FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 12, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-127-M
Petitioner	:	A.C. No. 13-02194-05501
	:	
	:	Docket No. CENT 2002-193-M
v.	:	A.C. No. 13-02194-05502
	:	
	:	Docket No. CENT 2002-269-M
KNAAK SAND,	:	A.C. No. 13-02194-05503
Respondent	:	
	:	Knaak Sand
	:	

CONSOLIDATION ORDER
AND
DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
James V. Knaak, *pro se*, Eldon, Iowa, for the Respondent.

Before: Judge Feldman

The hearing in these proceedings was conducted in Ottumwa, Iowa, on October 16, 2002. At the hearing the parties moved to consolidate the civil penalty proceedings in Docket Nos. CENT 127-M and CENT 2002-193-M, that had previously been scheduled for hearing, with the civil penalty case in Docket No. CENT 2002-269-M. The parties' motion was granted on the record. Accordingly, these civil penalty matters **ARE CONSOLIDATED**.

These proceedings concern petitions for assessment of civil penalties filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), 30 U.S.C. § 820(a), by the Secretary of Labor (the Secretary), against the respondent, Knaak Sand. The petitions seeks to impose a total civil penalty of $275.00 for five alleged violations of the mandatory safety standards in 30 C.F.R. Parts 50 and 56 of the Secretary's regulations governing surface mines. All of the alleged violations are characterized as non-significant and substantial

(non-S&S). A violation is non-S&S in nature if it is unlikely that the violation will be a factor that contributes to an illness or injury. *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981).

At the beginning of the hearing, the parties were advised that I would defer my ruling on the five citations pending post-hearing briefs, or, issue a bench decision if the parties waived their right to file post-hearing briefs. The parties waived the filing of briefs. (Tr. 41-43). This written decision formalizes the bench decision issued with respect to the contested citations. This decision contains an edited version of the bench decision issued at trial with added references to pertinent case law. The bench decision affirmed three of the five subject citations. A total civil penalty of $135.00 shall be imposed.

I. Pertinent Case Law and Penalty Criteria

The bench decision applied the statutory civil penalty criteria in section 110(i) of the Act, 30 U.S.C. § 820(i), to determine the appropriate civil penalty to be assessed. In determining the appropriate civil penalty, Section 110(i) provides, in pertinent part:

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

Knaak Sand, is a sole proprietorship operated by James V. Knaak. Knaak Sand is a small mine operator that is subject to the jurisdiction of the Mine Act. (Tr. 8-13). Knaak Sand has an excellent compliance history in that it has no history of previous violations. (Tr. 26). There is no evidence that the civil penalty proposed by the Secretary in these matters will effect Knaak Sand's ability to continue in business. Finally, the cited violations were not indicative of serious gravity and all of the cited conditions were abated in a timely manner.

II. Findings and Conclusions

James V. Knaak has operated Knaak Sand as a sole proprietorship since 1989. He has no employees. Knaak leases approximately 1000 feet of the river front along the Des Moines River in Eldon, Iowa, where he dredges and screens sand and gravel. The dredging equipment moves up and down the riverbank. The screening plant and stacker conveyor remain stationary. Knaak removes sand and gravel from the riverbed using a bucket that is attached to a link belt dragline. The bucket carries the sand to a sand bar that is located close to the riverbank. The material is raised from the sand bar onto the riverbank above by a Marion dragline. The extracted material is then transported by Hough front-end-loader to a hopper that feeds the material onto a conveyor to the screen plant. There the over-sized rock and the pea rock are separated from the sand which is further cleaned by a sand screw trough that utilizes water pumped from the river to separate debris. The screen plant and conveyor are powered by a generator. After cleaning, the sand is stockpiled by a stacker conveyor. The finished product ultimately is sold to customers and loaded into their haulage trucks.

The citations that are the subject of these proceedings were issued on December 5, 2001, by Mine Safety and Health Administration (MSHA) Inspector Christopher C. Willett. The citations were issued during the course of Willet's regular periodic inspection of the Knaak Sand facility. At the time of the inspection, Willett was accompanied by Gary Cook, a special investigator assigned to MSHA's Duluth, Minnesota office.

A. Docket No. CENT 2002-269-M

1. Citation No. 6152215

Upon arriving at the Knaak Sand facility on December 5, 2001, Willett asked Knaak if he recently had received first aid training. Knaak responded that he had not had any recent training. However, Knaak told Willett he had received first aid training in the past. (Tr. 27). Although Knaak worked alone, Willett believed it was important for Knaak to know how to render first aid in case a customer was injured on Knaak's premises. As a result of the information provided by Knaak, Willett issued Citation No. 6152215 alleging a violation of the mandatory safety standard in 30 C.F.R. § 56.18010 that requires the presence of a currently trained individual capable of performing first aid on all work shifts. Willett designated the alleged violation as non-S&S in nature because Knaak carried a cell phone and ambulance service was located in town only one mile from Knaak's sand facility.

Knaak's sand removal operations were suspended for the winter shortly after Willett's December inspection. Citation No. 6152215 was terminated the following Spring on April 30, 2002, after Willett returned to the facility and Knaak told him that he had read a Red Cross first aid book. Knaak was not required to receive any formal first aid training to terminate the citation.

Willett testified that he had no reason to believe that Knaak had not previously read the Red Cross first aid book. However, he opined the standard was violated because Knaak was not currently trained because he had not read the first aid book recently. Willett considered an individual not currently trained if he had not had first aid training in the previous three years. (Tr. 45).

Knaak testified that he has had extensive first aid training in the past. Knaak stated he first acquired knowledge of first aid when he was an Ottumwa police officer in 1969. He later obtained additional training when he worked for a quarry operator named Douds Stone in the 1980's. Knaak admitted that he hadn't had recent formal training. However, he testified that he is exposed to first aid issues everyday in that he thinks about first aid techniques that may become necessary during the performance of his daily work activities.

The bench decision noted, the Secretary has the burden of proving the alleged violation of a mandatory safety standard by a preponderance of the evidence. *Garden Creek Pocahontas Company*, 11 FMSHRC 2148, 2152 (Nov. 1989). Section 56.18010 provides that first aid training shall be made available to all interested employees. As noted, Knaak has no employees. Therefore, he cannot designate anyone other than himself to be the on-site person capable of rendering first aid.

Knaak admits he has not received recent formal first aid training. However, Citation No. 6152215 did not require formal first aid training for termination of the citation. Rather, all that was required was that Knaak read first aid materials. Although he could not recall when he last read about first aid, Knaak indicated he had read such materials in the past. Willett stated the cited standard requiring current first aid training contemplates that such training must have occurred within the last three years. Thus, the Secretary must demonstrate, by a preponderance of the evidence, that Knaak had not read first aid publications within the last three years. On balance, the Secretary has failed to do so. **Accordingly, Citation No. 6152215 shall be vacated**. (Tr. 42-47).

B. Docket No. CENT 2002-127-M

1. Citation No. 6152216

Section 50.30(a), 30 C.F.R. § 50.30(a), of the Secretary's regulations requires surface mine operators to file quarterly employment reports reflecting each "individual working during any day of a calender quarter" on MSHA Form 7000-2. (Gov. Ex. 5). Section 50.30-1(g)(3), 30 C.F.R. § 5030-1(g)(3), provides the instructions for completing MSHA Form 7000-2. Section 50.30-1(g)(3) specifies that Form 7000-2 should reflect "the total hours worked by *all employees* during the quarter covered." (Gov. Ex. 5) (Emphasis added).

Willett determined Knaak was not filing quarterly reports because Knaak Sand was on the non-response list that was kept at MSHA's Denver office. During his December 5, 2001, inspection Willett asked Knaak why he hadn't filed the September 2001 quarterly employment report. Knaak responded that he believed he was not required to complete Form 7000-2 because he did not have any employees. (Tr. 49). Consequently, Willett issued Citation No. 6152216 citing a technical non-S&S violation of the quarterly reporting requirements. The citation was terminated on December 10, 2001, after Knaak filed Form 7000-2 for the September 2001 quarter.

Knaak testified he has filed quarterly reports on an irregular basis. He stated he filed the reports sporadically only when he was asked to file them by MSHA inspectors. Knaak testified:

> . . . I have filed this form many times, and the employees hours are zero. There is (sic) no employees' hours. Why would I be required to file a form when there is no information on that form except zero? . . . I had put down zero, zero, zero and signed it and sent it in. If that's good information. That's nothing but zeroes. They can't seem to understand that I have no employees' hours. This information means nothing. . . . I am not an employee. I own this thing. This equipment belongs to me. This ground belongs to me. (Tr. 54, 56).

Form 7002-2 explicitly requires the mine operator to report "Employee-Hours." (Gov. 5). While it is clear Knaak "works"at the mine, at the hearing the Secretary's counsel and Willett were uncertain regarding whether Knaak was an employee whose hours had to be reported.

In this regard, counsel stated, " I don't have a position whether he is an employee, but he is clearly a miner under the Act . . . ." (Tr. 57). With regard to how Form 7000-2 should be completed with respect to hours worked, Counsel stated "Mr Willett testified it should be [Mr. Knaak's] hours. I don't know. Perhaps it should be zero." (Tr.63). However, counsel asserted that a sole proprietorship without employees should not be exempt from the quarterly filing requirements. (Tr. 62). Willett testified Knaak is an employee who "pays himself." (Tr.60-61).

In the bench decision I emphasized that the issue before me is not whether MSHA has the authority to require Knaak to file a quarterly report, which unquestionably it does. Rather, the issue is whether Citation No. 6152216 should be affirmed. Although MSHA Form 7000-2 only requires the reporting of "employee hours" worked, regulations should be interpreted consistent with their purposes. *Island Creek Coal Company*, 20 FMSHRC 14, 22 (January 1998) (citations omitted).

I agree with the Secretary's interpretation of section 50.30(a) expressed at the hearing that, to maintain records related to mine facility activities and hours worked, even sole proprietorships without employees are required to file quarterly reports. However, when the Secretary seeks to impose a civil penalty based on its interpretation of a regulation, a separate inquiry arises concerning whether the mine operator had "fair notice" of the interpretation it is charged with violating. *Id.* at 24 citing *Energy West Mining Co.*, 17 FMSHRC 1313, 1317-18 (August 1995). In *Island Creek* the Commission stated:

> "[D]ue process . . . prevents . . . deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires." *Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986). An agency's interpretation may be "permissible" but nevertheless fail to provide the notice required under this principle of administrative law to support imposition of a civil sanction. *General Elec.*, 53 F. 3d at 1333-34. The Commission has not required that the operator receive actual notice of the Secretary's interpretation. Instead, the Commission uses an objective test, *i.e.*, "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." *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). 20 FMSHRC at 24.

Applying the "reasonably prudent person" test, it has not been shown that Knaak knew, or should have known, that he was required to file quarterly reports under section 50.30(a) despite his lack of employees. I reach this conclusion based on MSHA's demonstrated uncertainty at the hearing concerning whether Knaak's work hours had to be reported. Accordingly, Knaak lacked the requisite fair notice necessary to satisfy due process. **Consequently, Citation No. 6152216 shall be vacated**. (Tr. 65-68).

2. Citation No. 6152217

During the course of Willett's December 5, 2001, inspection Willett asked Knaak if he had performed periodic continuity and resistance tests to ensure that the electrical equipment was properly grounded. Knaak assured Willett that the required testing had been performed.

However, Knaak did not have any written records identifying the equipment that had been tested or the dates of such tests. Consequently, Willett issued Citation No. 6152217 citing a violation of the mandatory safety standard in 30 C.F.R. § 56.12028. This standard requires that grounding systems shall be tested immediately after installation, repair or modification, and annually thereafter. The standard also requires that records of such testing shall be made available to MSHA inspectors upon request. Willett considered the violation to be a non-S&S paperwork violation that was attributable to a moderate degree of negligence. The Secretary seeks to impose a $55.00 civil penalty. The citation was terminated on December 10, 2001, after Knaak provided continuity and resistance testing records.

Knaak testified that his electric generator had been de-energized because it was not working. Knaak maintained that he had not installed repaired or modified any electrical equipment for a long time. However, Knaak admits that he did not keep resistance and continuity testing records.

Since Willett was unaware of any recent electrical installation, modification or repair, the missing testing records relate to the annual testing that is required by section 56.12028. It is unclear whether the missing records concern recent testing, or annual testing that was performed almost one year ago. It is also unclear whether the records were not kept or whether they were misplaced. However, the record keeping requirement of section 56.12028 is unambiguous. It is undisputed that Knaak failed to satisfy this requirement. Consequently, the Secretary has demonstrated the fact of the cited violation. Turning to the issue of negligence, the bench decision noted, under the Mine Act, operators are strictly liable for violations of the Secretary's safety standards without regard to fault. *Asarco, Inc.*, 8FMSHRC 1632 (Nov. 1986), *aff'd* 868 F. 2d 1195 (10th Cir. 1989). Here, I conclude Knaak's negligence was low given the fact that the dates and circumstances surrounding the unrecorded grounding tests are unknown. **Accordingly, a civil penalty of $40.00 is assessed for Citation No. 6152217**. (Tr. 78-79).

3. Citation No. 6152218

Section 56.15001, 30 C.F.R. § 56.15001, provides, in pertinent part, that "[a]dequate first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas." Knaak admits he did not have any conventional first aid materials at the mine facility. In this regard, Knaak testified that he had electrical tape and rags that he could use to provide emergency first aid. (Tr. 82). As a consequence of the undisputed lack of first aid materials at the Knaak Sand facility, Willett issued Citation No. 6152218 citing a violation of section 56.15001. The citation was terminated on December 10, 2001, after Willett determined that Knaak had brought a stretcher and blankets to the surface mine facility.

Although Knaak reportedly believes electrical tape and rags are a suitable alternative to blankets and bandages, the bench decision noted that no reasonable person would seriously assert that electrical tape and rags are adequate first aid materials. While I recognize the limited utility of a stretcher when Knaak was alone at the facility, it is possible that first aid materials, including a stretcher or blankets, could be required if a customer sustained injuries or

became ill. Accordingly, the fact of the violation has been demonstrated by the Secretary. Although Willett considered the lack of first aid materials to be serious, he nevertheless designated the violation as non-S&S because there was a medical facility with an ambulance located approximately one mile away. Willett attributed the violation to a moderate degree of negligence. In view of the fact that the circumstances that support the citation essentially are undisputed, **Citation No. 6152218 shall be affirmed and the $55.00 civil penalty proposed by the Secretary shall be imposed**. (Tr. 87-88).

C. Docket No. CENT 2002-193-M

1. Citation No. 6152219

During his December 5, 2001, inspection, Willett observed there was no berm along the riverbank for a distance of approximately 400 feet. There was an approximate ten foot drop-off from the riverbank to the river below. Most of this 400 foot long area was approximately 100 feet wide. Willett testified trucks normally use the roadway one at a time. Thus, the roadway is not used for two-way traffic. (Tr.99-100). Willett conceded an accident was not likely to occur along most areas of the riverbank where the travelable area was 100 feet wide. However, the area between the screen plant with its conveyors and the riverbank was 25 to 50 feet wide. The screen plant area was further narrowed by the stockpile where the distance between the stockpile and the riverbank ranged from 15 to 20 feet. Willett was concerned that a customer's haulage truck could roll over the riverbank while maneuvering to load at the stockpile. (Tr. 94). Under such circumstances the truck driver could sustain serious, if not fatal, injuries.

Consequently, Willett issued Citation No. 6152219 citing a violation of section 56.9300(a), 30 C.F.R. § 56.9300(a). This mandatory safety standard requires berms or guardrails to be constructed on banks of roadways where a drop-off exists of sufficient grade to cause a vehicle to overturn. Willett characterized the violation as non-S&S in nature because the majority of the cited 400 foot length of roadway was extremely wide with the exception of the area between the screen plant with its stockpile and the riverbank. (Tr.90). Willett attributed the violation to a moderate degree of negligence. The citation was terminated on January 16, 2002, after Willett observed that Knaak had installed a berm approximately two feet high for the entire 400 foot length along the riverbank. (Tr. 108).

Knaak testified that he leases an area along the Des Moines River that is 300 feet wide by 1000 feet long. Knaak conceded the need for a berm along the narrow portion of the roadway in that he admitted he had placed rocks and a berm along the riverbank that had washed away. (Tr. 94-95, 102, 107). Knaak does not contend that the rocks or berm had washed away recently. In this regard, he testified the river had not flooded since August 2001. (Tr. 128). Although Knaak acknowledged that a berm was necessary in some limited locations near the screen plant, he stated he was unable to maintain berms in the vicinity of the draglines because the draglines move laterally up and down the riverbank each day during the course of removing sand from the riverbed.

The bench decision noted that section 56.9300(a) requires berms on the banks of roadways where a drop-off could cause a vehicle to overturn. A violation is properly designated as significant and substantial in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to by the

violation will result in an injury or an illness of a reasonably serious nature. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984)*; National Gypsum,* 3 FMSHRC at 825. Ordinarily, the failure to maintain berms that are intended to prevent a vehicle from driving off an embankment is a significant and substantial violation, which, if uncorrected, is likely to contribute to an accident resulting in serious or fatal injuries. However, in this case, Willett characterized the violation as non-S&S because most of the cited 400 foot length along the riverbank cannot be considered a roadway because it is over 100 feet wide. Knaak has conceded, by virtue of his previous placement of rocks or berms along the riverbank near the screen plant, that the absence of protective measures in this area could cause a truck to overturn. Accordingly, the Secretary has demonstrated the fact of the violation.

The Secretary has attributed this violation to a moderate degree of negligence. In view of the fact that the area that requires berms is considerably less than the 400 foot length cited in Citation No. 6152219, the degree of negligence associated with the violation is reduced from moderate to low. **Accordingly, Citation No. 6152219 is affirmed and a civil penalty of $40.00 shall be assessed**. (Tr. 130-32).

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation No. 6152215 in Docket No. CENT 2002-269-M, and Citation No. 6152216 in Docket No. CENT 2002-127-M, **ARE VACATED**.

IT IS FURTHER ORDERED that Citation Nos. 6152217 and 6152218 in Docket No. CENT 2002-127-M, and Citation No. 6152219 Docket No. CENT 2002-193-M, **ARE AFFIRMED**.

IT IS FURTHER ORDERED that Knaak Sand **shall pay a total civil penalty of $135.00** in satisfaction of Citation Nos. Citation Nos. 6152217, 6152218 and 6152219. Payment is to be made to the Mine Safety and Health Administration within 40 days of the date of this Decision. Upon timely receipt of payment, Docket Nos. CENT 2002-127-M, CENT 2002-193-M and CENT 2002-269-M **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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