

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

April 30, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2006-184-M
Petitioner	:	A.C. No. 13-02285-90174
	:	
v.	:	Docket No. CENT 2007-039-M
	:	A.C. No. 13-02285-97606
	:	
	:	Docket No. CENT 2007-067-M
	:	A.C. No. 13-02285-102681
	:	
JEPPESEN GRAVEL,	:	Docket No. CENT 2007-091-M
Respondent	:	A.C. No. 13-02285-104903
	:	
	:	Jeppesen Pits

DECISION

Appearances: Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for the Petitioner;
Jay A. Jeppesen, Owner, Jeppesen Gravel, Sibley, Iowa, for Respondent.

Before: Judge Manning

These cases are before me on three petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Jeppesen Gravel pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). The cases involve 16 citations issued by MSHA under section 104(a) of the Mine Act at the pit operated by Jeppesen Gravel. The parties presented testimony and documentary evidence at the hearing held in Sioux City, Iowa.

I. BACKGROUND

Jay Jeppesen owns a large piece of property in Osceola County, Iowa, along the border with Minnesota. His home is on this property and he runs several businesses from this property. One of these businesses is Jeppesen Gravel, which he operates as the sole proprietor. The only employee of Jeppesen Gravel is his son, Alan. Jeppesen and his son do all of the physical work for Jeppesen Gravel. He has several areas on his property in which he digs. Sometimes he digs material and runs it through his plant to produce gravel for sale. He also produces gravel that is

not processed in any way for use as ballast under concrete. Rock that is of a uniform size is not as important in this work. Jeppesen also digs up material used for fill. He calls these areas his “borrow pits.” He digs out material from the earth and he transports it in the same condition to be used as fill. This material is often used in one of his other businesses.

Jeppesen testified that his gravel pit is quite small and is operated as needed. He also does demolition work, hauls “black dirt,” does grading work, snow plowing, and other similar jobs. Jeppesen also testified that most of the material that is dug from the ground on his property is not run through the plant, but is used as part of his demolition and building site work. (Tr. 144). For example, he uses the material from his borrow pit to fill in the basement of a structure he has removed.

Jeppesen stated that gravel was mined by his father on this property since the early 1960s and he took over this business years later. (Tr. 133). He has been in the gravel business for 30 years. He testified that he had never been inspected by MSHA and had never heard of MSHA prior to the first time that MSHA Inspector William Owen first came to his operation in 2004. (Tr. 125, 133). Jeppesen testified that when the MSHA inspectors told him he had to stop working until they completed their inspection, he did not believe them and he did not know who they were. Over time, he had to educate himself on MSHA requirements and this required “a lot of change in attitude” on his part. (Tr. 126).

MSHA and Jeppesen Gravel have had a rocky relationship since that first inspection in October 2003. A detailed account of this relationship is set forth below because several of the citations were issued for harassing MSHA inspectors and impeding MSHA inspections.

William Owen, the supervisory inspector in MSHA’s Fort Dodge, Iowa, office, testified that MSHA first became aware of Jeppesen’s operation in October 2003 when another gravel operator in the area asked an MSHA inspector if MSHA was aware of Jeppesen’s pit. (Tr. 13). Belinda Parsons, MSHA’s field service person, contacted Jay Jeppesen to set up an appointment to meet with him so that a legal identity form could be filled out, training plans could be established, and “the basics” could be started. (Tr. 14). When Ms. Parsons traveled to the pit at the appointed time, nobody was there and she could not find Mr. Jeppesen. She left some written material for him. The following day, Ms. Parsons called the pit and talked to Mrs. Jeppesen to reschedule their appointment. Mrs. Jeppesen stated that Jeppesen Gravel was not interested in rescheduling the appointment and that “they didn’t have any need to deal with MSHA.” (Tr. 15).

The following spring, Inspector Jim Hines traveled to the Jeppesen pit to talk to Mr. Jeppesen. Mr. Jeppesen was operating a loader when Inspector Hines arrived. Inspector Hines told Mr. Jeppesen that he was there to get the legal identity form filled out, to start getting him “in line with the requirements,” and that MSHA would conduct a compliance assistance visit (“CAV”). (Tr. 16). At this point, Mr. Jeppesen became upset and told Hines that he was not interested and that he did not want to do any of these things. Inspector Hines then left the area.

In May 2004, Inspector Owen visited the Jeppesen pit with Inspector Jeffrey Bagwell. The property is quite large and they did not see anyone there when they first arrived. When the inspectors saw a truck traveling down a road in another area on the property, they got in their vehicle and drove to where the truck had stopped. Mr. Jeppesen got out of the truck and Inspector Owen introduced himself and told Jeppesen why he was there. Mr. Jeppesen questioned Inspector Owen's right to be there. Jeppesen explained that he did not have any employees and that he was exempt. Inspector Owens told Jeppesen that he was not exempt from the requirements of the Mine Act and proceeded to explain that he needed to fill out a legal identity report and that MSHA would perform a CAV. Inspector Owens testified that Mr. Jeppesen became angry and asked the inspectors to leave. When Inspector Owen asked Mr. Jeppesen if he was denying MSHA entry to the mine, Jeppesen replied "yes." (Tr. 21). The inspectors then explained that it would not be in Jeppesen's best interest to deny MSHA entry to the mine because MSHA was not going to go away. Mr. Jeppesen "became more upset" and told the inspectors "to leave him alone and get off the property." *Id.* The inspectors then left the mine.

Inspector Owen wrote up a denial of entry order and then reentered the mine to talk to Mr. Jeppesen again to see if he would reconsider. Owen explained that he had the authority to issue a withdrawal order that would shut down his operation. Mr. Jeppesen became angry again and told the inspectors to get off his property. After talking to the MSHA District Office, he waited for Mr. Jeppesen's truck on the public road at the entrance to the pit. He attempted to serve Jeppesen with the denial of entry order. Mr. Jeppesen stopped his truck, but refused to take the papers the inspector wanted to hand him. These papers included the order, a legal identity report to be filled out, and other material. This paperwork was mailed to the pit the next day, but the material came back as "denied." MSHA tried to mail this material a second time but Jeppesen Gravel again refused to accept it.

The Department of Labor's Office of the Solicitor contacted Jeppesen Gravel to get consent to inspect the mine. When the Solicitor's office was not successful, counsel filed an application for a consent judgment with the United States District Court for the Northern District of Iowa. Counsel was apparently successful in getting Mr. Jeppesen to sign the consent judgment. (Ex. G-3).

On June 28, 2005, Inspector Owen returned to the property with Inspector Tony Runyon to conduct a CAV. Mr. Jeppesen was operating a front-end loader and had just dumped material into the feeder. The diesel generator was powering the plant, which was operating at that time. Mr. Jeppesen was the only person at the plant. When the inspector told Mr. Jeppesen that he was there to conduct an inspection, he became angry. He shut down the loader and the plant. Owen reminded Jeppesen that the parties had entered into a consent judgment that had been filed with the U.S. District Court wherein Jeppesen agreed to allow MSHA to inspect the pit. (Tr. 24; Ex. G-3). Inspector Owens testified that Jeppesen got into his truck and just said, "inspect." (Tr. 25). Inspector Owen terminated the previous denial of access order of withdrawal and told Jeppesen that he needed someone to operate the mobile equipment. Mr. Jeppesen did not say

much during the inspection and, according to Inspector Owen, he was not cooperative. He would not operate the mobile equipment so that the brakes could be checked. Instead, Mr. Jeppesen left the mine site and the inspectors walked around and conducted an inspection as best they could. The inspector issued ten CAV notices of violation.

The following day, when Jeppesen did not show up at the plant area, Inspector Owen called his house. Mrs. Jeppesen answered the phone and told him that he had left for the day. The inspector asked her to tell Mr. Jeppesen to call him so that they could complete the CAV inspection. Mr. Jeppesen never returned his call. The inspectors went to the repair shop/garage (the "shop"), the lights were on and there was a radio playing but they could not find anyone.

On the third day, when Inspector Owen called Mr. Jeppesen, his wife told him that he had left for the day. The inspector told Mrs. Jeppesen that he needed to complete the inspection. Later that day, Mrs. Jeppesen called Inspector Owen to tell him that Mr. Jeppesen would not be available that day. After looking around some more, the inspectors left the property. The CAV notices as well as other materials were sent to Mr. Jeppesen via Federal Express. (Tr. 27-28).

In September 20, 2005, Inspectors Owen and Ellis traveled to the Jeppesen Pit to conduct a regular inspection. When they arrived, it was obvious that the plant had been in operation because there were changes in equipment and the setup of the plant and there were changes in the stockpile products. The inspectors documented what they saw in a series of photographs. (Tr. 29; Ex. G-1). They used the photographs to document hazardous conditions. Owen testified that none of these conditions would require a great deal of money to repair or fix. (Tr. 31). Shortly after the inspectors arrived, two dump trucks pulled in bearing the name "Jeppesen Gravel." When Mr. Jeppesen got out of one of the trucks, Inspector Owen told him that they were there to conduct a regular inspection. Mr. Jeppesen replied, "We're not working today." (Tr. 32). In response, Inspector Owen asked Jeppesen if he would mind walking around the plant with him. Jeppesen declined the offer and both trucks left the property. The two inspectors completed as much of the inspection as they could without anyone present to operate mobile equipment.

The following day, Inspector Owen returned to the mine and called Mr. Jeppesen at home. His wife told the inspector that he had left for the day. The inspector called Jeppesen's cell phone and told him that MSHA needed to complete the inspection by having someone there to operate mobile equipment. The lights were on in the shop, a radio was playing, and the door was open, but nobody was present.

On September 22, 2005, Inspector Owen returned to the mine. He again asked Mrs. Jeppesen to have Mr. Jeppesen call him. When Owen went to the plant, a loader was loading trucks at the stockpiles and Mr. Jeppesen was in a backhoe. Jeppesen got out of the backhoe, walked to his truck, and proceeded to drive away. Before Jeppesen left, the inspector had a brief conversation with him asking whether he would accept the paperwork and also walk around the plant with him. Mr. Jeppesen refused. The inspector left the citations and other paperwork at the plant. Another copy of these documents was mailed to the mine. Included with these documents

was a letter from Gregory Tronson of the Secretary's Office of the Solicitor warning Jeppesen Gravel that if it fails to cooperate with MSHA inspectors, the Department of Labor will file suit to enforce the consent judgment. (Ex. G-3).

On October 19, 2005, Inspectors Owen and Runyon returned to the pit to terminate citations and conduct a follow-up inspection. (Tr. 43). There was nobody at the site when the inspectors arrived but the conditions had changed since their September inspection. It was obvious to the inspectors that the plant had been operated since their previous inspection. The engine on the loader was warm. (Tr. 46). They took photographs of the plant. (Tr. 44; Ex. G-14). They also looked at the hazardous conditions that they had previously cited and wrote up section 104(b) orders for conditions that had not been abated. Next, they drove to the shop and saw Mr. Jeppesen leaving the area in a pickup truck.

Inspector Owen traveled to the pit again on January 12, 2006. Accompanying him was Assistant United States Attorney Martha Fagg. They had made an appointment with Mr. Jeppesen to meet on that day. Ms. Fagg was present to see if she could help resolve the difficulties that had arisen between MSHA and Jeppesen Gravel. Owen testified that she wanted "to let [the Jeppesens] know what some of their options were to get into compliance and move the whole procedure in a positive manner." (Tr. 71). MSHA had not been able to complete its inspection of Jeppesen Gravel because, for example, it had not allowed inspectors to test the braking systems on mobile equipment and to review its records on training, workplace examinations, and electrical grounding. A United States Marshal and a county deputy were also present. They caught up with Mr. Jeppesen at the pit. Ms. Fagg talked to Jeppesen and described some of his options. For example, she explained the process for contesting citations. She also stated that MSHA had estimated that it would cost Jeppesen about \$1,500 to correct the conditions that had been cited by MSHA during the previous inspection. Jeppesen said that he did not have \$1,500. When Mr. Jeppesen questioned whether it would cost him \$1,500 every time MSHA inspected his facility, the meeting became more confrontational. Inspector Owen reviewed MSHA's small mines booklet to show Jeppesen the steps necessary to come into compliance. When Owen asked about looking at Jeppesen's records, Mr. Jeppesen replied that he did not have any records that were ready for review. (Tr. 75). He also refused to walk around the mine so that Inspector Owen could show him the conditions that needed correction. When Mr. Jeppesen made it clear that he was not interested in talking about safety issues any further, the inspection party left the mine.

The next day, Mr. Jeppesen called Ms. Fagg and asked for copies of citations that he had refused to take during the earlier inspections. Inspector Owen responded to this request and included a cover letter in which he summarized some of the steps that Jeppesen needed to take to come into compliance with MSHA regulations and standards. (Tr. 77; Ex. G-68).

On June 6, 2006, Inspector Jeffrey Bagwell inspected the Jeppesen property along with Assistant District Manager Herald Holeman. They were there to conduct a CAV and to follow up on previously issued citations. The district had agreed that MSHA would conduct another

CAV and this visit had been previously scheduled with Mr. Jeppesen. (Tr. 83). Although there was no one around when he first arrived, Mr. Jeppesen, his wife and his adult daughter, Katie Jeppesen, arrived soon thereafter. As he began his CAV inspection, he encountered an unguarded tail pulley. Bagwell explained to Katie Jeppesen how fatal accidents can occur as a result of unguarded tail pulleys. Mr. Jeppesen came up and accused the inspector of trying to scare his daughter. Mr. Holeman intervened and tried to explain that Bagwell was not trying to scare anyone but was trying to educate everyone. Mr. Jeppesen became verbally aggressive with Mr. Holeman, walked up to him and touched him. (Tr. 84). Holeman told Jeppesen that his behavior could be considered as “trying to intimidate and harass a federal mine inspector.” (Tr. 84, 91-92). When Mr. Jeppesen continued to yell at him, Inspector Bagwell was instructed to issue a section 103 citation for intimidating a federal mine inspector, which he did. (Tr. 85; Ex. G-70). Inspectors Bagwell and Holeman were set to leave the mine when Jeppesen calmed down and said that he would allow the inspection to continue. Mr. Jeppesen accompanied the inspectors on the inspection and was cooperative with them.

At one point during this inspection, Bagwell went to his vehicle to get an electrical book. Holeman used this opportunity to write down some notes on the day’s activities. Katie Jeppesen approached him and demanded to know what he was writing down. When he would not reveal his exact words, Mr. Jeppesen ordered Holeman to go to his vehicle. Holeman explained that he was there to help Inspector Bagwell with his CAV inspection. (Tr. 93-94). Inspectors Bagwell and Holeman decided that, since Bagwell seemed to have a better relationship with Mr. Jeppesen, Inspector Bagwell would continue the CAV inspection and Holeman would remain in his vehicle and observe the inspection.

On July 19, 2006, Inspector Jeffrey Hornbeck traveled to the pit with Inspector Owen. He was there to conduct a regular inspection and to terminate any outstanding citations. The inspectors saw Jay Jeppesen’s son, Alan Jeppesen, in the pit area. Because Alan Jeppesen was getting ready to operate a loader, the inspector asked him to check the brakes, the backup alarm, and the horn. (Tr. 99). Alan refused, got off the loader without setting the parking brake, and left the area. Inspector Hornbeck took photographs and conducted his inspection. Later during this inspection, Jay Jeppesen arrived and ordered both inspectors off his property. (Tr. 108). When Inspector Owen explained that they were there to conduct a regular inspection, Jeppesen seemed very upset and did not talk. Because they wanted to avoid any altercations, the inspectors left the property. Inspector Hornbeck issued a section 104(a) citation alleging a violation of section 103(a) of the Mine Act for refusing to allow the inspection to continue. (Tr. 109; Ex. G-79).

On August 24, 2006, Inspector Jeffrey Schaaf accompanied Inspector Owen on a compliance follow-up visit to Jeppesen Gravel. They were accompanied by an Osceola County Deputy. There was nobody at the mine but it appeared that mining activity had recently occurred. The inspector took photographs of the mine site. (Tr. 115-16; Ex. G-82). The inspector issued some section 104(b) orders of withdrawal. When Jay Jeppesen arrived, he was upset that Inspector Owen was present. Inspector Schaaf asked to inspect the mobile equipment,

but Jeppesen refused to operate the equipment. The inspectors explained why they were there and that the loader needed to be operated to check the brakes, horn, and backup alarm. When Jeppesen continued to refuse to operate the loader and told Inspector Owen to leave the property, Inspector Schaaf issued a section 104(b) order for the operator's refusal to comply with the denial of entry citation. (Tr. 121; Ex. G-88).

Mr. Jeppesen did not seriously dispute these events, although he seemed to believe that many of the disputes were instigated by MSHA's aggressive actions. He testified that, as of the date of the hearing, Jeppesen Gravel is "virtually in compliance." *Id.* He had to remove mobile equipment that was not in compliance with MSHA requirements and rent newer equipment. He testified that he has spent about \$8,000 to get into compliance and most of that is on his personal credit card. Jeppesen testified that Mike Jackley from MSHA's small mines office was immensely helpful. Jeppesen testified that he completely "redid" his operation in the spring of 2006 to come into compliance MSHA's regulations.

II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW

In 1979, MSHA entered into an interagency agreement with the Department of Labor's Occupational Safety and Health Administration ("OSHA") to provide some guidance to the regulated community on the jurisdiction of these two agencies ("Interagency Agreement"). (<http://www.msha.gov/regs/1979mshaoshammu.htm>). In section B(7) of the Interagency Agreement, the following definition is provided:

"Borrow Pits" are subject to OSHA jurisdiction except those borrow pits located on mine property or related to mining. (For example, a borrow pit used to build a road or construct a surface facility on mine property is subject to MSHA jurisdiction).

"Borrow pit" means an area of land where the overburden, consisting of unconsolidated rock, glacial debris, other earth material overlying bedrock is extracted from the surface.

Extraction occurs on a one-time only basis or only intermittently as need occurs, for use as fill materials by the extracting party in the form in which it is extracted. No milling is involved, except for the use of a scalping screen to remove large rocks, wood and trash.

The material is used by the extracting party more for its bulk than its intrinsic qualities on land which is relatively near the borrow pit.

MSHA has determined that some of areas on Jeppesen's property are actually borrow pits that are not subject to MSHA jurisdiction. These borrow pits are separate from the pits used to mine sand and gravel. Pits used to mine gravel, whether the material is treated at the plant or not, are subject to MSHA jurisdiction.

At the hearing, Mr. Jeppesen presented several of his federal tax returns to show that he is virtually broke. These returns show that his adjusted gross income was \$11,347 in 2006, was \$30,256 in 2005, and was \$7,995 in 2004. (Tr. 140). His Schedule C for 2006 shows a profit of \$9,100 on his business. (Tr. 141). His Schedule C for 2005 shows a profit of \$29,800. His Schedule C for 2003 shows a net loss of \$28,500. (Tr. 142). He also introduced a letter from his bank showing that he has about \$254,000 in outstanding loans from the bank. (Ex. R-1).

A. Citations Issued.

Jeppesen Gravel was issued 16 citations between September 2005 and July 2006, as follows:

1. On September 20, 2005, Inspector Owen issued Citation No. 6154828 alleging a violation of section 56.14130(a)(3). (Exs. G-4, G-6). The citation alleges that a Caterpillar 966C front-end loader, which was manufactured in 1970, was not provided with a roll-over protective structure (“ROPS”). It also had a seatbelt that was not properly installed and maintained. Inspector Owen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was of a significant and substantial nature (“S&S”) and that the negligence was moderate. The inspector determined that the violation was serious because the loader travels on the feed ramp and on rock stockpiles and is therefore subject to a rollover hazard. (Tr. 39). The safety standard provides that ROPS and seatbelts shall be installed on wheel loaders. The safety standard also requires that seatbelts be maintained in a functional condition and replaced when necessary to assure proper performance. The Secretary proposes a penalty of \$124.00 for this citation.

2. On September 20, 2005, Inspector Owen issued Citation No. 6154829 alleging a violation of section 56.9301. (Exs. G-7, G-9). The citation alleges that adequate berms were not provided on the sides of the ramp on the oversize rock pile, which is used by the front-end loader. The ramp was about 6 feet high, 35 feet long, and 12 feet wide. The berm was 16 inches high on the east side and 4 inches high on the west side. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector observed loader tracks near the edge of the ramp on the pile. (Tr. 41). The safety standard provides that berms or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning. The Secretary proposes a penalty of \$60.00 for this citation.

3. On September 20, 2005, Inspector Owen issued Citation No. 6154830 alleging a violation of section 56.12018. (Exs. G-10, G-12). The citation alleges that the individual circuit breakers on the free standing control panel were not labeled to show which circuit they controlled. In the event of an emergency, persons may not be able to determine which circuit to disconnect. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that, although Mr. Jeppesen

is likely to be aware what each switch controls, others may not. (Tr. 42). The safety standard provides that principal power switches shall be labeled to show which units they control. When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154840 under section 104(b) of the Mine Act. (Ex. G-15). The Secretary proposes a penalty of \$237.00 for this citation.

4. On September 20, 2005, Inspector Owen issued Citation No. 6154831 alleging a violation of section 56.14130(c). (Exs. G-18, G-20). The citation alleges that the Caterpillar 936E front-end loader was not provided with a ROPS approval label. The loader was parked in the plant area but the tire tracks indicated that it had recently been used. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to result in lost workdays or restricted duty. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the ROPS on the cab of the loader appeared to fit but, without the label, he could not be certain. (Tr. 41). The safety standard provides that all ROPS must have a permanent label designating the make and model number of the equipment for which the ROPS is designed. The Secretary proposes a penalty of \$60.00 for this citation.

5. On September 20, 2005, Inspector Owen issued Citation No. 6154832 alleging a violation of section 56.14107(a). (Exs. G-21, G-23). The citation alleges that the self-cleaning tail pulley on the dozer trap feeder conveyor was not guarded. The condition was in an area that is not normally traveled during plant operations, but the pulley was totally exposed. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that, although contact with the tail pulley was not likely, the pulley was so open that someone could be drawn into it upon accidental contact. (Tr. 50). The safety standard provides that moving machine parts shall be guarded to protect people from contacting drive, head, tail, and takeup pulleys and other similar moving parts that can cause injury. When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154841 under section 104(b) of the Mine Act. (Ex. G-24). The Secretary proposes a penalty of \$271.00 for this citation.

6. On September 20, 2005, Inspector Owen issued Citation No. 6154833 alleging a violation of section 56.12008. (Exs. G-26, G-28). The citation alleges that bushings were not provided where the power cord for the feeder conveyor motor exited the disconnect box on the conveyor framework and at the motor junction box. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the outer jacket on the cable did not appear to be damaged but that the vibration of the machinery could damage the cable creating an electric shock hazard. (Tr. 52). The safety standard provides that power wires and cable shall enter metal frames of motors, splice boxes, and electrical components only through proper fittings and bushings. When Inspector Owen returned on October 19, 2005, he discovered that

no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154842 under section 104(b) of the Mine Act. (Ex. G-29). The Secretary proposes a penalty of \$291.00 for this citation.

7. On September 20, 2005, Inspector Owen issued Citation No. 6154834 alleging a violation of section 56.14107(a). (Exs. G-32, G-34). The citation alleges that the tail pulley on the rock discharge conveyor for the screen plant was not guarded. The tail pulley was located at the top of a ladder providing access to the walkway for the screen plant. The tail pulley was about two feet above the walkway but the conveyor framework partially blocked access. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that, although contact with the tail pulley was not likely because it was behind structural steel, if someone were to come into contact with the moving parts he could be severely injured. (Tr. 56). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154843 under section 104(b) of the Mine Act. (Ex. G-35). The Secretary proposes a penalty of \$237.00 for this citation.

8. On September 20, 2005, Inspector Owen issued Citation No. 6154835 alleging a violation of section 56.14107(a). (Exs. G-38, G-40). The citation alleges that the tail pulley on the sand discharge conveyor for the screen plant was not guarded. The tail pulley was about two feet above the ground and was partially guarded by location. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be permanently disabling. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the tail pulley was partially guarded due to the fact that it was located “within the confines of the machinery.” (Tr. 57-58). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154844 under section 104(b) of the Mine Act. (Ex. G-41). The Secretary proposes a penalty of \$237.00 for this citation.

9. On September 20, 2005, Inspector Owen issued Citation No. 6154836 alleging a violation of section 56.14107(a). (Exs. G-43, G-45). The citation alleges that the self-cleaning tail pulley on the portable conveyor feeding sand to the screening plant was not completely guarded. The sides and top were well guarded but the pulley was fully exposed from the rear. The opening was about 40 inches wide and 20 inches high and the pulley was recessed about 4 inches. This same condition existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the exposed tail pulley was about 30 inches above the ground, but that the area is not normally traveled while the plant is operating. (Tr. 60). Because the opening was large, someone could be pulled into the pulley if contact were made. When Inspector Owen

returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154844 under section 104(b) of the Mine Act. (Ex. G-46). The Secretary proposes a penalty of \$291.00 for this citation.

10. On September 20, 2005, Inspector Owen issued Citation No. 6154837 alleging a violation of section 56.12008. (Exs. G-49, G-51). The citation alleges that bushings were not provided where the power cord for the rock discharge conveyor exited the disconnect box and at the junction box on the support leg of the screening plant. There were also 2 inches of inner conductors exposed on the power cord at the junction box on the support leg of the screening plant and there were 14 inches of exposed inner conductors on the power cords at the fused disconnect box. These same conditions existed during the June 2005 CAV inspection. Inspector Owen determined that an injury was unlikely but that any injury could reasonably be expected to be fatal. He determined that the violation was not S&S and that the negligence was moderate. The inspector testified that the copper conductors were not exposed at any location but that there was no mechanical protection where the outer jacket had been stripped away. (Tr. 62-63). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154846 under section 104(b) of the Mine Act. (Ex. G-52). The Secretary proposes a penalty of \$291.00 for this citation.

11. On September 20, 2005, Inspector Owen issued Citation No. 6154838 alleging a violation of section 56.12032. (Exs. G-55, G-57). The citation alleges that there was an opening in the plug-in panel at the rear of the portable generator exposing a person to the hazard of contacting the bus bars inside the panel. The opening was four inches in diameter and the bus bars were two inches behind the opening. The opening was below the generator controls. Inspector Owen determined that an injury was reasonably likely and that any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was moderate. The safety standard provides that inspection and cover plates on electrical equipment shall be kept in place at all times except during testing and repairs. The inspector testified that the controls to start the generator motor were on another side, but the controls to turn on the power were above the cited opening. (Tr. 65-66). The bus bars were just inside the opening. He believed that a serious injury was reasonably likely. When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154847 under section 104(b) of the Mine Act. (Ex. G-58). The Secretary proposes a penalty of \$354.00 for this citation.

12. On September 20, 2005, Inspector Owen issued Citation No. 6154839 alleging a violation of section 56.4101. (Exs. G-61, G-63). The citation alleges that warning signs were not provided on the large fuel tank on the portable generator to prohibit smoking or the use of open flames. Inspector Owen determined that an injury was unlikely and that any injury would not result in lost work days. He determined that the violation was not S&S and that the negligence was low. The safety standard provides that readily visible signs prohibiting smoking and open flames must be posted where a fire or explosion hazard exists. The inspector testified that, because it would be rather obvious to anyone that the tank contained diesel fuel and the tank

was not leaking, an injury was not likely. (Tr. 68). When Inspector Owen returned on October 19, 2005, he discovered that no effort had been made to abate the cited condition. Consequently, he issued Order No. 6154848 under section 104(b) of the Mine Act. (Ex. G-64). The Secretary proposes a penalty of \$94.00 for this citation.

13. On June 6, 2006, Inspector Bagwell issued Citation No. 6181361 alleging a violation of section 103(a) of the Mine Act. (Ex. G-70). The citation alleges that the mine operator harassed and tried to intimidate a federal mine inspector while he was trying to conduct a compliance follow-up inspection. The mine operator “engaged in screaming and provoking comments.” Inspector Bagwell determined that an injury was not likely and the violation would not result in any lost workdays. He determined that the violation was not S&S and that the negligence was high. Section 103(a) of the Mine Act provides that authorized representatives of the Secretary of Labor shall make frequent inspections of mines to determine whether there is compliance with health and safety standards. This section further provides that in fulfilling this responsibility under the Mine Act, the authorized representatives of the Secretary “shall have a right of entry to, upon, or through any . . . mine.” The inspector testified that, after he started the inspection, Jay Jeppesen started yelling at Assistant District Manager Holeman and then got in very close to him. (Tr. 84). He issued this citation based on Mr. Jeppesen’s behavior. Holeman testified that Jeppesen refused to shake his hand when he arrived. Later, Mr. Jeppesen started yelling at him and made physical contact with him. (Tr. 91). After Holeman warned Jeppesen that he could be issued a citation for harassing and intimidating a federal inspector, Jeppesen continued to scream at him. Holeman remained in his vehicle during the remainder of the inspection. The Secretary proposes a penalty of \$275.00 for this citation.

14. On July 19, 2006, Inspector Hornbeck issued Citation No. 6182485 alleging a violation of section 56.14130(h). (Exs. G-74, G-76). The citation alleges that the seat belt for the Caterpillar 966C front-end loader was not in functional condition. The female latch was rusted closed and the seatbelt could not be latched or unlatched. In addition, the straps for the seatbelt were attached to the seat itself and not to the mounting point on the loader. Inspector Hornbeck determined that an injury was reasonably likely and any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was high. The safety standard sets forth the requirements for seatbelt construction. The inspector testified that the seatbelt straps were not tethered to the frame of the loader and the belt buckle would not work. (Tr. 103). Before he arrived to inspect Jeppesen Gravel, he reviewed MSHA’s file on Jeppesen Gravel in his office. He discovered that Citation No. 6154828 issued by Inspector Owen on September 20, 2005, for failing to have an operable seatbelt on this loader was terminated when Jeppesen removed the loader from mine property for use at its borrow pit. (Tr. 104; Ex. G-72). As a consequence, he determined that Jeppesen’s negligence was high because Mr. Jeppesen was told that he could not bring the loader back to the mine until the seatbelt was fixed. (Tr. 104-05). The Secretary proposes a penalty of \$1,800.00 for this citation.

15. On July 19, 2006, Inspector Hornbeck issued Citation No. 6182486 alleging a violation of section 56.14130(a). (Exs. G-76, G-77). The citation alleges that there was no

ROPS on the Caterpillar 966C front-end loader and that the loader had been previously cited for this condition. The loader was being used to load delivery trucks from product stockpiles. Inspector Hornbeck determined that an injury was reasonably likely and any injury could reasonably be expected to be fatal. He determined that the violation was S&S and that the negligence was high. The inspector testified that the violation was very serious. (Tr. 106). As with the previous citation, this condition was cited previously and was terminated when the loader was removed to the borrow pit. As a consequence, he determined that Jeppesen's negligence was high because Mr. Jeppesen was told that he could not bring the loader back to the mine until a ROPS was installed. (Tr. 104-05). The Secretary proposes a penalty of \$1,800.00 for this citation.

16. On July 19, 2006, Inspector Hornbeck issued Citation No. 6182487 alleging a violation of section 103(a) of the Mine Act. (Ex. G-79). The citation alleges that the mine operator refused to allow an authorized representative to inspect his mine. Inspector Owen was with Inspector Hornbeck during the inspection. Mr. Jeppesen approached the MSHA inspectors in a pickup truck "driving erratically sliding to a stop exiting the vehicle shouting, "Bill Owen, you can't be here this is my property and I told you can't be here and get off my property." When Inspector Owen tried to tell Jay Jeppesen that he was denying entry to an authorized representative of the Secretary of Labor, Jeppesen told him to leave and not come back. Inspector Hornbeck determined that an injury was not likely and the violation would not result in any lost workdays. He determined that the violation was not S&S and that Jeppesen demonstrated reckless disregard. The inspector testified that he was concerned that there could be an altercation, given Mr. Jeppesen's angry demeanor. (Tr. 108). Inspectors Owens and Hornbeck left the property after the citation was written. The Secretary proposes a penalty of \$1,000.00 for this citation.

B. Discussion and Analysis

Jeppesen Gravel did not introduce evidence to contradict the evidence presented by the Secretary other than to state that the crushing plant was not operating at the time of several MSHA inspections. (Tr. 123). Instead, it argues that it does not have any money to pay the proposed penalties. Jeppesen states that the MSHA inspectors have been uncooperative. The inspectors conduct CAV inspections, which should not involve any penalties, but when they returned, citations and penalties were issued. In his opening statement, Mr. Jeppesen stated that "from the very beginning, I have explained that getting into compliance is going to be a grave hardship for my family." (Tr. 6). MSHA is "making me choose between having a guard on an implement that only I can get caught in or not having good enough tires for my family to ride in." *Id.* He stated that if he had the money, he would gladly fix everything to MSHA's standards.

I find that Jeppesen Gravel is a very small, seasonal sole proprietorship. The information submitted to MSHA by Jeppesen Gravel indicates that Jeppesen operated the pit and plant about 16 hours in 2006. Although that figure is likely too low, there is no doubt that Jeppesen is an

extremely small operation. Mr. Jeppesen does not have many assets and he has little money to pay penalties.

Apparently, his pit was not known to MSHA until about 2003. Although the property is in Iowa, the main access road to the mine is along the Minnesota state line. Jay Jeppesen was hostile to MSHA from the beginning. I believe that he was being honest when he testified that he did not know who the inspectors were or what they were doing on his property the first few times they were there. Nevertheless, MSHA inspectors gave him plenty of opportunities to learn more about MSHA and its legal authority by September 2005, when the first citations at issue in these cases were issued. Moreover, when Inspector Owen arrived in January 2006 along with an Assistant United States Attorney and a United States Marshal, Mr. Jeppesen should have recognized that he could no longer refuse to cooperate with MSHA inspectors. Despite this warning, he continued to harass MSHA inspectors and impeded their lawful inspections. In addition, Mr. Jeppesen failed to take advantage of the CAV inspections because he did not make any effort to correct the deficiencies. As a consequence, citations were later issued for many of these same conditions. Moreover, he did not correct many of the hazardous conditions cited by MSHA until section 104(b) orders were issued. Finally, although Jeppesen abated Citation No. 6154828, which involved a ROPS and seatbelt violation, by removing his Caterpillar 966C loader to his borrow pit, he later brought the loader back for use in the gravel pit without correcting the deficiencies. Mr. Jeppesen was his own worst enemy during these inspections.

Nothing in the record suggests that the MSHA inspectors were overbearing, hostile, or overly aggressive. Indeed, it appears that they bent over backwards to try to inform Mr. Jeppesen about the requirements of the Mine Act and help him come into compliance. MSHA does not have the legal authority to exempt Jeppesen Gravel from the requirements of the Mine Act, so its inspectors had to take steps to get Jeppesen into compliance with the safety standards. It appears that only Mr. Jeppesen himself was put in danger as a result of the cited conditions, although his son was also apparently affected in some instances.

Mr. Jeppesen must understand that 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 [were] proper.

Allied Products, Inc., 666 F.2d 890, 892-93 (5th Cir. 1982)(footnote omitted). The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in

assessing a civil penalty under section 110(i). 30 U.S.C. § 820(i). Thus, a violation is found and a penalty is assessed even if the chance of an injury is not very great.

The Commission interprets safety standards to take into consideration “ordinary human carelessness.” *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984). In that case, the Commission held that the guarding standard must be interpreted to consider whether there is a “reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness.” *Id.* Human behavior can be erratic and unpredictable. For example, someone might attempt to perform minor maintenance or cleaning near an unguarded tail pulley without first shutting it down. In such an instance, the employee’s clothing could become entangled in the moving parts and a serious injury could result. Guards are designed to prevent just such an accident. The fact that no employee has ever been injured by an unguarded tail pulley at Jeppesen Gravel’s operation is not a defense because there is a history of such injuries at 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). For example, fatal accidents have occurred at small operations as a result of inadequately guarded tail pulleys. *See Darwin Stratton & Son, Inc.*, 22 FMSHRC 1265 (Oct. 2000) (ALJ).

I find that the Secretary established that Jeppesen Gravel violated the safety standards and section 103(a) of the Mine Act as alleged in the 16 citations at issue. I also uphold the S&S determinations of the inspectors. A violation is classified as S&S “if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.” *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming “continued normal mining operations.” *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). Citation Nos. 6154828, 6182485, and 6182486 were S&S and serious violations of the cited safety standards. The other citations were neither S&S nor serious. I am mindful of the fact that, in many instances, the only individual at risk from the hazards cited was Mr. Jeppesen himself.

I am reducing the negligence of Jeppesen Gravel on those citations that were issued on September 20, 2005, where the company timely abated the condition. Thus, the negligence for Citation Nos. 6154828, 6154829, and 6154831 is reduced to “low” to reflect the fact that this

was Jeppesen's first MSHA inspection. The inspectors' negligence findings with respect to the other citations are affirmed.

The Commission has held that, when considering the ability to continue in business criterion in a case involving a sole proprietor, a judge must make findings regarding the effect of a penalty on the individual's ability to meet his financial obligations. *Unique Electric*, 20 FMSHRC 1119, 1122-23 (Oct. 1998). In this case, I find that the evidence establishes that the penalties proposed by the Secretary will significantly affect Jay Jeppesen's ability to meet his financial obligations. (*See, for example*, Tr. 139-43). I have taken this criterion into consideration in assessing the penalties in these cases.

III. APPROPRIATE CIVIL PENALTIES

Section 110(i) of the Mine Act sets forth six criteria to be considered in determining appropriate civil penalties. The record shows that one citation was issued prior to the citations at issue in these cases. As discussed above, Jeppesen Gravel is an extremely small mine operator. Only a few of the citations at issue in these cases were abated in good faith. As discussed above, Jeppesen Gravel demonstrated that the proposed penalties will affect its ability to continue in the sand and gravel business. My gravity and negligence findings are set forth above. Jay Jeppesen must understand that he should not expect to see such large reductions in penalties in future cases. I gave him the benefit of the doubt with respect to the negligence criterion because his experience with MSHA was limited. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

IV. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
CENT 2006-184-M		
6154830	56.12018	\$50.00
6154832	56.14107(a)	50.00
6154833	56.12008	55.00
6154834	56.14107(a)	50.00
6154835	56.14107(a)	50.00
6154836	56.14107(a)	55.00
6154837	56.12008	55.00
6154838	56.12032	60.00
6154839	56.4101	5.00

CENT 2007-039-M

6154828	56.14130(a)(3)	50.00
6154829	56.9301	1.00
6154831	56.14130(c)	1.00

CENT 2007-067-M

6181361	103(a) Mine Act	100.00
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CENT 2007-067-M

6182485	56.14130(h)	200.00
6182486	56.14130(a)	200.00
6182487	103 (a) of Mine Act	500.00

TOTAL PENALTY	\$1,482.00
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For the reasons set forth above, the citations and orders are **AFFIRMED** or **MODIFIED**, as set forth above. Jay Jeppesen, doing business as Jeppesen Gravel, is **ORDERED TO PAY** the Secretary of Labor the sum of \$1,482.00 within 40 days of the date of this decision. Payment should be sent to: U.S. Department of Labor, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

Richard W. Manning
Administrative Law Judge

Distribution:

Gregory Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Certified Mail)

Jay A. Jeppesen, 719 Eighth Street, Sibley, IA 51249 (Certified Mail)

RWM