that the loader operator would be injured in the event of an accident.

Mr. Salts testified that the original seat belts in the loader worked properly. (Tr. 114). They latched together in a way that is different from seat belts used today. The other belt that had been installed was not working, but the original set was functional. This set may have fallen under the seat. The violation was also neither serious nor S&S and there was no negligence. Salts testified that the employee has worn the seat belt in the past. (Tr. 115).

I credit the testimony of Mr. Salts that there was a functioning seat belt in the loader. Because the latch operated differently than is typical, the inspector may not have recognized that it could be used. Consequently, this citation is vacated.

10. Inspector Spruell issued Citation No. 7810810 alleging a violation of section 56.14101(a)(3). The citation alleges that the left, rear brake on the loader had been disconnected and the line leading to the brake chamber had been plugged off. When tested, the brakes stopped and held the loader on an incline without a load in the bucket. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that "[a]ll braking systems installed on [self-propelled mobile] equipment shall be maintained in functional condition."

Inspector Spruell testified that the left, rear brake had been disconnected and the line from the actuator had been plugged off. (Tr. 47-48). He believed that because one of four brakes had been rendered inoperable, an injury was reasonably likely. The loader stopped when it was tested on an incline, but the safety standard requires that all the braking systems be functional. (Tr. 51-54).

Mr. Salts testified that he was not aware that the line leading to the left, rear brake on the loader had been plugged off. (Tr. 116). Nevertheless, he testified that the brakes worked fine. When the brakes were tested by the inspector, the loader held on an incline. The citation should not have been designated as serious or S&S and there was no negligence because he was not aware of the condition. All the braking systems on the loader were working.

I find that the Secretary established a violation. Although the brakes could stop the loader when tested, not all of the brakes on the loader were working. If the loader operator had to stop the vehicle quickly in an emergency, he would likely need all of the brakes to work. I find, however, that the violation was not S&S. It was not reasonably likely that someone would be injured as a result of this violation. The operator's negligence was moderate because an inspection of the loader would have revealed the condition. A penalty of \$40.00 is appropriate.

11. Inspector Spruell issued Citation No. 7810811 alleging a violation of section 50.30(a). The citation alleges that work was performed at the quarry in March 2007 and a quarterly employment report was not completed or submitted for the first quarter of 2007. Inspector Spruell determined that there was no likelihood of an injury and that the operator's negligence was low. The regulation requires, in part, that every mine operator prepare and submit to MSHA a quarterly employment report.

The inspector testified that a miner worked at the quarry during the first quarter of 2007 and the required quarterly employment report was not submitted to MSHA. (Tr. 55). Mr. Salts testified that he did not know about this requirement.

I find that the Secretary established a violation, but the violation was not serious. A penalty of \$10.00 is appropriate for this violation.

12. Inspector Spruell issued Citation No. 7810812 alleging a violation of section 50.30(a). The citation alleges that work was performed at the quarry during April, May and June 2007 and a quarterly employment report was not completed or submitted for the first quarter of 2007. Inspector Spruell determined that there was no likelihood of an injury and that the operator's negligence was low.

The inspector testified that a miner worked at the quarry during the second quarter of 2007 and the required quarterly employment report was not submitted to MSHA. (Tr. 58). My findings here are the same as with the previous citation.

13. Inspector Spruell issued Citation No. 7810813 alleging a violation of section 56.13015(a). The citation alleges that there was no record to indicate that the air receiver tank on the air compressor at the shop had been inspected by a certified inspector. The compressor was fairly new and had been recently installed. No adverse conditions were observed by the inspector. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that "[c]ompressed-air

receivers and other unfired pressure vessels shall be inspected by inspectors holding a valid National Board Commission.”

The inspector testified that there was no indication that the air receiver had ever been properly inspected. (Tr. 60-61). The violation was not S&S because the compressor appeared to be fairly new and in good shape. Mr. Salts testified that he was not aware that these tanks had to be inspected, especially on compressors that are new. (Tr. 117). He testified that the tank was on a “brand-spanking-new compressor.” *Id.* The manufacturer placed a metal tag on the side of the pressurized vessel to show that it was pressure-tested before it was sold. He testified that he bought the compressor in 2006 or 2007. (Tr. 119).

I credit the testimony of Mr. Salts that the compressor was new and that it had been recently pressure-tested and inspected by the manufacturer. The citation is vacated.

14. Inspector Spruell issued Citation No. 7810814 alleging a violation of section 56.12028. The citation alleges that there was no record to indicate that testing for continuity and resistance of the grounding system had been performed at this quarry. Electrical equipment was present at the mine. No ungrounded circuits were discovered. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[c]ontinuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification, and annually thereafter.”

The inspector testified that the resistance and continuity of the grounding circuits for electrical motors had never been tested at the quarry. (Tr. 64). No ungrounded circuits were found. The inspector considered this to be a paperwork violation. (Tr. 66). Mr. Salts testified that all equipment was properly grounded. (Tr. 119). He said that he was not aware he was required to do this test.

The Secretary established a violation. All electric equipment was properly grounded. A penalty of \$20.00 is appropriate.

15. Inspector Spruell issued Citation No. 7810815 alleging a violation of section 56.12034. The citation alleges that there were no guards on the two lights in the shop. There was nothing in place to prevent contact with the bulbs. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[p]ortable extension lights, and other lights that by their location present a shock or burn hazard, shall be guarded.”

Inspector Spruell testified that the unguarded lights were about 6 ½ feet above the floor of the shop. The hazard the inspector was concerned about was getting burned by contacting the bulbs. (Tr. 67). Mr. Salts testified that, given the height of the bulbs, it was highly unlikely that anyone would come into contact with the lights. (Tr. 120).

I agree that contact with the bulbs was unlikely, but they were not so high that they did not present a hazard. The Secretary established a violation. A penalty of \$20.00 is appropriate.

16. Inspector Spruell issued Citation No. 7810816 alleging a violation of section 56.4201(a)(1). The citation alleges that the fire extinguishers on the loader and at the shop were not being inspected monthly to determine if they were fully charged and operable. The gauges showed that the extinguishers were fully charged and they appeared to be operable. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, that “[f]ire extinguishers shall be visually inspected at least once a month to determine that they are fully charged and operable.”

The inspector testified that the extinguishers had not been inspected, but they appeared to be fully functional. (Tr. 71). Mr. Salts testified that he was not aware of this requirement. He stated that he regularly checks them but there are no tags on the extinguishers to indicate when they were tested. (Tr. 120-21). They were all in working order.

The Secretary established a violation. I credit the testimony of Mr. Salts and find that the violation was not serious. A penalty of \$20.00 is appropriate.

17. Inspector Spruell issued Citation No. 7810817 alleging a violation of section 56.12032. The citation alleges there was no cover on the main breaker panel for the quarry. This condition meant that energized electrical parts would be exposed to anyone who opened the panel door. Inspector Spruell determined that an injury was unlikely but that any injury would likely result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was low. The safety standard provides, in part, 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.”

Inspector Spruell testified that the breaker panel was south of the scale trailer. The door for the panel was closed but, when opened, there was no cover for the breakers. (Tr. 74). The circuits were energized.

Mr. Salts admits that there was a panel missing on the inside of the electrical box, but the outside cover was still present. (Tr. 121). Salts had an electrical contractor install this box and he was not aware that the inside cover was missing.

The evidence establishes that the outside cover for the electrical box was closed. The inner cover was apparently never installed by the electrician. The Secretary established a violation. A penalty of \$20.00 is appropriate.

18. Inspector Spruell issued Citation No. 7810818 alleging a violation of section 56.11012. The citation alleges that there were openings in the handrail around the platform on the sand conveyor. The platform was about 7 feet above the ground and 2 ½ feet wide. At the

top of the ladder there was nothing in place to prevent anyone from falling down. At the right side of the platform there was an 18 inch area that was not protected by a handrail. There was also an opening in the floor of the platform that was 2 feet long and about 6 inches wide. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that “[o]penings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers.”

Inspector Spruell testified that the platform for the sand conveyor had areas that were not protected by handrails. (Tr. 78; Exs. G-6, G-7 & G-8). A person could fall from the platform or partially fall through the opening in the floor. The platform was 7 feet above the ground. There was no handrail where the ladder came up to the platform and to the left of the ladder. (Tr. 79). There was another opening at the end of the platform near the engine. This area would need to be accessed twice a day to start and stop the engine. There was also an opening in the floor of the platform near the engine.

Mr. Salts testified that at one end of the platform, the handrail was not tied back to the structure. He said that “[t]here was hardly enough room for anybody to get through there.” (Tr. 122). The citation should not have been marked as “reasonably likely” and the negligence should be low.

I credit the testimony of Inspector Spruell as to the hazards presented by the cited conditions. The citation is affirmed as written. The violation was S&S because it was reasonably likely that someone would be injured by the conditions, assuming continued mining operations. The operator’s negligence was moderate because the hazards were obvious. (Tr. 84). A penalty of \$50.00 is appropriate.

19. Inspector Spruell issued Citation No. 7810819 alleging a violation of section 56.14107(a). The citation alleges that there was no guard on the tail pulley of the finish gravel conveyor belt. The unguarded pulley was about 2 ½ feet above the ground. The inspector was advised that people are not in the area when the conveyor is operating. Inspector Spruell determined that an injury was unlikely but that any injury would likely be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The safety standard provides, in part, that “[m]oving machine parts shall be guarded to protect persons from contacting . . . drive, head, tail, and takeup pulleys . . . and similar moving machine parts that can cause injury.”

The inspector testified that there was no guard to protect the cited tail pulley. (Tr. 88-89; Ex. G-9). He did not believe that an injury was likely because people do not normally travel through the area when the conveyor is operating.

Mr. Salts testified that nobody walks or travels near this pulley when it is operating. (Tr. 123). I find that the Secretary established a violation. The pulley was clearly not guarded. (Ex.

G-9). I affirm the citation and find that the operator's negligence was moderate. A penalty of \$30.00 is appropriate.

20. Inspector Spruell issued Citation No. 7810820 alleging a violation of section 56.14109. The citation alleges that there was no railing or stop cord for the three upper rollers and one lower roller on the sand conveyor belt. The upper rollers were between 3 ½ and 6 ½ feet above the ground while the bottom roller was about 4 feet above the ground. Someone travels by the belt after the conveyor is started. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides, in part, that “[u]nguarded conveyors next to travelways shall be equipped with (a) emergency stop devices . . . or (b) railings”

Inspector Spruell testified that there was a conveyor belt without a railing or stop cord in an area where contact could be made with the belt or rollers. (Tr. 91). The rollers were from 3 feet to 6 ½ feet above the ground. He determined that the violation should be S&S because the employee walks by this area while the conveyor is operating. He based this determination on a conversation with the employee. The employee would be 3 to 4 feet from the conveyor when he walked by. This condition should have been known by the operator.

Mr. Salts testified that nobody would travel near the conveyor belt. (Tr. 123). He said that he was baffled that anyone would have told the inspector that he usually walked near the conveyor because it is not on the way to anything. He also testified that the condition was not serious because nobody could get into the belt or rollers.

I find that the Secretary established a violation. The area was not protected by a railing or a stop cord. Whether the violation was S&S is a close question because the testimony directly conflicts. I find that the violation was not S&S. The evidence does not establish that it was reasonably likely that anyone would come into contact with the belt or the rollers. The conveyor was out in the open and I am not convinced that anyone would walk immediately adjacent to the moving belt. The operator's negligence was moderate. A penalty of \$30.00 is appropriate.

21. Inspector Spruell issued Citation No. 7810821 alleging a violation of section 56.14107(a). The citation alleges that a guard was not provided to prevent accidental contact with the pulley or v-belt drive on the engine of the loader. The pulley and belt were about 2 to 3 inches from the cowling at the left rear of the loader. The loader operator was observed passing by this area during trips in and out of the cab of the loader. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was moderate.

The inspector testified that there was no guard to protect the pulley and v-belt on the engine of the loader. (Tr. 94; Ex. G-10). He testified that the loader operator passes close by this area every time he gets in and out of the loader. (Tr. 95). The condition was obvious and presented a hazard of a serious injury.

Mr. Salts testified that the v-belt drive and pulley referenced in the citation are for the air conditioner for the loader. (Tr. 124-25). The loader was manufactured without any type of guard in this location.

I find that the Secretary established a violation. The fact that the manufacturer did not install a guard does not relieve the operator from its responsibility to comply with the safety standard. I affirm the citation as written, including the S&S determination, except that I find that the operator's negligence was low. The pulley and drive belt are partially recessed behind the frame of the loader and the operator did not believe that it created a hazard. A penalty of \$40.00 is appropriate.

22. Inspector Spruell issued Citation No. 7810822 alleging a violation of section 56.18002(a). The citation alleges that a competent person designated by the operator was not examining each working place at least once each shift for conditions which may adversely affect safety or health. Several safety hazards were discovered during the MSHA inspection. Inspector Spruell determined that an injury was reasonably likely and that any injury would likely result in lost workdays or restricted duty. He determined that the violation was S&S and that the negligence was low. The safety standard requires that a "competent person . . . examine each working place at least once each shift for conditions which may adversely affect safety or health." The operator is required to correct any safety hazards that are found.

Inspector Spruell testified that the operator was not keeping records of workplace examinations that are required to be performed each shift. (Tr. 99). He was not given any information that suggested that such examinations were being conducted. He determined that the violation was S&S based on the number of violations he found during his inspection. Negligence was low because the operator was not aware that it was subject to MSHA inspections.

Mr. Salts testified that he performed examinations at the quarry and he made any necessary repairs. He went to the quarry every evening to check everything. (Tr. 126).

I find that the Secretary established a violation. I also find that the violation was S&S because workplace examinations are crucial to ensure that the work environment is safe. Although I do not dispute that Mr. Salts checked out and repaired equipment in the evenings, such activities are not as comprehensive as the examinations required under the safety standard. Recording safety problems in a record book also helps to ensure that any problems are promptly corrected. A penalty of \$30.00 is appropriate.

II. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. D & H Gravel had not been issued any citations prior to the present inspection. D & H Gravel was a small operator. All of the violations were abated in good faith. D & H Gravel did not establish that the penalties assessed in this decision will have an adverse

effect on its ability to continue in business. My gravity and negligence findings are set forth above. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the following civil penalties:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
LAKE 2008-219-M		
7810801	56.18013	\$20.00
7810802	46.3(a)	20.00
7810803	41.11(a)	10.00
7810804	56.15001	20.00
7810807	56.14132(a)	40.00
7810808	56.14103(b)	Vacated
7810809	56.14130(a)	Vacated
7810810	56.14101(a)(3)	40.00
7810811	50.30(a)	10.00
7810812	50.30(a)	10.00
7810813	56.13015(a)	Vacated
7810814	56.12028	20.00
7810815	56.12034	20.00
7810816	56.4201(a)(1)	20.00
7810817	56.12032	20.00
7810818	56.11012	50.00
7810819	56.14107(a)	30.00
7810820	56.14109	30.00
7810821	56.14107(a)	40.00
7810822	56.18002(a)	30.00

LAKE 2008-220-M

7810805	56.18010	20.00
7810806	46.5(a)	50.00

TOTAL PENALTY \$500.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and D & H Gravel is **ORDERED TO PAY** the Secretary of

Labor the sum of \$500.00 within 40 days of the date of this decision.¹ Upon payment of the penalty, these proceedings are **DISMISSED**.

Richard W. Manning
Administrative Law Judge

Distribution:

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James R. Salts, D & H Gravel, 7794 S State Road 263, Williamsport, IN 47993-8271 (Certified Mail)

RWM

¹ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390