FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-208-M
Petitioner	:	A.C. No. 13-00691-05514
	:	
v.	:	Docket No. CENT 2001-140-M
	:	A.C. No. 39-01439-05502
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	IA Portable #1 & Bergdale Pit

DECISION

Appearances: Ann M. Noble, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Higman Sand and Gravel, Inc. ("Higman 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"). A hearing was held in Sioux City, Iowa. At my request, the parties filed post-hearing briefs on the issues raised by the Commission's decision in *Alan Lee Good d/b/a Good Construction*, 23 FMSHRC 995 (Sept. 2001) ("*Good Construction*").

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Background and Discussion of General Issues Raised by Higman Gravel

Higman Gravel operates the Bergdale Pit and IA Portable #1. The Bergdale Pit is a small pit and screening plant which opened less that a year prior to the subject MSHA inspection. This pit had not been inspected by MSHA prior to this inspection. MSHA Inspector Joe Steichen inspected the Bergdale Pit on August 16, 2000, and issued one citation. The IA Portable #1 is near Akron, Iowa, in Plymouth County. Higman Gravel refers to this facility as the "Akron Plant." It is a gravel-processing facility that includes a pit and a plant where the excavated rock is crushed and screened. It was opened in the 1960s. The equipment is permanent and, despite the name given it by MSHA, it is not a portable operation. MSHA Inspector Kevin LeGrand

inspected the Akron Plant on December 2, 1999. Higman Gravel contested 16 of the citations issued by Inspector LeGrand in these proceedings.

Higman Gravel raised a number of general issues in these cases. First, it argues that the Secretary failed to demonstrate that accidents could result from the cited conditions. It contends that an injury could only result from an employee's intentional misconduct and that no employee has ever been injured by the cited conditions. It maintains that the Secretary failed to establish any likelihood of an injury to employees as a result of the cited conditions.

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 risk of injury and the appropriate penalty for each citation is discussed below.

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. The fact that no employee has ever been injured by an unguarded tail pulley at Higman Gravel's operations is not a defense because there is a history of such injuries at crushing plants 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).

Ten of the seventeen citations at issue in these cases allege that Higman Gravel failed to adequately guard moving machine parts. Higman Gravel argues that it did not receive fair

notice of MSHA's determination that its existing guards were inadequate. The Akron Plant has been inspected at least annually since MSHA was created. Higman Gravel contends that many of the guards that were cited by Inspector LeGrand have been present in the same condition since MSHA began enforcing the Mine Act in 1978 and that all of these guards have been present for at least ten years. It states that MSHA never cited these guards until the Inspector LeGrand's inspection. At the hearing, the Secretary stipulated that none of the pulleys cited by the inspector have been cited in the past. Higman Gravel states that, although it has received citations for failing to guard moving machine parts in the past, these prior citations were issued because the guard had been removed and had not been replaced at the time of the inspection. I analyze this issue below.

B. Guarding Citations at the Akron Plant (IA Portable #1), CENT 2000-208-M.

Inspector LeGrand issued nine guarding citations at the Akron Plant. Inspector LeGrand was a new MSHA inspector who graduated from MSHA's Mine Safety and Health Academy about six months prior to this inspection. With one exception, all of the cited pulleys were protected by substantial metal guards. Inspector LeGrand believed that additional guarding was required, as discussed in more detail below.

Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head , tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving machine parts that can cause injury." The standard makes clear that guarding is required, but leaves unanswered what is required to protect persons from contacting moving machine parts. Consequently, I find that this standard is ambiguous, especially when applied to moving machine parts that are already protected by a guard. As discussed in more detail below, I find that the Secretary's determination to construe the standard in a broad manner is reasonable. The standard was written broadly to cover a wide range of moving machine parts within the standard's protective purpose. Higman Gravel is not arguing that the cited pulleys did not come within the purview of the standard.

The Secretary must provide fair notice of the requirements of a broadly written safety standard. The language of section 56.14107(a) is "simple and brief in order to be broadly adaptable to myriad circumstances." *Kerr-McGee Corp.*, 3 FMSHRC 2496, 2497 (November 1981); *Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1992). Such broadly written standards must afford notice of what is required or proscribed. *U.S. Steel Corp.*, 5 FMSHRC 3, 4 (January 1983). In "order to afford adequate notice and pass constitutional muster, a mandatory safety standard cannot be 'so incomplete, vague, indefinite, or uncertain that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application'" *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990)(citation omitted). A standard must "give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Lanham Coal Co.*, 13 FMSHRC 1341, 1343 (September 1991).

> When faced with a challenge that a safety standard failed to provide adequate notice of prohibited or required conduct, the Commission has applied an objective standard, *i.e.*, the reasonably prudent person test. The Commission recently summarized this test as "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific prohibition or requirement of the standard."

Id. (citations omitted). To put it another way, a safety standard cannot be construed to mean what the Secretary intended but did not adequately express. "The Secretary, as enforcer of the Act, has the responsibility to state with ascertainable certainty what is meant by the standard he has promulgated." *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976).

The Commission addressed this issue with respect to the Secretary's guarding standard in *Good Construction*. The Secretary has been enforcing this standard for about 23 years. Relying, in part, on *Good Construction*, Higman Gravel believes that the guarding citations should be vacated because the Akron Plant has been inspected by MSHA over many years; MSHA inspectors have examined the guards during these inspections; and no citations were previously issued at the cited locations. It believes that if a mine operator has been guarding its moving machine parts in a particular manner without receiving citations from MSHA, the Secretary must provide notice of her intention to require additional guarding before civil penalties may be assessed. The Secretary contends that the citations should be affirmed because Higman did not meet the burden of proof for this notice defense. The Secretary maintains that "to establish such an affirmative defense, the operator must demonstrate particularized facts, such as: the prior inspector actually examined the machine part in question, that the operator's representative discussed the situation (here, the partial guards), and was told that the guarding was adequate." (S. Br. at 6). The Secretary contends that the operator has a "heavy burden" of demonstrating a lack of notice, given the strict liability nature of the Mine Act. *Id.* at 7.

In *Good Construction*, the mine operator contended that it did not have adequate notice of the requirements of 30 C.F.R. § 56.14107(a) because the language of the safety standard "does not provide reasonably clear guidance regarding how any particular moving part should be guarded, allows inconsistent interpretation by inspectors, and is unconstitutionally vague based on the fact that other MSHA inspectors never cited these same conditions over the past 18 years." *Good Construction* at 1002. The moving machine parts were guarded, but the MSHA inspector determined that the guarding was insufficient.

The Commission's decision was split on the issue of how that particular case should be handled. Nevertheless, when put in the context of previous Commission decisions, I believe that the holding is essentially the same in both opinions with respect to how this issue should be analyzed in future cases, as summarized in the opinion of Commissioners Jordan and Beatty.

> In applying the reasonably prudent person standard to a notice question, the Commission has taken into account a wide

> variety of factors, including the text of a regulation, its placement in the overall enforcement scheme, its regulatory history, the consistency of the agency's enforcement, and whether MSHA has published notices informing the regulated community with "ascertainable certainty" of its interpretation of the standard in question. Also relevant is the testimony of the inspector and the operator's employees as to whether the practices affected safety. Finally, we have looked to accepted safety standards in the field, considerations unique to the mining industry, and the circumstances at the operator's mine.

23 FMSHRC 1005 (citations and footnote omitted). The facts raised by Higman Gravel relate to the consistency of MSHA's enforcement. I discuss the notice issues in the context of specific citations below.

Citation No. **7815172** alleges a violation of section 56.14107(a) because the left, right, and rear sides of the fin-type tail pulley on the South Dakota flat sand conveyor were not provided with a guard. The citation states that the roller was about two feet above the ground. Inspector LeGrand determined that the violation was not significant and substantial ("S&S") and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The inspector testified that the cited tail pulley was guarded at the time of his inspection but that there were openings in the guard through which a miner could get his hand or arm caught if he stumbled and fell. (Tr. 67, Exs. G-10 & 11). He believes that the opening at the back measured about 9 by 30 inches and the openings on the sides to be about 6 by 6 inches. (Tr. 69-70). He determined that the violation was not S&S because water and a Bobcat (skid loader) are used to clean up any accumulations under the pulley. Inspector LeGrand determined that someone could be seriously injured as a result of this condition, but such an injury was not likely because employees do not work in the area. The inspector determined that the operator's negligence was moderate because Ray Haneklaus, a Higman Gravel employee who accompanied LeGrand during his inspection, told him that he did not believe that the condition created a hazard. Inspector LeGrand testified that the tail pulley was required to be completely enclosed by a guard as shown in Figure 3 of MSHA's Guide to Equipment Guarding. (Ex. G-3).

Harold Higman, the owner of Higman Gravel, testified that the cited tail pulley has been in the same condition since 1962. (Tr. 303). He also testified that the plant was inspected by MSHA at least annually since the Mine Act was passed. Mr. Higman stated that, because the Akron Plant is small, it is thoroughly inspected each time an MSHA conducts an inspection. (Tr. 315). Higman testified that during these past inspections, no inspector ever suggested that the tail pulley needed to be more completely guarded. (Tr. 316). Higman stated that accumulations are cleaned out with water and a skid loader. Consequently, employees do not work or walk around the plant while it is operating. The only employee working around the plant when it is operating

is Steve Haneklaus, the plant operator, who performs all maintenance when the plant is shut down.

Mr. Higman testified that the pulley is recessed more than twelve inches from the back of the guard and eight inches from each side. (Tr. 313, 317). He believes that it would take an intentional act for someone to get his hand or arm caught in the moving tail pulley. Someone stumbling or falling in the area would not get any part of his body or clothing into the moving pulley because the existing guard provided sufficient protection.

The language of the standard states that moving machine parts that can cause injury, including drive, head, tail, and take-up pulleys, must be guarded. In the preamble to the final rule, the Secretary emphasized the broad construction of this safety standard. The preamble states:

> [T]he final standard requires the installation of guards to protect persons from coming into contact with hazardous moving machine parts. The standard clarifies that the objective is to prevent contact with these machine parts. *The guard must enclose the moving parts to the extent necessary to achieve this objective.*

53 Fed. Reg. 32496, 32509 (Aug. 25, 1988) (emphasis added). The preamble further provides:

> Under the final rule, the standard applies where the moving machine parts can be contacted and cause injury. Some commenters believed that guards should provide protection against inadvertent, careless, or accidental contact but not against deliberate or purposeful actions. They consider guards which totally enclose moving parts as counter-productive to other safety considerations such as proper work procedures, training, and general attention to hazardous conditions.

Id. In rejecting these comments, the Secretary stated that most injuries caused by moving machine parts occur when persons are "performing deliberate or purposeful work-related actions with the machinery" and that the installation of a guard would have prevented these injuries. *Id.* The Secretary stated that "[g]uards provide a physical barrier, which offers the most effective protection from hazards associated with moving machine parts." *Id.* Thus, the Secretary provided notice to the regulated community that she would interpret this safety standard very broadly to protect persons from coming into contact with moving machine parts and that the standard covers deliberate actions by employees.

The Secretary's Program Policy Manual ("PPM") provides additional information to the public about the Secretary's interpretation of safety standards. The PPM provides, in part, as follows:

> All moving parts identified under this standard are to be guarded with adequately constructed, installed and maintained guards to provide the required protection. The use of chains to rail off walkways and travelways near moving machine parts, with or without the posting of warning signs in lieu of guards, is not in compliance with this standard.

IV MSHA, U.S. Dep't of Labor, *Program Policy Manual*, Part 56/57.14107 (2000) ("PPM"). Although the PPM is not binding on the Secretary, it does provide the mining community with notice of MSHA's interpretation of her safety standards.

I vacate this citation for the following reasons. Although the Secretary's broad interpretation of the standard is reasonable, she failed to give adequate notice that the guard on the cited tail pulley was no longer sufficient to meet the requirements of the safety standard. A reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized that additional guarding was required, given MSHA's enforcement history at the Akron Plant. The text of the safety standard is broadly written and does not describe the extent of the guarding required other than to state that moving machine parts shall be guarded to protect persons from contacting the moving parts. It does not state that moving machine parts must be totally enclosed by a guard. The regulatory history provides some guidance. The history makes clear that guards must "provide a physical barrier" because such a barrier "offers the most effective protection from hazards associated with moving machine parts." 53 Fed. Reg. 32509. It also states that the Secretary interprets the safety standard to protect against deliberate and purposeful actions of employees because most injuries caused by moving machine parts occur when employees are "performing deliberate or purposeful work-related actions with the machinery." *Id.* The language of the PPM merely states that the standard should be interpreted to require guards that are "adequate" to "provide the required protection." These aids to regulatory interpretation state that moving machine parts must be guarded to the extent necessary to prevent contact with the moving parts.

Based, in part, on MSHA's Guide to Equipment Guarding, Inspector LeGrand required the pulley to be completely enclosed by a guard. (Ex. G-3). All of the illustrations in the guide picture metal cages around moving machine parts. With respect to the guarding of head and tail pulleys, every example shown in the guide depicts a wire cage built around the entire pulley structure. The language of the safety standard and the other aids to its interpretation discussed above do not indicate that mine operators must construct such cage-type guards in order to comply with the safety standard. I conclude that the regulatory history, the PPM, and MSHA's guide are ambiguous. I conclude that MSHA has not "published notices informing the regulated community with 'ascertainable certainty' of [Inspector LeGrand's] interpretation of the standard" as applied to this pulley. Clearly the tail pulley was required to be guarded, so the issue is whether MSHA provided notice that the type of guard that Higman Gravel had in place was inadequate under the standard.

The guard that was installed by Higman Gravel was quite substantial. (Exs. G-10 & 11). I credit the testimony of Mr. Higman that the conveyor, tail pulley, and guard have existed at the Akron Plant for a significant length of time. I also credit his testimony that the plant has been inspected by MSHA at least once a year since MSHA's inception. The plant is small and the cited tail pulley was obvious. It is inconceivable that MSHA has been inspecting this plant for all of these years and not a single inspector examined the tail pulley in question. Indeed, Mr. Higman testified one MSHA inspector terminated a citation issued because a guard was missing by accepting as abatement the exact type of guard that Inspector LeGrand cited in this instance. (Tr. 347).

I agree with the Secretary that the fair notice issue is an affirmative defense and that a judge should not assume that a condition has been observed by MSHA inspectors during previous inspections. Nevertheless, an operator is not required to prove that an MSHA inspector examined the cited moving machine part, discussed the existing guard with the mine operator, and told the operator that the guard was adequate. The Commission rejected this approach in *Good Construction*. In any event, Mr. Higman credibly testified that in at least one instance an inspector accepted the type of guard cited here.

It is also important to understand that the hazard created by the openings in the existing guard were negligible. The statement in the citation that the back and sides of the tail pulley were not guarded is not correct. Those areas were guarded by metal panels or a metal guard but the guarding did not completely enclose the pulley. Employees did not use a shovel to remove accumulations of material from around the tail pulley and the openings were small. Employees did not work or travel in the vicinity of the tail pulley. The pulley was also well-recessed within the existing guard.

Applying the factors set forth in the opinion of Commissioners Jordan and Beatty in *Good Construction* to the facts of this case, I find that Higman Gravel was not provided with fair notice that additional guarding was required at the tail pulley cited by Inspector LeGrand in Citation No. 7815172. My holding relies heavily on the fact that the existing guard has been in place for many years through numerous MSHA inspections and has never been cited under the safety standard. Higman Gravel was led to believe by prior citation-free inspections that its guard complied with the standard. A reasonably prudent person would have reached the same conclusion as Higman Gravel. A civil penalty cannot be assessed under such circumstances and, consequently, I vacate this citation.

Citation No. **7815174** alleges a violation of section 56.14107(a) because guarding was not provided for the head pulley v-belt drive and spoked sheave on the South Dakota flat conveyor. The citation states that the moving machine parts were about six feet above ground level. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that he walked under the pulley and determined that the sheave for the v-belt drive that powers the pulley was about six feet above the ground level by using his own height as a gage. (Tr. 78, 285; Ex. G-13). He stated that it was unlikely that anyone would be around this sheave during normal operations. (Tr. 80). He did not use a tape measure to determine the height of the sheave because of the muck and mud under the sheave. (Tr. 17172). The inspector determined that the negligence was moderate because Ray Haneklaus did not believe that the condition presented a hazard. On cross-examination Inspector LeGrand admitted that he was not positive that the sheave was less that seven feet above the ground. (Tr. 172).

Mr. Higman testified that the moving machine parts cited by Inspector LeGrand are in excess of eight feet above the ground. (Tr. 318, 379-81). He also testified that the mud and muck under the sheave is about 18 inches deep. He stated that nobody would ever want to walk in the area because the mud would come up over his boots. If someone did walk into the area, he would sink into the mud to such an extent that the moving machine parts would be out of reach. Higman testified that the area is always this muddy. He further testified that this condition has existed since 1962; that it is an obvious feature at the plant; and the area has been inspected by MSHA at least annually for years. (Tr. 319).

Steve Haneklaus testified that anyone walking under the cited sheave would sink into the mud at least two feet. (Tr. 398). He stated that Inspector LeGrand did not walk under the sheave during his inspection. Haneklaus further stated that the moving machine parts are about eight to nine feet above the solid ground. (Tr. 399). He also testified that a loader is used to clean up the area. (Tr. 400-01).

Section (b) of the standard provides that guards are not required if the exposed moving machine parts are at least seven feet away from walking or working surfaces. I find that the Secretary did not establish a violation. The sheave for the v-belt drive was not guarded. Inspector LeGrand estimated the height of this sheave above the ground and could not testify with certainty that it was less than seven feet above the ground. In addition, I credit the testimony of Higman and Haneklaus as to the conditions in the area. The area was extremely muddy as shown on Exhibit 13. As a consequence, the ground under the moving parts was not really a walking or working surface. The fact that this condition existed for many years without being cited by MSHA supports Higman Gravel's case. The condition was obvious and would have been easily observed by other MSHA inspectors. Consequently, I vacate this citation.

Citation No. **7815176** alleges a violation of section 56.14107(a) because the left and right sides of the fin-type tail pulley on the wash plant feed conveyor were not provided with a guard. The citation states that the pulley was about one foot above the ground and that the openings on the sides of the guard measured about five by eight inches. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that the existing guard on this tail pulley was the same type that was installed on the tail pulley cited in Citation No. 7815172 discussed above. (Tr. 87-88; Ex. G-17). LeGrand testified that he designated this citation as S&S because Ray Haneklaus told him that Steve Haneklaus cleans out accumulations around the pulley several times a day using a shovel.

Mr. Higman testified that the tail pulley and the existing guard have been in the same location for over 30 years. (Tr. 329). He stated that water is used to clean out the area around the pulley. The conveyor sits on a concrete platform and water is used to wash away accumulations. (Tr. 329-30). A pay loader is then used to scoop any material that is washed up against the retaining wall adjacent to the conveyor. Mr. Higman testified that accumulations are not cleaned up manually. (Tr. 330). Steve Haneklaus testified that he uses a Bobcat and a loader to clean the area of accumulations. (Tr. 403). Mr. Higman testified that Ray Haneklaus, who is Steve's father, is a mechanic at the plant. Because he spends most of his time in the shop, he does not have specific knowledge of the clean-up procedures at the plant. (Tr. 306-10).

For the reasons set forth with respect to Citation No. 7815172, I vacate this citation. The cited tail pulley assembly has been in existence at the same location for many years; MSHA has inspected this plant many times; the plant is small; and the pulley is in plain sight. There is no doubt that MSHA inspectors have examined this tail pulley during previous inspections without issuing citations. Taking into consideration all the factors to be considered in applying the reasonably prudent person test set forth in *Good Construction*, I find that Higman Gravel was not provided with sufficient notice that the existing guard failed to meet the requirements of the safety standard.

Citation No. **7815177** alleges a violation of section 56.14107(a) because the left and right sides of the fin-type tail pulley on the one-inch rock conveyor were not provided with a guard. The citation states that the pulley was about two feet above the ground and that the openings on the sides of the guard measured about five by eight inches. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The testimony with respect to this citation is essentially the same as with Citation No. 7815176. (Tr. 93-94, 331-32, 405). Unlike that citation, however, Inspector LeGrand determined that the condition did not present an S&S hazard. For the reasons set forth with respect to Citation Nos. 7815172 and 7815176, I vacate this citation.

Citation No. **7815181** alleges a violation of section 56.14107(a) because the left, right, and rear sides of the fin-type tail pulley on the rock conveyor were not provided with a guard. The citation states that the pulley was about three feet above the ground and that the openings on the sides of the guard measured about five by eight inches. The citation also states that the opening at the back was about 24 by 9 inches. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

The testimony with respect to this citation is essentially the same as with Citation No. 7815172. (Tr. 106-09, 216-19, 342-47, 410-11; Ex. G-23). Mr. Higman testified that sometimes a guard will be torn up by a loader, but the guard is always replaced by the same type of guard. (Tr. 344). Steve Haneklaus testified that MSHA inspectors have examined the guards on tail pulleys during previous inspections. (Tr. 411). For the reasons set forth with respect to Citation Nos. 7815172, 7815176, and 7815177, I vacate this citation.

Citation No. **7815182** alleges a violation of section 56.14107(a) because a guard was not provided on the drive pulleys on the raw material stacker conveyor. The citation states that a round six-inch diameter hole had been cut into the right side of the drive pulleys. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that the hole presented a hazard because someone could be "drawn in by contacting the pulleys that are on the inside, resulting in cuts, lacerations, and broken bones." (Tr. 112; Ex. G-25). He testified that Ray Haneklaus told him that the hole was cut to provide access to the bearings for the pulleys. He admitted that the bearings could not be changed while the unit was operating. (Tr. 225). He also did not know how far in the opening the pulley was located. He did not observe a grease fitting. He believes that the opening was about chest high. (Tr. 226).

Mr. Higman testified that there are no moving machine parts directly inside the hole. (Tr. 350). He stated that the condition of the bolts shown in the photograph demonstrates that the "area has not been touched for a significant number of years." (Tr. 351). The bearings cannot be replaced while the machinery is in operation. Steve Haneklaus also testified that the opening did not present a hazard to employees. (Tr. 412). He stated that if someone were walking in the area and slipped, he is not going to accidentally put his hand through the cited hole.

As with the other guarding citations, the condition cited by Inspector LeGrand existed for many years without being cited during previous MSHA inspections. As a consequence, this citation is infected by the same notice problems noted above. I vacate this citation on a more fundamental basis, however. The standard requires that moving machine parts be guarded to protect persons from contacting moving machine parts. As shown in the photograph, the pulley was covered by a substantial metal guard. (Ex. G-25). The small opening did not present any hazard to employees. I credit the testimony of Higman and Haneklaus that it would be virtually impossible to get one's hand or arm through the hole and contact a moving machine part. If an employee tripped in the area, his hand would not enter this opening. In addition, there is absolutely no proof that anyone would or could perform maintenance in or around the hole while the unit was operating. I find that the moving machine parts were adequately guarded under the safety standard. Consequently, I vacate this citation..

Citation No. **7815183** alleges a violation of section 56.14107(a) because the left, right, and rear sides of the fin-type tail pulley on the rock-return conveyor were not provided with a

guard. The citation states that the pulley was about one foot above the ground, that the opening at the rear was five inches high and two feet wide, and side openings were about five by six inches. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that the conditions that led him to issue this citation were the same as with the previous citations. (Tr. 115; Ex G-27). He determined that this citation was S&S because Ray Haneklaus told him that someone cleans up accumulations around this tail pulley "throughout the day whenever it's needed." (Tr. 115, 231-32) The inspector believes that the area is cleaned by an employee using a shovel.

Mr. Higman testified that this area is cleaned out by an employee using a shovel, but that it is only cleaned once a day prior to commencing operations. (Tr. 354). He stated that the pulley is recessed about a foot from the back opening. Steve Haneklaus cleans the area each day using a shovel and a skid loader, but only when the conveyor is not running. (Tr. 413). He stated that neither he nor anyone else is around the pulley during operations. He also testified that he personally observed at least one other MSHA inspector examine this conveyor without issuing a citation. (Tr. 414-15).

As with other tail pulleys at the Akron Plant, this one was protected by a guard that had openings on the back and sides. The record establishes that this condition existed for many years and was observed by other MSHA inspectors. The guard that was present appears to be similar to the guards that were used at the other pulleys cited by Inspector LeGrand. For the reasons stated with respect to Citation No. 7815172, above, I vacate this citation. Higman Gravel was not provided with fair notice that additional guarding was required at this location.

Citation No. **7815186** alleges a violation of section 56.14107(a) because the rear side of the fin-type tail pulley on the raw material conveyor under the truck feed hopper was not provided with a guard. The citation states that the pulley was about one foot above the ground and that the opening was about 17 by 48 inches. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that the tail pulley was not guarded at the back. (Tr. 122). He determined that the condition created a hazard because Ray Haneklaus told him that "the plant person normally cleans out around this area on a daily basis as needed." (Tr. 123). The inspector believed that an employee's clothing could become entangled in the moving machine parts, pull him into these parts, and severely injure him. Inspector LeGrand credibly testified that these types of accidents occur with some frequency at unguarded tail pulleys.

Mr. Higman testified that the cited area was between "two cement high walls." (Tr. 355). He further stated that a pay loader is used to keep the area clean of accumulations. He testified that no employees work or travel in the area. He further testified that if anyone were to slip and

fall next to the pulley, he would not be injured by the moving machine parts because there are "additional bars around it that keep people away." (Tr. 356). Steve Haneklaus testified that he is the "plant person" referred to by Inspector LeGrand. (Tr. 415). He stated that he does not manually clean up accumulations in the area with a shovel. He further testified that there is no reason for anyone to be in the vicinity of the tail pulley when it is in operation. (Tr. 416). Although the pulley needs to be greased, he performs that task prior to starting operations. Finally, he stated that he saw at least one other MSHA inspector look at the area without issuing a citation. *Id.*

No photographs were taken of the cited condition. This cited area does not appear to be similar to the other cited areas, given its location and the size of the opening. Ordinarily, an unguarded area that measures 17 by 48 inches adjacent to a tail pulley that is about a foot above the ground would violate the safety standard. Such a condition creates a risk that someone could become entangled in the moving machine parts as described by the inspector. Mr. Higman testified that metal bars were present to keep people away. Both Higman and Haneklaus testified that no employees work in the vicinity of the tail pulley. I credit this testimony.

Taking into consideration the factors set forth in *Good Construction*, I find that the Secretary did not provide adequate notice that additional guarding was required at this location. As stated above, the safety standard is broadly written to apply to a wide range of situations. The cited condition existed for many years and has been inspected by MSHA on a regular basis. The Akron Plant is not a large facility. The hazard presented was not very great because employees do not walk or travel in the area. Although it is within MSHA's authority under the standard to require a guard at the cited location, a reasonably prudent person familiar with the mining industry and the protective purposes of the safety standard would not have realized that one was required, given MSHA's enforcement history and the low risk of injury. Consequently, I vacate this citation.

Citation No. **7815179** alleges a violation of section 56.14108 because two v-belts for the head pulley drive on the rock conveyor were not guarded to prevent whipping action hazards if a belt broke. The citation states that the v-belts were about 7.5 feet directly above the rock screw elevated walkway. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "overhead drive belts shall be guarded to contain the whipping action of a broken belt if that action could be hazardous to persons." The Secretary proposes a penalty of $90 for this alleged violation.

Inspector LeGrand testified that if either of the two belts were to break, anyone on the platform or on the ladder to the platform could be struck by the broken belt. (Tr. 98-99; Ex. G-20). Ray Haneklaus told him that the belts were about nine feet long and that the plant person would go up the ladder once a day to monitor the material flow and the rock screws. (Tr. 99-100). The inspector did not observe anyone on the platform or on the ladder during his inspection. (Tr. 202). He estimated that the distance from these belts to the ground to be about 20 feet. (Tr. 205). He also testified that he relied on the statements made to him by Ray

Haneklaus when issuing this citation. (Tr. 207-09). The inspector does not know if the plant is operating when employees are on the platform. (Tr. 209-10). The citation was abated when the operator removed the ladder.

Mr. Higman testified that no employees travel to the platform while the pulleys are in operation. (Tr. 336). Higman testified that there are only two reasons to travel up onto the platform. First, someone goes up while the plant is down to check for wear and tear on the parts. (Tr. 336-67). Second, if the screws plug up with rock, someone has to go up onto the platform to remove the plugged up rock. By necessity, the unit is shut down while this occurs. Otherwise, the conveyor continues to dump rock onto the area. (Tr. 337-38). The conveyor is shut down at the control house before any plug-ups are removed. The pulleys in question are attached to the conveyor motor. (Ex. G-20).

Steve Haneklaus testified that he is the person who would go up onto the platform if the need arose. (Tr. 405). He further testified that he would not travel up the ladder to the platform to fix a problem such as a plugged rock screw while the conveyor was operating. He stated that rock would fall on him from the conveyor if he tried to do so.

I find that the Secretary did not establish a violation. The pulley was too high to pose a hazard to anyone on the ground. An employee could be injured only if a belt were to break while he was on the ladder or platform. I credit the testimony of Messrs. Higman and Haneklaus as to the use of the ladder and platform. There were no grease fittings or other service items at the cited location. The rock screws are checked for wear when the plant is shut down. If there is a plug-up, the conveyor is shutdown as soon as possible. It is quite obvious from the photograph that the operator would not want the conveyor to continue dumping rock over the top of the screws in the event of a plug-up. Moreover, the plant person could not fix the problem if the conveyor continued to operate. Thus, no employee would be on the ladder or platform when the pulleys were in operation. No employee has ever been injured by the whipping action of a belt at this location. If one of the cited belts broke, its whipping action would not create a hazard because employees do not work or travel on the ladder or platform while the conveyor is operating. Accordingly, I vacate this citation.

C. Guarding Citation at the Bergdale Pit, CENT 2001-140-M.

Citation No. **7919642** alleges a violation of section 56.14107(a) because the fan blades on the Detroit engine used to provide power to the screen plant were not guarded to prevent persons from coming into accidental contact with them. The citation states that the fan blades were about 30 inches from the ground and about 30 inches from the control levers. It also states that employees are in the area on a daily basis. MSHA Inspector Joe Steichen determined that the violation was S&S and the result of Higman Gravel's moderate negligence. The Secretary proposes a penalty of $90 for this alleged violation.

Inspector Steichen testified that the back side of the fan blades for the diesel engine on the generator were not guarded. (Tr. 29; Ex. G-2). He believed that someone walking by the generator motor could "perhaps trip and fall" into the fan blades. *Id.* The fan blades were recessed about four inches into the frame for the radiator. (Tr. 38). Steichen testified that if an employee were to get a hand or arm caught in the fan blades, he could suffer serious injuries. He was concerned that someone could try to make adjustments to the engine without turning it off. He also stated that the Bergdale Pit had never been inspected by MSHA.

James Abbott, who ran the excavator at the pit, testified that sometimes he starts the diesel engine but that the loader operator usually starts it. (Tr. 10-11). The engine operates during the entire shift. The fluid levels are checked and other maintenance is performed before the engine is started. (Tr. 16, 39). He testified that there is no reason for anyone to perform any maintenance on the generator unit while it is operating. (Tr. 39). The controls for the generator are about four feet from the engine. Abbott further testified that it is not necessary to clean up any material in or around the generator. (Tr. 20). He does not believe that it is very likely that anyone would become entangled in the fan blades because the fan "sits way back in there next to the radiator." (Tr. 21).

Mr. Higman testified that this generator was used by Higman Gravel at its Volin, South Dakota, pit for about ten years before it was moved to the Bergdale Pit. (Tr. 42). He also stated that the cited condition has existed since the generator was purchased and that no employees have been injured. He further testified that there is no reason for anyone to be anywhere near the generator after it is started. The two employees at the pit operate heavy equipment during the entire shift. In addition, the generator sits under a conveyor assembly so it is protected by its location. (Tr. 45).

I find that the Secretary established a violation, which is not S&S. The fan blades are moving machine parts that are required to be protected. The likelihood of such an injury was not very great, however. I credit the testimony of Higman Gravel's witnesses on the likelihood of an injury issue. I also find that Higman Gravel's negligence was low. I assess a penalty of $40 for this violation.

D. <u>Other Citations at the Akron Plant (IA Portable #1), CENT 2000-208-M.</u>

Citation No. **7815175** alleges a violation of section 56.12008 because a bushing was not provided for the 220-volt cord where it entered the metal junction box for the electric motor on the South Dakota flat conveyor. The citation states that no bare wires were discovered. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides, in pertinent part, that power "cables shall enter metal frames of . . . electrical components only through proper fittings ." It further states that "[w]hen insulated wires, other than cables, pass through metal frames, the holes shall be substantially bushed with insulated bushings." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that the power cord was a "three-wire Romex type cord." (Tr. 84). It had "three wires in it with plastic wrap around." *Id.* It appears to me that the power cord in question was an electrical cable rather than an insulated wire, as these terms are used in the safety standard. Nevertheless, I will interpret Inspector LeGrand's testimony concerning the lack of a bushing to include the lack of a proper fitting. The Secretary's regulations and her PPM do not provide any guidance. Inspector LeGrand was concerned that the cord could rub against the metal opening and energize the metal frame of the conveyor. He observed the condition while standing on the ground some distance away. The muddy conditions described in the discussion of Citation No. 7815174 above, were located directly under the motor. The inspector estimated that the cited area was about nine feet above the ground. (Tr. 176; Ex. G-15). The cord entered into the motor through, what the inspector called, a "metal elbow." *Id.* He believed that the cord could vibrate within that elbow. (Tr. 177). He could not state with certainty that the cord was not tightly clamped within that elbow, but he did not see a bushing or any other device holding the cord. (Tr. 177-78, 290).

Mr. Higman testified that the cord was not free to move around because it entered the junction box through a metal conduit. (Tr. 320-21). He stated that the cited equipment had been in use since the 1960s, but that it was taken out of service prior to the hearing. He further testified that no change was made to abate the cited condition. (Tr. 324, 325-26). He took a photograph of the cited area after the equipment was taken out of service. (Tr. 322; Ex. R-C). Mr. Higman testified that because the cord was tight and secure in the metal fitting, the condition did not present a hazard. Finally, he stated that because of location of the motor, it was difficult if not impossible to see the fitting from the ground. (Tr. 323-24).

I find that the Secretary did not establish a violation. The cord was a cable that was required to enter the frame of the motor through a "proper fitting." The cord entered the motor through a metal elbow or conduit. I credit Higman Gravel's evidence that the cord was secure within this metal conduit which served as a fitting. (Ex. R-C). It was difficult to see this fitting from the ground, as evidenced by the fact that the citation was terminated even though Higman Gravel did nothing to abate the condition. Consequently, I vacate this citation.

Citation No. **7815180** alleges a violation of section 56.11004 because the 12-foot portable metal ladder to the elevated platform for the rock screw was not secured in place. The citation states that the plant person uses this ladder daily to access the rock screw elevated walkway. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "[p]ortable ridged ladders shall be provided with suitable bases and placed securely when used." The Secretary proposes a penalty of $113 for this alleged violation.

Inspector LeGrand testified that the cited metal ladder was leaning against the metal frame of the walkway adjacent to the rock screws. (Tr. 101). The ladder was not affixed to the walkway at the top. (Ex. G-20). He stated that the ladder slid to one side when he first stepped onto the ladder. (Tr. 102). He was not concerned whether the base of the ladder was suitable.

Rather, he was concerned that the ladder was not secured at the top and feared that it could slide off the walkway. *Id.* If the ladder fell while a person was climbing it, he could sustain serious injuries. He issued the citation because the ladder shifted when he first stepped on it. (Tr. 215).

Mr. Higman testified that the bottom of the ladder was buried in rock. (Tr. 340). Higman Gravel abated the citation by removing the ladder. A payloader had to be used to dig out the ladder from the accumulated rock. Steve Haneklaus testified that the ladder could not be removed by hand because it was buried about two to three feet in accumulated rock. A payloader was used to remove some of the rock and then a chain was attached between the bottom of ladder and the bucket of the loader. (Tr. 409). The ladder was then pulled out of the remaining rock.

I find that the Secretary did not establish a violation. The safety standard requires that portable ladders be "placed securely when used." The mere fact that the ladder shifted some when the inspector first stepped on it does not establish that it was not secure. Although it would be a good idea to attach the top of the ladder to the frame of the walkway, the standard does not specifically require that ladders be affixed at the top. In addition, the fact that the ladder had to be pulled out of the rock with a loader shows that the ladder was secure. Consequently, I vacate this citation.

Citation No. **7815185** alleges a violation of section 56.4101 because a sign prohibiting smoking or open flame was not provided at or near the 500 gallon diesel tank under the raw material feed conveyor. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard states that "[r]eadily visible signs prohibiting smoking and open flames shall be posed where a fire or explosion hazard exists." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that there were no signs posted at or near the diesel fuel storage tank. (Tr. 116; Ex. G-29). The only source of a flame would be someone smoking or welding in the area. (Tr. 120). Mr. Higman testified that diesel fuel has a very low flash point so that the possibility of someone starting a fire or causing an explosion by smoking or using an open flame was virtually nonexistent. (Tr. 354-55).

I find that the Secretary established a violation. Diesel fuel storage facilities are covered by the safety standard. The fact that the likelihood of a fire was not great relates to the gravity of the citation. I find that the violation was not serious and that Higman Gravel's negligence was low. A penalty of $40 is appropriate.

Citation No. **7815187** alleges a violation of section 56.14132(a) because the horn and back-up alarm on the Kamotsu loader were not in operating condition. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. 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." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that he asked the loader operator to test the horn and it did not work. (Tr. 127; Ex. G-32). He stated that the loader operator should have detected this deficiency in his pre-operational check. He also determined that the back-up alarm did not work when he asked the loader operator to put the loader in reverse. (Tr. 130). The loader was operating at the pit, which is across the road from the plant. *Id.* The inspector testified that there were no pedestrians in the area. (Tr. 131). The loader operator had an obstructed view to the rear of the vehicle. Mr. Higman did not know that the horn was not working and does not know when it ceased operating. (Tr. 357). He also disputed LeGrand's testimony that there was limited visibility to the rear of the loader.

I find that the Secretary established a violation of section 56.14132(a). There is no dispute that the horn and the backup alarm were not working. The violation was not serious because pedestrians are not in the pit area of the plant. Higman Gravel's negligence was moderate because these safety defects should have been detected during the required examinations of mobile equipment. The Secretary's proposed penalty of $55 is appropriate.

Citation No. **7815189** alleges a violation of section 56.9300(a) because berming was not provided for a distance of about 100 feet along the edge of the pond in the sand pit. The citation states that the Kamotsu loader was operating in the area and that loader tracks were observed within two feet of the pond edge. Inspector LeGrand determined that the violation was S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides 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." The Secretary proposes a penalty of $113 for this alleged violation.

Inspector LeGrand testified that he observed the loader operating ten feet away from the pond. (Tr. 134). He stated that there was no berm separating the work area of the loader from the pond. (Exs. G-32, G-34). The inspector testified that the loader scoops up the sand that is pulled out of the edge of the pond by the excavator. The excavator operator positions the equipment at the edge of the pond and scoops out fine material from the pond. The inspector testified that it did not violate the standard for the excavator to work at the edge of the pond. The sand is loaded into belly load dump trucks and is transported across the road to the plant. Ray Haneklaus told the inspector that berms had never been required along the edge of the pond. (Tr. 136). Haneklaus also told the inspector that the pond is about 15 to 20 feet deep at the edge. LeGrand determined that the loader travels within a few feet of the edge of the pond based on his evaluation of the tire tracks he observed in the area. He issued the citation because the loader operator could accidentally back into the pond while traveling in the area.

Mr. Higman testified that the edge of the pond must be clear of material so that the excavator can "come in and begin excavation." (Tr. 359). The loader operator must clear an

area that is about 100 feet long because that is the distance the excavator will "cover in a one-day period." *Id.* The excavator "digs the material out of the water, swings it to the side, and stockpiles it for dewatering." (Tr. 360). The loader removes the mined material so that the excavator can extract more material on the next cycle. Mr. Higman testified that the loader operates parallel to the edge of the pond when cleaning the area adjacent to the pond. (Tr. 363). He stated that the loader does not travel within 20 feet of the pond when it is required to operate perpendicularly to the edge of the pond. The dump trucks do not travel near the edge of the pond. Mr. Higman does not consider the area adjacent to the pond to be a roadway or travelway. (Tr. 364-65).

Mr. Abbott, who operates the excavator, testified that he must have a smooth area to operate safely. (Tr. 431; Exs R-A, R-B). The loader operator tries to keep an area that is about 80 to 100 feet long clear for the excavator. The loader operator and excavator operator work together in cycles up and down the edge of the pond. When the loader operator is loading the dump trucks, he stays about 50 to 60 feet away from the edge of the water. (Tr. 436). If a loader is in the vicinity of the pond, the loader operator is supposed to turn away from the pond or travel parallel to the edge of the pond. (Tr. 447).

I find that the Secretary did not establish a violation. The Secretary is correct when she states that there was no physical barrier preventing the loader from driving into the pond. (Tr. 471). The safety standard, however, does not require berms "wherever a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment." The safety standard requires berms only "on the banks of roadways." I find that because the cited area is not a roadway, the safety standard does not apply to the cited condition.

The Commission has interpreted this safety standard to include various transportation corridors. For example, the term "roadway" in the standard applied to elevated ramps that lead up to dumping points. *Capitol Aggregates, Inc.*, 4 FMSHRC 846, 847 (May 1982). The Commission has also concluded that a bench at an open pit mine is a roadway if haulage trucks are driven along the bench. *El Paso Rock Quarries, Inc.* 3 FMSHRC 35, 36 (Jan 1981). Under the facts of this case, however, the area in question was not being used as a roadway.

Three types of vehicles enter the area along the pond. The excavator, the loader, and the dump trucks. By necessity, the excavator is used along the edge of the pond to remove material from the pond. Inspector LeGrand did not consider this use of the excavator as a violation of the safety standard. The excavator is mounted on caterpillar tracks. He also did not express any concern about the trucks. The inspector believes that a berm was required to protect the loader operator. He stated that the "loader [operating] there makes it a travelway." (Tr. 249). The inspector was primarily concerned that the loader operator would accidentally back into the pond. There is a slight drop-off at the edge of the pond to the top of the water. The bank continues to drop under the water. A berm would let the loader operator know that he was close to the edge. He further stated that other gravel operators place berms around their ponds to provide this protection. (Tr. 263-64). Higman Gravel contends that the loader operator does not travel closer

than 20 feet from the edge of the pond except when smoothing out the area for the excavator and that he performs that task while traveling parallel to the edge of the pond.

As described above, the excavator and loader work in tandem in about 100-foot increments up and down the edge of the pond pulling and loading material from the pond. The excavator is pulled away from the pond as the loader prepares a new area for excavation. When the area has been prepared, the excavator is brought in to scoop up material along the 100-foot distance. The loader stockpiles the material for dewatering and then loads it onto trucks for transportation to the plant. When all of the mined material has been transported away or stockpiled, the mining cycle starts again along an adjacent area of the pond. Before Higman Gravel started mining, the pond did not exist. The pond was created as excavation occurred because the water table is high in the area.

I find that the cited area is a "working place." The Secretary defines a "working place" as "any place in or about a mine where work is being performed." 30 C.F.R. § 56.2. The cited area along the pond is not a "roadway." Vehicles do not travel along the pond to get from one point of the mine to another. Term "roadway" has not been defined by the Secretary and its meaning in the standard is not plain on its face.[1] The loader works in the pond area and does not transport material out of the area. The cited area is not akin to a ramp for a hopper or a bench used as a roadway. It is not a transportation corridor. Although placing a berm along the edge of the pond may enhance safety, the Secretary's interpretation of the term "roadway" to include the work area along the pond is unreasonable. As a consequence, I do not defer to her interpretation.

In addition, even if I were to defer to the Secretary's interpretation here, Higman Gravel was not provided with sufficient notice of her interpretation. The PPM and other interpretative materials do not provide any guidance. Although Inspector LeGrand spoke of other operations, it is not clear that providing berms along ponds in this situation is an industry practice. Higman Gravel has been mining out of this pond since the 1960s without receiving a citation for failing to provide a berm along the edge of the pond. MSHA has inspected this operation at least once a year since the Mine Act became effective in 1978 and only Inspector LeGrand determined that the safety standard required a berm around the edge of the pond. Consequently, for the reasons set forth with respect to the guarding citations, I would also vacate this citation because the Secretary failed to provide notice of the requirements of the standard. Consequently, I vacate this citation.

Citation No. **7815191** alleges a violation of section 56.18002(a) because adequate examinations of working places were not being performed as indicated by the multiple citations issued in the inspection. The citation states that contact with most of the cited conditions would have injured employees. Inspector LeGrand determined that the violation was S&S and was the

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[1] The Secretary's regulations and interpretative material do not define the term "roadway." A "roadway" can be defined as "a strip of land through which a road is constructed" and "the part of a road over which vehicular traffic travels." *Webster's Third New Int'l Dictionary* 1963 (1976).

result of Higman Gravel's moderate negligence. The safety standard provides, in part, that "[a] competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health." The Secretary proposes a penalty of $66 for this alleged violation.

Inspector LeGrand testified that he issued the citation because he believed that the workplace examinations were not sufficiently thorough to meet the requirements of the standard. (Tr. 148). He reached this conclusion because he issued 14 citations including 9 guarding citations. The inspector believed that, because Ray and Steve Haneklaus did not recognize that the cited conditions created hazards, their examinations were inadequate. (Tr. 150).

Mr. Higman testified that competent examinations were being performed but that the conditions cited by Inspector LeGrand did not create hazards. (Tr. 369). He contends that the fact that most of the cited conditions had been previously inspected by MSHA helps prove his point. (369-71).

I find that the Secretary did not establish a violation. First, I vacated most of the citations in this case because the Secretary either did not establish a violation or because she failed to provide adequate notice of her interpretation of the cited safety standard. Most of the cited conditions existed for 20 years and have never been cited in previous inspections. In addition, the fact that an inspector finds a number of violations does not, by itself, establish a violation. *Dumbarton Quarry Associates*, 21 FMSHRC 1132, 1135-36 (Oct. 1999) (ALJ Manning). Higman Gravel may have allowed the cited conditions to exist because it believed that they were not hazardous and did not violate the Secretary's safety standards, rather than because workplace examinations were not competently performed. *Higman Sand & Gravel, Inc.*, 18 FMSHRC 951, 962-63 (June 1996) (ALJ). Consequently, I vacate this citation.

Citation No. **7815190** alleges a violation of section 56.18002(b) because there were no records of daily work place examinations available for review. Inspector LeGrand determined that the violation was not S&S and was the result of Higman Gravel's moderate negligence. The safety standard provides that "[a] record that such examinations were conducted shall be kept by the operator for a period of one year and shall be made available for review by the Secretary." The Secretary proposes a penalty of $55 for this alleged violation.

Inspector LeGrand testified that Ray Haneklaus advised him that no written records of workplace examinations were kept at the mine. (Tr. 151). Higman Gravel did not produce any records for him to review.

Mr. Higman testified that the person responsible for each area of the plant examines his workplace once each shift. (Tr. 366). Most areas are examined by Steve Haneklaus. Higman stated that the record kept to show that the examination was completed is Mr. Haneklaus's time sheet. If he reported to work, he performed the examination because that is an important part of his job. (Tr. 366-67). Higman further testified that the citation was abated by placing a calendar

at the work station where the examiner is required to indicate that he performed the required examination. (Tr. 367).

The Secretary established a violation. An examiner's time sheet which simply shows that he reported to work that day is not sufficient to meet the requirements of this safety standard. He may forget to perform the examination, yet the time sheet would indicate that the work place examination was performed. The $55 penalty proposed by the Secretary 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. With respect to the history of paid violations, I find that no citations were issued at the IA Portable #1 (Akron Plant) and no citations were issued at the Bergdale Pit in the 24 months preceding these inspections. (Tr. 154-56; Ex. G-44). Higman Gravel is a small operator that worked 6,500 man-hours at the Bergdale Pit in 1999 and 5,597 man-hours at the IA Portable #1 in four quarters beginning with the fourth quarter of 1998. (Tr. 4-5). All of the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Higman Gravel's ability to continue in business. My findings with regard to gravity and negligence 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:

Citation No.	30 C.F.R. §	Penalty
CENT 2000-208-M		
7815172	56.14107(a)	Vacated
7815174	56.14107(a)	Vacated
7815175	56.12008	Vacated

Citation No.	30 C.F.R. §	Penalty
7815176	56.14107(a)	Vacated
7815177	56.14107(a)	Vacated
7815179	56.14108	Vacated
7815180	56.11004	Vacated
7815181	56.14107(a)	Vacated
7815182	56.14107(a)	Vacated

7815183	56.14107(a)	Vacated
7815185	56.4101	$40.00
7815186	56.14107(a)	Vacated
7815187	56.14132(a)	$55.00
7815189	56.9300(a)	Vacated
7815190	56.18002(b)	$55.00
7815191	56.18002(a)	Vacated
CENT 2001-140-M		
7919642	56.14107(a)	$40.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Higman Sand & Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of $190.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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