# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 30, 2000

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| CENTRAL SAND AND GRAVEL COMPANY, | : | CONTEST PROCEEDING |
| Contestant | : | Docket No. CENT 98-230-RM |
| v. | : | Citation No. 7926022; 7/15/98 |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | Pit No. 77 Grand Island |
| | : | Mine ID 25-00686 |
| Respondent | : | |
| | : | |
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), | : | CIVIL PENALTY PROCEEDING |
| | : | Docket No. CENT 99-242-M |
| Petitioner | : | A. C. No. 25-00686-05515 |
| v. | : | |
| CENTRAL SAND AND GRAVEL, COMPANY, | : | Mine: Pit No. 77 Grand Island |
| Respondent | : | |

## DECISION

**Appearances:**

**Mark E. Novotny, Esq., Lamson, Dugan & Murray, LLP, Omaha, Nebraska, for Contestant;**
**Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.**

**Before:** **Judge Barbour**

These are contest and civil penalty proceedings that arise under Section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. §815) (Mine Act or Act). They involve one citation issued to Central Sand and Gravel Company (Central Sand) at the company's Pit No. 77, a sand and gravel extraction and processing facility in Hall County, Nebraska. The citation was issued after a fatal accident that occurred at the mine on July 1, 1998.

The accident took the life of a 11-year-old boy. Personnel from the Hall County Sheriff's Department, the City of Grand Island Utility Department, and the Secretary of Labor's Mine Safety and Health Administration (MSHA) conducted investigations. As a result of its investigation, MSHA issued to the company the subject citation. It charges the company with a violation of 30 C.F.R. § 56.12045, a mandatory safety standard for surface metal and non metal mines requiring installation of overhead powerlines as specified by the National Electric Code (NEC). It also charges that the violation was a significant and substantial contribution to a mine safety hazard (S&S) and was the result of Central Sand's unwarrantable failure to comply with Section 56.12045.[1] In contesting the validity of the citation the company argues that the cited conditions do not constitute a violation, or if they do, the violation is neither S&S nor unwarrantable. Finally, in her civil penalty petition the Secretary proposes the assessment of a penalty of $25,000 for the violation. She asserts, among other things, the company's high negligence justifies the amount.

These cases were consolidated for hearing and decision. After extensive discovery, they were heard in Grand Island, Nebraska. Counsels have submitted helpful briefs.

## THE ISSUES

The primary issues are whether the company violated either Section 56.12045 or Section 56.12030, and if so whether the violation is S&S and unwarrantable. If a violation is found, the amount of the civil penalty also is at issue.

## THE STIPULATIONS

The parties stipulated as follows:

> l. [Central Sand] is engaged in the mining and selling of sand and gravel . . . [a]nd its mining operations affect interstate commerce.
>
> 2. [Central Sand] is the owner and operator of Pit No. 77[,] Grand Island Mine.
>
> 3. [Central Sand] is subject to the jurisdiction of the . . . Mine Act.
>
> 4. [T]he Administrative Law Judge has jurisdiction in this matter.

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[1] Subsequently, the Secretary amended her petition to charge in the alternative a violation of 30 C.F.R.§ 56.12030, a mandatory standard requiring that "[w]hen a potentially dangerous condition is found it shall be corrected before . . . wiring is energized."

5. [Citation No. 7926022] was properly served by a duly authorized representative of the Secretary upon an agent of [Central Sand] on the date and placed stated there[on].

6. The exhibits offered by the parties are stipulated to be authentic but [the parties] make no stipulation as to the relevance or the truth of the matter[s] asserted therein.

7. [T]he proposed penalty [of $25,000] will not affect the ability of [Central Sand] . . . to continue in business.

8. [Central Sand] is a mine operator with 12,638 hours of work at Pit No. 77 . . . in 1998 . . . [a]nd with 259,746 total hours of work . . . in 1998.

9. [A] copy of the MSHA Assessed Violation History Report accurately reflects the history [of previous violations] of this mine for . . . two years prior to the date of . . . [C]itation No. 7926022 (Tr. 9-10).

Based on the stipulations counsel for the Secretary characterized Central Sand as a large operator with a moderate to small history of previous violations (28).

## THE FACTS

### The Mine

No. 77 Pit is a sand and gravel mine that encompasses between forty and fifty acres (Tr. 315). A lake abuts the southern edge of the land portion of the mine. The company owns almost half of the lake. The company's dredge is on the lake. The dredge suctions sand and gravel from the lake bottom. A pipeline carries the sand and gravel across the lake to a screening plant. The plant is north of the lake shoreline. The material is processed at the plant, and a conveyor belt carries it to a radial stacker. The stacker deposits the sand and gravel in one of six stockpiles that are maintained north of the stacker. The maximum height of a stockpile made by the stacker is approximately 45 feet (Tr. 161-162, 292). A front end loader is used to transfer the processed material from the piles to customers' trucks (Tr. 331-332).

Official access to the mine is gained through an entrance gate on the western side of the property. A gravel access road runs along the northern side of the property. The road leads from the gate, to the mine office, the maintenance building, and the stockpiles. The road traverses the property in a generally west to east direction. High voltage powerlines run somewhat parallel to the road. They cross the road in at least two places before they make a turn to the south, cross the road again, and proceed to an electrical shed and transformer. Before arriving at the shed and

transformer, the lines pass over the western side of one of the stockpiles. The accident occurred at this stockpile. Although it is located where previous stockpiles existed, the particular stockkpile was there for less than two weeks before the accident (Tr. 122).

The powerlines are carried on utility poles. At the point where they cross the stockpile they consist of two parallel high voltage lines and one static line. The static line runs above the high voltage lines (See Gov. Exh. 1; Tr. 69).

The northern side of the access road to the stockpiles is bermed with three to four feet sand berms (Tr. 226, Exh. C 15 at CSG 210, GSC 216). Immediately north of the berms is a zone of dense brush and other vegetation. Here the land falls to the southern bank of a river. Across the river is another zone of dense brush and vegetation, as well as a barbed wire fence. The fence marks the northen extremity of mine property. A trailer court of privately owned mobile homes is located adjacent to the property (Tr. 123-124, See generally Gov. Exh. G 1, Exh. C 3).

Entry to the mine is restricted. A vehicle coming into the mine must proceed through the gate, which is secured at the end of the business day, and must pass the mine office. The mine is posted with "no trespassing" signs, including signs located along the northern side of the road, between the river and the stockpiles (Tr. 221-222, 227, 229; Exh. C 11 at CSG 201, CSG 206, GSG 221, CSG 222, CSG 235, CSG 237, Exh. C 3). Although additional signs were added after the accident, several were in place before it occurred (Tr. 294).

Despite the gate, fence, and signs, unauthorized entry is possible. At points between the trailer court and the mine, the fence is down or otherwise in need of repair (Tr. 176-178). In addition, because the lake cannot be fenced, both the dredge and mine property that borders the lake can be visited by boaters (Tr. 214).

## The Accident

On the evening of July 1, 2000, Deputy Frank Bergmark, an investigator of the Hall County Sheriff's Office was called at home and told there had been an accident at Pit No. 77. Bergmark immediately went to the pit, where he was met by an officer of the Grand Island Police Department.

Bergmark and the officer went to the accident site. Although the rescue squad already had removed the victim, Bergmark learned that the boy involved in the accident was a resident of the trailer court. After the close of work, the victim and a friend left home and crossed the fence onto mine property (Tr. 124). The boys traveled across the river and walked through the brush to the access road. They then began to "meander" about the pit. As the boys wandered they left footprints. By observing the footprints, Bergmark was able to determine that the victim and his friend ultimately arrived at the subject stockpile and ascended it. Looking at the stockpile Bergrmak saw that the high voltage powerlines were "very close" to the pile (Tr. 41). Bergmark

was told that as the victim started to descend the western side of the pile, he contacted one of the powerlines (Tr. 42-43).

Bergmark's scenario of the boys' travels and of the events of July 1, generally agreed with that of Lloyd R. Caldwell, an MSHA inspector who was assigned to investigate the accident for the agency and who arrived at the mine on the morning of July 2.[2] However, Caldwell was able to provide some additional details concerning what happened.

Caldwell testified that reaching the river was not that difficult for the boys because the fence was pushed down in several places and paths ran through the dense vegetation between the fence and the river. He observed that after they crossed the river and walked up its south bank through the brush to the access road, the boys passed, but clearly did not heed, a "no trespassing" sign (Tr. 124, 220-221). He learned that the boys were playing a game of "007", which involved chasing one another, perhaps with water guns (Tr. 125).

John Brezina, Central Sand's mine manager, traveled with Caldwell during most of Caldwell's on-site investigation (Tr. 303-304, 306-307). Brezina testified that the footprints indicated the boys first attempted to climb a stockpile other than the one where the accident occurred, but gave up because they could not keep their footing (Tr. 307).

All agreed that when the boys came to the subject stockpile they were able to ascended to its top (Tr. 125-126). Once at the top, the victim started down its western side. The sand and gravel acted "like a pile of roller bearings"(Tr. 123) and the victim began to slid. Bergmark surmised that the victim, who was approximately 5 feet tall, must have seen the powerlines, which were about 10 feet below the summit of the stockpile (Tr. 57, 62). Realizing he was fast approaching the lines, the victim leaned backward, trying to go feet-first under them. Part of his body cleared, but one of his hands moved upward and touched the powerline closest to the stockpile (Tr. 30, 45, 123; See Gov. Exhs. 3F, 3G). The victim was electrocuted. Subsequently, his body slid down the pile, until he come to rest about 15 feet above ground level.

In the meantime, the victim's friend ran back to the trailer court and told the victim's mother to come quickly, that her son was hurt. She raced to the scene where she found the boy. A short time later rescue personnel arrived and attempted to revive him. The victim was rushed to the hospital where he was pronounced dead (Tr. 58).

**The Powerlines and The Stockpile**

Bergmark determined that during the time between the accident and his arrival no rescue personnel nor other persons had been to the top of the stockpile. Nor had anyone been on the pile at the point where the victim touched the powerline (Tr. 58). Therefore, when Bergmark

[2] Following the investigation, Caldwell retired. Therefore, when he testified Caldwell no longer worked for the agency.

measured the distance from the powerlines to the stockpile, he believed his results reflected conditions as they existed at the time of the accident. It was difficult for Bergmark to make the measurements because when he moved or walked near the points he was trying to measure, the sand and gravel shifted and slid down the pile (Tr. 44, 53-54, 57). Nevertheless, Bergmark found that the vertical distance (or clearance) from the nearest line to the surface was 29 inches and that the horizontal distance was 60 inches (Tr. 44, 56).[3]

The powerlines where installed in 1978, by the City of Grand Island Utility Department. They had not been altered or changed since (Tr. 31, 92, 93-94, 213, See also Tr. 294). The powerlines carried three-phase, 13,899 volts of electricity, which was described by Rober Smith, the assistant director of the department, as "standard primary voltage" (Tr. 67).

On the morning of July 2, Smith went to the mine with other utility department employees and with the Grand Island city attorney. The group wanted to determine the role played by the powerlines in the accident (Tr. 65). A bucket truck was brought to the scene. A utility department employee went up in the bucket and measured the height of the lines from the ground (Tr. 66). He determined that the powerlines were 25 feet, 5 inches from the ground and that the static wire above the lines was 29 feet, 10 inches from the ground. The employee also measured the height of the stockpile, which he found to be 35 feet, 7 inches high (Tr. 69, Gov. Exh. 4)).

**Inspector Caldwell, The Investigation, and The Citation**

In addition to being an inspector and accident investigator, Caldwell is a certified electrician. When he worked for MSHA, Caldwell's duties included the training of inspectors with regard to the meaning and application of MSHA's electrical regulations (Tr. 103-105).

Caldwell's July 2, investigation of the accident was interrupted by the July 4, weekend. Caldwell and another MSHA employee returned on July 7 and July 8 (Tr. 106-108). At the conclusion of the investigation the men submitted a written report to MSHA (Tr. 110; Gov. Exh. 8).

During the investigation Caldwell relied on Bergmark's measurements (See Tr. 116, 117-119, 170-171; See also n. 3 supra). In Caldwell's view, the clearances Bergmark measured did not meet those required by the NEC (Tr. 129-130, 137). Therefore, he issued Citation 7926022 to Central Sand, charging the company with a violation of Section 56.12045. In addition, although the regulation states compliance with the code is required when the powerlines are "installed", Caldwell testified he "looked at the installation not as the physical work to install . . . [the powerlines], but as the installation as a unit that was there at the time that [he] viewed the operation" (Tr. 127).

[3] Caldwell also noted the instability of the pile. In fact, he found that it was so unstable he did not climb it to measure the vertical and horizontal clearances (Tr. 116).

Caldwell found that the violation was “S&S” because “the accident occurred and the accident was fatal" (Tr. 139). He further found that the company’s negligence was “high” because “the company knew or had good reason to know that the violation existed and . . . would cause injury" (Tr. 142). As for the company’s unwarrantable failure to comply with Section 56.12045, he stated “unwarrantable failure means there ain’t no damn excuse for it happening . And that it just exactly the way I felt about it” (Tr. 141).

## THE VIOLATION

In charging a violation of Section 56.12045, Citation No. 7926022 states:

> On July 1, 1998 at approximately 8:45 p.m., an eleven-year-old boy was electrocuted when he contacted a bare power line. The victim was sliding down the road gravel stockpile when he made contact with one phase conductor of the 3-phase 13.8 KV power line which ran to the plant substation. The power line was originally installed in compliance with the national code by the local utility. Production personnel at the mine had allowed the road gravel stockpile to build under the radial stacker so that the pile was more than 10 feet higher than the power line and the west side of the pile was less than 2 feet from the line. Failure to maintain adequate clearance between this high power line and the stockpile constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard (Gov. Exh. G-9).

Section 56.12045, is worded in a straightforward manner. The powerlines must be “overhead”, they must be “high-potential”, and they must “be installed” according to the requirements of the NEC.

Here, the powerlines clearly were "overhead". Smith testified without dispute that the lines were 25 feet, 5 inches above the ground, which is "overhead" by any definition of the word (Tr. 69). Also, the lines were "high potential". Section 56.2 (30 C.F.R. §56.2) defines "high potential” powerlines as lines that carry more than 650 volts. Smith testified, again without dispute, that the lines in question carried electricity far in excess of 650 volts (Tr. 67).

Were the powerlines installed as required by the NEC? Both former inspector Caldwell and city utility department assistant director Smith agreed that the NEC incorporates by reference the National Electric Safety Code (NESC). They also agreed it is the NESC that mandates how high-potential powerlines must be installed, including requirements for the various clearances that must be maintained (Tr. 59, 63-64, 79, 131; Gov. Exh. 6 at 70-31, 70-57 FPN). I accept their undisputed testimony.

Turning to the NESC (Gov. Exh. 7), I find that although it does not specifically reference stockpiles as points of departure for determining required clearances, a reasonable operator parsing the code would conclude stockpiles come within its broader categories.

A purpose of the NESC is to institute "safety rules for the . . . maintenance of overhead electric supply . . . lines" (Gov. Exh. 7 at 59). Clearance requirements for such lines are among the code's specified safety rules. The requirements are found in Section 23 (Gov. Exh. 7 at 69), which is divided into various subsections containing tables specifying the clearance for conductors carrying various voltages when the conductors are located above and around various facilities and surfaces.

An operator attempting to comply with the code first would note that Section 23, "covers all clearances . . . involving overhead supply . . . lines" and would recognize the lines in question are overhead supply lines (Gov. Exh. 7 at 69). Next, the operator would note that Section 23, applies to "[p]ermanent and [t]emporary installations" (Id.) and would know that the stockpile is "temporary" in that it is built up in order to be depleted. Further, the stockpile is an "installation", in that it is "installed". To install is to set up for use (*Webster's Third New International Dictionary* (1986) at 1171)), and stockpiles, including the stockpile in question, are set up as repositories for material that later is sold, loaded, and usually is used elsewhere.

Having determined that Section 23, applies to the powerlines and to the stockpile, an operator attempting to comply with the NESC would review the subsections of Section 23, to determine which is applicable. In so doing, an operator would find that Subsection 231, the first subsection, applies to "[s]upporting structures, support arms and equipment attached thereto, and braces" (Gov. Exh. 7 at 71). The operator would know that the stockpile is not a "supporting structure" for the overhead conductor nor is it a "support arm" or a "brace" for the powerlines in question (Id.).

The operator would proceed to Subsection 232, which is titled, *Vertical Clearance of Wires, Conductors, Cables, and Equipment Above Ground, Roadway, Rail, or Water Surfaces*. The operator rightly would know that the stockpile in question is not a "roadway" (no vehicles travel over it). It is not a "[r]ail or [w]ater surface". Nor is it "ground" as the word usually is used, for although it is made up of earth, it is not a surface upon which persons normally stand nor upon which they move, dwell, nor upon which objects naturally rest (See *Webster's* at 1002). Rather, a stockpile is a purposefully constructed feature of the mine, a "heap of material formed to create a reserve for loading or other purposes" (American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* (1996) at 540)). Therefore, the operator would find that Subsection 232, is inapplicable.

The operator's finding would be confirmed when the operator examined the tables that set forth the precise requirements of Subsection 232. They specify areas for which clearances are required. In so doing they refer to areas that are subject to regular or restricted traffic by pedestrians, sailors, swimmers, or vehicles. Front-end loaders load material into trucks from the

base of the stockpile, and the witnesses agreed that neither loaders, other vehicles, miners, nor anyone else travel or work on the stockpile so that it is not subject to traffic of any kind.

The next subsection, Subsection 233, is titled, *Clearance Between Wires, Conductors, and Cables Carried on Different Supporting Structures* (Gov. Exh. 7 at 84). The operator would know that the question is not the proper clearance between the conductors but rather the proper clearance from the surface of the stockpile to the conductors. In addition, the operator would know that the conductors under consideration are carried on common (not on different) supporting structures.

It is at Subsection 234, that the operator would find the clearance requirements for the stockpile. The subsection is titled, *Clearance of Wires, Conductors, Cables and Equipment from Buildings, Bridges, Rail Cars, Swimming Pools, and Other Installations*. As I have noted, a stockpile is an installation. This being the case, the operator would use Table 234-1, to find the clearances prescribed (Gov. Exh. 7 at 101). The table is itself divided into two categories, the first is "[b]uildings" but the stockpile is not a building. The second is "[s]igns, chimneys, billboards, radio and television antennas, tanks, and other installations not classified as buildings or bridges" (Id.). Realizing that the stockpile can only be one of the "other installations" and therefore that the second category of Table 234 -1 applies, the operator would determine that for "supply conductors over 750 v[olts]" a vertical clearance of 8 feet and a horizontal clearance of 7 ½ feet is required. Then, noting that the horizontal clearance requirement bears a footnote that allows the requirement to be reduced by two feet when no maintenance is required on the installation (Gov. Exh. 7 n. 1 at 102), the operator further would determine that the actual horizontal clearance required is 5 ½ feet because no maintenance is required on the stockpile (Gov. Exh. 7 at 101 (Table 234-1 n. 1 at 102)).[4]

Does the evidence establish that on the July 1, 1998, Central Sand failed to maintain a vertical clearance of 8 feet and a horizontal clearance of 5 ½ feet? No one who witnessed the accident testified. Therefore, clearances at the time of the accident must be inferred from testimony regarding conditions both before and immediately after the event.

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[4] It should be obvious at this point that despite the straightforward wording of the standard, by incorporating the NEC and the NESC into the standard, the Secretary has adopted an approach to regulation that is not "user friendly" — to say the least. It takes diligence to sift through the many sections, subsections, and tables of the codes and find applicable requirements. Indeed, the difficulties inherent in the approach are evidenced in this case in that even those most familiar with the codes, Smith and Caldwell, seemed unsure at times as to which particular provision applied (See Tr. 74-75, 89-90, 132-133, 156-157, 159, 168-169, 188). This said, despite their complexity the codes are not impossible to understand and to apply. Although there may be a more direct and less difficult way to regulate required clearances, the Secretary's approach is not impermissible. Therefore, it is the duty of each operator to have a thorough, working knowledge of the codes' contents and applications.

Central Sand did not offer any reliable evidence regarding the clearances as they existed prior to the accident. The company's inspection reports do not reference the clearances (Tr. 268-269) and although the mine manager, Brezina claimed that the "rule of thumb" at the mine is to maintain clearances of at least 10 feet (Tr. 270-271, 339), the way he determined the distances — by eyeballing them, frequently from inside a moving vehicle (Tr. 339) — is not conducive to accurate measurement. As he stated, it is "just kind of guess judging" (Tr. 340).

On the other hand, sound inferences that the required clearances were not maintained can be drawn from the accident and the post-accident observations of the investigators. The most important fact is that the victim touched the wire. Obviously, a five-foot tall, eleven-year-old boy would not have done so had there been a vertical clearance of 8 feet. Second, when a vertical clearance of 29 inches and a horizontal clearance of 60 inches were measured by Bergmark on July 2, no one had been on the pile and disturbed the accident site between the time the accident occurred and the time Bergmark measured (Tr. 58). Further, Bergmark emphasized that in reaching the site to make the measurements he disturbed conditions as little as possible (Tr. 41).

Moreover, there is no dispute that on July 2, the stockpile was 35 feet, 7 inches high (Tr. 69). The company hypothesizes that on the previous day the stockpile had been 45 feet high (the maximum height of a stockpile built by the radial stacker) (Tr. 292-293)); that the high voltage lines had adequate clearance on July 1; but that the victim pushed sand and gravel ahead of him as he slid down the slope toward the powerlines (Tr. 161-162, 299). Sand and gravel lost at the top reduced the height of the stockpile, built up under the powerlines, and altered the clearance to less than required.

Caldwell rejected this theory. In his view the top of the stockpile had not been disturbed after the stacker last added to the pile. Caldwell based his opinion on his observation of the stockpile, and he testified that photographs the government entered into evidence confirm what he had seen. He stated, "Very quickly you can look at the photographs and you can see that the top of the pile has not been disturbed" (Tr. 162).

I find Caldwell's testimony compelling, for as he pointed out, the photographs clearly depict undisturbed water streaks from the wet sand and gravel the stacker last put on the stockpile. Since the stockpile was not added to after the accident or before the photographs were taken, I agree with Caldwell that the top of the pile was not significantly reduced prior to the accident (Tr. 162-163; Gov. Exh. 3b, Gov. Exh. 3e). Further, although Caldwell agreed that there could have been movement of material on the side of the pile (Tr. 162), he did not believe movement occurred in the immediate accident area, and he testified that the photographs of the area did not reveal any signs of significant movement (Tr. 165). Again, I agree.

Given the testimony and the exhibits, I conclude that while some movement of sand and gravel may have been caused by the boys, the material was not moved to such an extent that otherwise permissible clearances went out of compliance. Rather, I find that the evidence and testimony permit the inference that the clearances were out of compliance with the NESC prior to

and at the time of the accident.

The final question is whether the powerlines were "installed" according to the code. Caldwell stated that the phrase “shall be installed” meant that the powelines not only had to be fixed in position for use according to the code, they also had to be maintained in compliance (Tr. 126). Caldwell’s construction is logical. To read the phrase as applicable only to the original positioning of the lines would negate much of regulation’s protective intent. Powerlines, once installed, tend to be permanent, whereas conditions around and under them frequently are subject to change. For these reasons I conclude that because the subject powerlines were not maintained in compliance with the NESC, they were not “installed as specified”. Therefore, Central Sand violated Section 56.12045 as cited.[5]

## S&S and GRAVITY

A violation is significant and substantial, if based on the particular 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 (Arch of Kentucky, 20 FMSHRC 1321, 1329 (December, 1998); Cyprus Emerald Resources, Inc., 20 FMSHRC 790, 816 (August 1998); National Gypsum Co., 3 FMSHRC 822, 825 (April 1981)). In Mathies Coal Co., 6 FMSHRC 1 (January 1984), the Commission held that in order to establish a S&S violation of a mandatory standard the Secretary must prove: (1) the existence of an underlying violation; (2) a discrete safety hazard — that is, a measure of danger to safety contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood the injury in question will be of a reasonable serious nature.

The Secretary met her burden. The violation existed as charged. The hazard contributed to by the failure of the company to maintain the required clearances is the danger that a person will touch the powerline and be shocked, burned or electrocuted. When, as here, clearances for an unguarded high voltage powerline are reduced to the point where a boy of eleven can not proceed upright past and under them without contacting the lines, there is a reasonable likelihood that the lines will be touched and serious injury or death will result.

The Commission recently has reemphasized that the focus of the gravity criterion is on "the effect of the hazard if it occurs" (Hubb Corp., 22 FMSHRC 606, 609 (May 2000) (quoting Consolidation Coal Co., 18 FMSHRC 1541, 1550 (September 1996)). In this case, the hazard occurred, and its effect was lethal. This is a very serious violation.

## UNWARRANTABLE FAILURE and NEGLIGENCE

[5] In view of this conclusion I need not reach the issue of whether the company violated Section 56.12030.

The Commission has defined unwarrantable failure as aggravated conduct constituting more than ordinary negligence (Emery Mining Corp., 9 FMSHRC 1997, 2001 (December 1987)). The Commission also has stated that unwarrantable failure is conduct that is characterized by reckless disregard, intentional misconduct, indifference or a serious lack of reasonable care (Emery, 9 FMSHRC at 2003-04; Rochester & Pittsburgh Coal Co., 13 FMSHRC 189, 194 (February 1991)).

Several factors must be considered in analyzing whether a violation results from unwarrantable failure, among these are: "the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the . . . condition, and whether [the] operator has been placed on notice that greater efforts are necessary for compliance" (Mullins and Sons Coal Co., 16 FMSHRC 192, 195 (February 1994)). The culpability determination required for a finding of unwarrantable failure is similar to gross negligence or recklessness. It is more than a "knew or should have known" test (Virginia Crews Coal Co., 15 FMSHRC 2103, 2107 October 1993)).

In view of these and other factors, I conclude that Central Sand did not unwarrantably fail to comply with Section 56.12045. First, the violation was not easy to detect. To determine whether the company was in compliance, the mine examiner had to judge the horizontal and vertical distance between the lines and the slope of the stockpile from ground level, either while driving past the pile or while out of the vehicle and on the ground. In the case of the subject stockpile this meant making a judgement call from 29-feet or more below and at an angle to the lines (Tr. 44. 330, 340). This method of determining compliance, while difficult, was reasonable given the size of the mine and the location of the powerlines. There is nothing in the record to suggest that MSHA advised the company to measure the distance from another location (for example from the top or side of the stockpile) or always to estimate the distance while standing at the base of the stockpile.

Second, it is the nature of stockpiles that they are not necessarily built at one time. Material may be deposited on them over a series of shifts or even days. Although the subject stockpile had been in existence for up to nine days prior to the accident (Tr. 315, See also Tr. 122), the Secretary did not bring forward evidence to establish when the size of the pile reached the point where the vertical and horizontal clearances went out of compliance. Thus, it may well be that the violation existed for a very shot time prior to the accident (Tr. 314-315).

It is clear from Caldwell's testimony that MSHA was concerned about clearances for high voltage powerlines where the lines crossed mine roads or ran above areas where trucks were loaded or unloaded (Tr. 134-135, 161). It is also clear the agency's concern extended to clearances above stockpiles. Stanley Benke, the company safety director, admitted that at joint MSHA/industry workshops it was Caldwell who warned company representatives about the hazards of powerlines and high voltage wires above stockpiles.

Benke testified that Caldwell "said . . . its a recommended practice -- safe practice to try and keep stockpiles and materials away from powerlines [and that] [i]f you're not within the

mandated requirements as far as clearances that it could result in a citation" (Tr. 252). However, Caldwell's warning was general in nature and was directed to all operators at the meetings. Central Sand was not singled out and told that it needed to exert greater efforts to ensure compliance with regard to clearances above stockpiles at its mines. In fact, other stockpiles had existed at the location of the cited stockpile, and the Secretary offered no evidence that the company was cited previously for a violation of the clearance requirements with respect to its stockpiles. The subject incident may represent the one and only time prior to July 1, that powerlines ran too close to a stockpile at the mine.

Based on the testimony and the lack of any evidence regarding previous violations of Section 56.12045, I conclude that although Central Sand was aware it was required to comply with the clearance requirements in situations where high voltage lines ran above its stockpiles, it was not on notice that greater efforts were needed to ensure compliance.

Finally, Central Sand had no reason to think a person would come near the lines. Miners never worked nor traveled on the stockpile. The only person the company might have anticipated would be endangered is a trespasser, and Central Sand posted and fenced its property to prevent unauthorized entry. While it is true that it might have posted a greater number of "no trespassing" signs and might have better maintained its fence (Tr. 176), the company's lack of care was not such as to be gross or reckless.

The testimony revealed the company experienced one prior instance of trespassing, one that involved vandalism to the dredge on the lake, but the company's safety director, who is likely to know, could think of no prior incident that involved the stockpile or that occurred anywhere near it (Tr. 215). Moreover, while the victim's mother testified the victim played on mine property prior to the accident and she had warned him not to go there again, there is no evidence she alerted the company to the fact (Tr. 38, See also Tr. 309).

Given all of these factors and the lengths to which the boys had to go to place themselves in harm's way — pass the fence, travel through dense brush, cross the river, walk past at least one "no trespassing" sign, and climb to the top of the stockpile — I cannot find that Central Sand's lack of care was aggravated or more than ordinary. Rather, the company failed to exhibit the ordinary care that was required by the circumstances, and in this way it was negligent.

## CIVIL PENALTY CRITERIA

I have found that the violation was very serious and was the result of the company's failure to exercise the care required. In assessing a civil penalty, the Act mandates that I also consider Central Sand's history of previous violations, the size of its business, the effect of the penalty on the company's ability to continue in business, and its good faith in attempting to comply rapidly after being charged (30 U.S.C. §820(i)).

As noted above, Counsel for the Secretary characterized Central Sand's history of previous violations as moderate to small and the company's size as large (Tr. 28). The parties

agreed that a penalty of up to $25,000 would not affect the company's ability to continue in business (Stipulation 7). The company abated the violation in a timely fashion and with good faith by trimming the stockpile to obtain the clearances required (Gov. Exh. 9).

Considering all of these factors, and taking note especially that the company's negligence was not aggravated, I conclude that a civil penalty of $6,000 is warranted. It is important to understand that while the assessment faithfully reflects the statutory civil penalty criteria, serves as an incentive for future compliance, and conforms in all respects to the law under which it is imposed, it is not a valuation of the life that was lost or of the great pain that was and will continue to be inflicted by this accident. Such things are beyond the Act.

## ORDER

Within 30 days of the date of this Decision, Central Sand is **ORDERED** to pay a civil penalty of $6,000. Upon payment of the penalty, these proceedings are **DISMISSED**.

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified)

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[6] Because trial counsel Mark W. Nelson since has left the Office of the Solicitor, the decision is being distributed to the Associate Regional Solicitor.