FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 10, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2007-62-M
Petitioner	:	A. C. No. 02-02777-99898
	:	
v.	:	Docket No. WEST 2007-147-M
	:	A. C. No. 02-02777-102413
	:	
	:	Docket No. WEST 2007-184-M
	:	A. C. No. 02-02777-104635
AMMON ENTERPRISES,	:	
Respondent	:	Ammon-Courtland

DECISION

Appearances: Cheryl L. Adams, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf of the Secretary of Labor;
Peter J. Ammon, Dragoon, Arizona, on behalf Ammon Enterprises.

Before: Judge Zielinski

These cases are before me on Petitions for Assessment of Civil Penalties filed by the Secretary of Labor, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The petitions allege that Ammon Enterprises is liable for seventeen violations of the Secretary's Mandatory Safety and Health Standards for Surface Metal and Nonmetal Mines, and propose the imposition of civil penalties totaling $4,130.00. A hearing was held in Tucson, Arizona, and the parties filed briefs after receipt of the transcript. For the reasons set forth below, I find that Ammon committed fifteen violations, and impose civil penalties in the total amount of $1,365.00.

Findings of Fact - Conclusions of Law

Ammon Enterprises is a sole proprietorship, owned by Peter Ammon, that engages in several business activities, including excavation, grading, road construction and maintenance, residential housing pad construction, and septic system installation. Ammon is also licensed to store materials and heavy equipment, rent equipment, conduct Arizona concealed weapons certifications, operate a private air strip, and resell home, automobile and ranch supplies. It owns and leases a considerable amount of mobile equipment, including five loaders and loader/backhoes, six trailers, two graders, two semi trucks, a scraper, a water trailer, and a ten-

wheeled dump truck. It also utilizes welding, trenching, steam cleaning, pipe fitting, and electric pedestal installation equipment.

Ammon's operations are conducted from two sites. Pits, from which gravel is extracted, a screening plant, a shop building, fuel tanks and a water well and pump are located on a 120-acre site six miles north of Elfrida, Arizona. Ammon's equipment is serviced, prepared for rental, refueled, maintained and repaired at the Elfrida facility. Its offices are located on a 139-acre tract in Dragoon, Arizona, which also supports the resale and equipment and material storage operations.

On August 8, 2006, Lawrence Nelson, an MSHA inspector, conducted an inspection of Ammon's Elfrida facility. He inspected the screening plant, shop, refueling area, a Case 621 loader and a CAT 613C scraper.[1] He found several conditions that, in his judgment, were violations of mandatory safety standards, and issued citations to the operator. On August 9, Nelson traveled to Ammon's offices and inspected training and other records. He initiated enforcement action with respect to deficiencies he found in the records. He also initiated enforcement action on two subsequent visits to the Elfrida facility. Ammon timely contested the civil penalties assessed for the alleged violations.

Jurisdiction

There are relatively few factual disputes with respect to most of the alleged violations. The primary thrust of Ammon's defense is that MSHA has jurisdiction only over its screening plant, which occupies approximately one-half acre of the site, and constitutes about one percent of the activity on the property. It also acknowledges that the 621 loader is part of the mining operation when the plant is running. Peter Ammon maintains that he is the sole operator of the plant and, consequently, the only miner involved in the operation. The Secretary maintains that Ammon's extraction of gravel from the pits brings its facility within the Act's definition of a mine, that its screening plant and portable screens are involved in milling, which is also within the statutory definition, and that mobile equipment used in those operations, as well as facilities and employees who are involved in them, are subject to MSHA's jurisdiction.

The "L-shaped" Elfrida site is depicted in a poorly focused overhead photograph. Ex. R-7. The pits are located at the top, North, end of the "L," and the screening plant is located about 1,300 feet to the South of the pits. The water tank, shop and fuel tanks lie near the corner of the vertical member and the base of the "L," about 1,000 feet from both the pits and the

[1] Nelson was not aware of Ammon's other businesses at the time of the inspection, and did not obtain much information about them during the course of the inspection. Tr. 93-94. He did not inspect a grader that was at the site because he did not believe that it was involved in Ammon's mining activities. He also did not inspect a CAT 988A loader because it had obviously been inoperable for a considerable period of time.

screening plant. Two portable screens, called "shaker buddies," were located near the pits.[2]

Peter Ammon described the material obtained from the pits as "highly unique" because it is of very good quality, approximately 55% gravel, and is able to be used in many applications without further processing, i.e., as "pit run." Tr. 380-81. Material was extracted from the pits on a weekly basis, and Ammon used the pit run material for roads, road pad build-ups, and residential house pads. Ex. P-62 at 57-58. A small percentage of the material removed from the pits was run through the screening plant, which separated it into five different-sized products. Ammon constructs septic systems and uses leach rock, 3/4 to 2 inch-sized rock, in the septic fields. Occasionally, material from the pits was also run through the shaker buddies. Tr. 291, 294, 310.

Ammon commenced screening operations at the Elfrida site in 1998. Tr. 293. It provided an "Update Notice" to MSHA, effective August 18, 1998, under Mine I.D. No. 02-02776, that it would be engaged in "gravel screening only." Ex. P-38. It purchased the screening plant and a CAT 988A loader in 2002. The 988 loader had a seven-cubic-yard bucket and was capable of moving large amounts of material. It was used, among other things, to extract material from the pits, transport it to stockpiles near the screening plant, and to feed material into the screening plant's hopper. At least for several months in 2003, the screening plant was operated on a relatively continuous basis, which resulted in the creation of large stockpiles of screened material. The plant was operated by two employees, Don Bartle, the plant manager, and Mike Gojkovich.

Ammon acknowledged that, as of 2003, it was conducting regular mining activities, and had provided appropriate training to Bartle and Gojkovich, including first aid training for Gojkovich. However, an MSHA inspection around that time resulted in the issuance of several citations that Ammon viewed as unjustified. As a result, Peter Ammon decided to substantially limit operation of the screening plant. He planned to personally operate the plant as time permitted, e.g., if he was free on a Saturday, and would be the only person involved in that operation. Bartle left Ammon's employment. Because of the extensive stockpiles, the screening

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[2] Peter Ammon described the shaker buddies as highly efficient double-decked screens, that could be nearly as productive as the screening plant. Tr. 290-94. Ammon claims that there are a number of such machines being used by various entities, generally not considered mining companies, and that MSHA has not sought to exercise jurisdiction over them. Peter Ammon testified that his operation has been inspected over seven times and none of the MSHA inspectors looked at the shaker buddies. Ex. P-62 at 63. Nelson does not appear to have examined them when he conducted the inspection. He later considered them to be a part of Ammon's mining operation because Gojkovich told him that they were going to be incorporated into the screening plant. Tr. 285. Gojkovich did not recall stating that, and testified that he had never been under that impression. Tr. 354. Peter Ammon testified that, although the subject had been mentioned, there was no plan to add the shaker buddies to the plant, and that they were being readied for an impending deal involving a project at another site. Tr. 288.

plant was operated only occasionally, as specific material was needed.

The 621 loader has a considerably smaller bucket than the 988 loader, 2.25 cubic yards, and was not generally used to shuttle material from the pit to the stockpiles, although after the 988 loader broke down in 2004, it was the only piece of equipment on the site capable of performing that function. It was used to load trucks, to feed the screening plant and shaker buddies, to push up material, and for a variety of other purposes, both on-site and off-site. Tr. 346. About two months before the August 2006 inspection, Ammon entered into a lease agreement and acquired a "low boy" trailer and a CAT 613C scraper. However, the scraper was in very poor, "as is," condition, and Ammon had to expend considerable time and effort to make it operational. That effort included identification and repair of hydraulic leaks, replacement of the cutting edge, repairs to the transmission brake and service brakes, and replacing the batteries. In addition, the fuel injection pump had to be removed, sent out for repairs, and replaced. Some repairs, e.g., stoppage of hydraulic leaks and replacement of the scraper's cutting edge, were done before the inspection, and some were done after it. After initial repairs were done, Gojkovich operated the scraper to gain familiarity with it and identify other repair needs. He removed material from the pits and transported it to stockpiles near the screening plant and shaker buddies. Tr. 302, 346. None of the material moved with the scraper was run through the screening plant. Tr. 315. The main stockpile was located near the screening plant because the area was clean and easily accessible by Ammon's trucks. The vast majority of the material was trucked to other sites, without being milled or processed.

The shop is a 50 by 60-foot building. Equipment, spare parts, and miscellaneous supplies were kept in the shop, and certain maintenance tasks were performed there.[3] If a piece of equipment was too large to fit into the shop, maintenance was performed near the shop. For example, Gojkovich worked on the scraper near the shop, and changed the 621 loader's oil in the shop. Tr. 307. The fuel tanks stored diesel fuel for use in off-road equipment, e.g., the loaders, scraper and graders, some of which were on-site at the time of the inspection. A water tank was used to supply water to several trees and, following the inspection, water was pumped to the shop and a toilet located therein.

Gojkovich has worked at Ammon for about seven years as an equipment operator and maintenance mechanic. Tr. 298-99. In 2006, he continued to work at the Elfrida site two to three days per week and, generally, was the only person at the site. Tr. 303. He operated mobile equipment on the site. He had also operated the screening plant as recently as a few weeks before the inspection, and operated the shaker buddies to screen material from the pits. Tr. 54-56, 299-300. He refueled, maintained and repaired graders, backhoes, trucks, the 621 loader, and the 613 scraper, using the shop and other facilities on-site.

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[3] The most common maintenance parts for the screening plant, electrical fuses, were kept in the shop. Tr. 334. A replacement bearing for one of the plant's shakers was temporarily stored in the shop. Tires for the various pieces of mobile equipment were also stored in the shop, as were, on occasion, parts for the scraper and 621 loader. Tr. 306.

Ammon is registered as an "intermittent" mining operation. However, it technically remained "open" at all times. MSHA inspectors had recommended to Peter Ammon that he close the mining operation during periods when it was not operating. However, he did not want to close the mine, and then have to transmit facsimiles to notify MSHA that he was opening the mine if he wanted to run some material on a Saturday. There was no fax machine at the Elfrida site, and the need to fax a notice that the screening plant would operate for a day, and then fax a notice that it was again closed, was viewed as unworkable. Tr. 369-70; ex. P-62 at 13. Subsequent to the August inspection, Ammon decided to take MSHA's advice, and temporarily closed the mine on September 15, 2006. Tr. 367-68; ex. P-63.

Section 4 of the Federal Mine Safety and Health Act of 1977 provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(g) of the Act provides that a "'miner' means any individual working in a coal or other mine," and section 3(h) of the Act defines the term "mine," in part, as:

> h(1) "coal or other mine" means (A) an area of land from which minerals are extracted . . . (B) private ways and roads appurtenant to such area, and (C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing . . . minerals, ...

30 U.S.C. § 802(g), (h)(1).

The legislative history of the Act makes clear that Congress intended that the Act's coverage provisions be interpreted broadly. The Senate Committee report emphasized that "what is considered to be a mine and to be regulated under this Act [should] be given the broadest possible interpretation, and . . . doubts [should] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978).

The Commission and the courts have recognized that broad Congressional intent and have applied the Act's provisions to a wide variety of mining operations, including mining and preparation facilities similar to those at Ammon's Elfrida site. *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979) (facilities for processing of material dredged from a river bed were within the Act's definition of the term "coal or other mine"); *Jerry Ike Harless Towing, Inc.*, 16 FMSHRC 683 (April 1994) (sand dredging operation that included screening and separation of water from sand subject to Act's jurisdiction); *W.J. Bokus Ind.*, 16 FMSHRC 704 (April 1994) (equipment in garage used by both operator's sand and gravel mine and asphalt

plant is subject to Mine Act's jurisdiction);[4] *Marshall v. Cedar Lake Sand and Gravel Co., Inc.*, 480 F.Supp. 171 (E.D. Wisc. 1979) (pit from which sand and gravel are removed falls squarely within the Act's definition of a mine); *Marshall v. Gilliam*, 462 F.Supp. 133 (E.D. Mo. 1978) (MSHA has jurisdiction over clay stockpile, loading and selling operation, including structures and machines that were used, or that had been used in connection with the extraction of clay and its preparation for loading, including a shop area and machines used to maintain mining equipment). In a very recent case with facts similar to those at issue here, a small, family-run gravel business was held to be a mine and MSHA's jurisdiction to inspect and enforce the Act was upheld as to a gravel pit, screening plant and equipment used, or that had been used, in the operation. *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 2008) (ALJ).

Ammon readily concedes that its screening operation, which separates material into five different products, is subject to MSHA jurisdiction, because it constitutes milling, as defined in the Act. However, it steadfastly contends that no other parts of its extensive operations are mining activities. Specifically, it argues that the removal from the pits of native material, and its transport to job sites without any processing, is the type of activity performed by thousands of other businesses licensed to excavate and remove excess material, e.g., septic system contractors and excavation contractors. "Transporting natural material without any milling, is a non Mine Act legal operation." Resp. Br. at 2-3.

While Ammon does not cite any legal authority in support of its argument, in essence, it argues that its pits are "borrow pits" that are not subject to MSHA jurisdiction. The Secretary has recognized a limited exception for operations that might otherwise fall within the broad definition of coal or other mine. It is reflected in a 1979 interagency agreement between MSHA and the Department of Labor's Occupational Safety and Health Administration ("OSHA"), specifying that borrow pits that are not on mine property or related to mining are subject to OSHA, not MSHA jurisdiction. 44 Fed. Reg. 22827 (April 17, 1979). The term "borrow pits" is defined in the agreement as:

> 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.

It may be that the septic system and excavation contractors referred to by Ammon would be exempt from MSHA jurisdiction under the provisions of the agreement. However, for several

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[4] The Commission did not reach the question of whether the garage was a facility subject to Mine Act jurisdiction. However, it held that certain equipment was within the Act's coverage, in part, because defects could injure miners working in the garage. 16 FMSHRC at 708.

reasons, Ammon's pits are not borrow pits. Material from the pits is run through the screening plant and the shaker buddies, which are not "scalping screens." [5] Large amounts of material were processed in 2003, and the screen was operated intermittently after that, most recently, a few weeks prior to the inspection. This "milling" of minerals dictates that the area qualifies as a mine, and borrow pits that are on mine property or related to mining are under MSHA jurisdiction. Moreover, material is removed from the pits, used in Ammon's various business activities and occasionally sold to others on an ongoing, not one-time or intermittent, basis. The material is also of very high quality and suited to its particular uses. It is not used more for its bulk than for its intrinsic properties, and is used over a relatively wide area at any number of locations where Ammon conducts its activities.

Ammon's extraction of gravel at the Elfrida facility cannot escape MSHA jurisdiction under the borrow pit exception. *See Drillex, Inc.*, 16 FMSHRC 2391 (Dec. 1994); *Kerr Enterprises, Inc.*, 26 FMSHRC 953 (Order, dated Dec. 21, 2004) (ALJ); *Jeppesen Gravel, supra.*

Several aspects of Ammon's operation easily fall within the Act's definition of a mine. The removal of gravel, a mineral, from its natural deposits in the pits and transporting it to stockpiles constitutes mining, as does the processing of such material through the screening plant and the shaker buddies. Gojkovich was intimately involved with both aspects of Ammon's mining operations. He operated the 613 scraper, and used it to remove material from the pits and transport it to stockpiles, from which it was loaded into trucks. Ammon argues that none of the material removed from the pits with the scraper was ever processed through the screening plant. However, the extraction of gravel from its natural deposits constitutes mining, whether or not it was subsequently milled. Gojkovich operated the 621 loader to feed the screens, occasionally to extract material from the pits, to load trucks, and for other purposes. He maintained and repaired mining equipment, the screening plant, shaker buddies and associated mobile equipment. He was an individual working in a mine, and was clearly a miner. The shop and fuel tanks were also involved in the mining operation. The fuel tanks contained diesel fuel used by the 621 loader and the 613 scraper, both of which were serviced in or near the shop using tools and supplies stored in the shop. Parts for the screening plant, fuses and a bearing, were kept in the shop, as were tires for wheeled vehicles, including the 621 loader. Consequently, even though the shop was primarily used to support Ammon's non-mining activities, it was a facility used or to be used in its mining operations and was subject to MSHA jurisdiction. Whether specific items, such as gas cans or oxygen cylinders, were actually used in mining activities, their presence in the shop, where Gojkovich, a miner, worked mandated that they comply with MSHA's regulations. *W.J. Bokus Ind., supra; Marshall v. Gilliam, supra*.

The timing of MSHA's inspection was also appropriate. While the screening plant and shaker buddies were operated only intermittently, material was extracted from the pits on a more regular basis, and neither operation was officially shut down for any specified period. Gojkovich

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[5] Shaker buddies could be, and perhaps are, used as scalping screens. However, they were not so used at Ammon's facility, where pit run gravel was processed through them.

worked at the Elfrida site two or three days a week. Equipment and facilities that are available for use by miners must be maintained in compliance with applicable safety standards, and are subject to inspections whether or not they are actually being used at the time. *See, e.g., Ideal Basic Ind., Cement Div*., 3 FMSHRC 843 (April 1981) (equipment located in a normal work area and capable of being used must be in compliance with safety standards).

Ammon's challenges to jurisdiction must be rejected.[6] MSHA was statutorily obligated to inspect all mining operations at the Elfrida site, including the pits, screening plant, shaker buddies, the shop and fueling areas, and associated mobile equipment.

Order No. 6330985

Order No. 6330985 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 46.8(a)(1), which requires that mine operators "provide each miner with no less than 8 hours of annual refresher training." Ex. P-22. In response to Nelson's inquiry, Gojkovich stated that he had not received any refresher training in several years. Nelson then issued the order, pursuant to section 104(g) of the Act, which required Gojkovich's immediate withdrawal from the mine, and prohibited his reentry until an authorized representative of the Secretary had determined that he had received the requisite training. Nelson determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was significant and substantial ("S&S"), that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of $500.00 has been proposed for this violation.

Ammon does not dispute the fact that Gojkovich was not provided refresher training during the pertinent time period. Its defense to this alleged violation, and related training violations, is that Gojkovich ceased to be a miner in 2003, when Ammon drastically curtailed its "only" mining operation, i.e., the screening plant. Thereafter, Ammon contends, Peter Ammon was the "sole miner" and, as owner/operator was qualified to provide training and sign training certificates. Tr. 262-63.

As noted above, Ammon's jurisdictional arguments have been rejected, and it cannot escape the fact that Gojkovich worked as a miner. In addition, Gojkovich had not been completely excluded from Ammon's admitted mining operation. He had operated the screening plant as recently as a few weeks prior to the inspection. The definition of a miner for training purposes, as set forth in the subject regulation, includes "[a]ny person, including any operator or supervisor, who works at a mine and who is engaged in mining operations." 30 C.F.R. § 46.2(g)(1)(i). Mining operations include "extraction, milling, crushing, screening, or sizing of

[6] It is also clear that Ammon's operations affect interstate commerce. It is well established that the Commerce Clause has been broadly construed, and that Congress may regulate highly localized commercial activities because even small scale efforts, when combined with other similar operations, can influence interstate pricing and demand. *See Harless Towing, supra,* 16 FMSHRC at 686.

minerals at a mine; maintenance and repair of mining equipment; and associated haulage of materials within the mine from these activities." 30 C.F.R. § 46.2(h). Because Gojkovich was a miner, Ammon was required to provide him with annual refresher training. I find that the regulation was violated.

Significant and Substantial

A significant and substantial violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981).

The Commission has explained that:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (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 that the injury in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc*., 9 FMSHRC 2015, 2021 (Dec. 1987) (approving *Mathies* criteria).

In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the *contribution* of a violation to the cause and effect of a hazard that must be significant and substantial. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U.S. Steel Mining Co., Inc*., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in terms of "continued normal mining operations." *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. 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 (Apr. 1988); *Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

Generally speaking, an untrained miner is a hazard to himself and others. 30 U.S.C. § 814(g)(1). Gojkovich had not been provided annual refresher training since 2003.[7] However, he was not "untrained." He periodically received informal training from or through Peter Ammon, e.g., Ammon had the former owner of the scraper show him how to operate it and he, in turn, instructed Gojkovich and charged him with the task of identifying what needed to be repaired. Tr. 275-76, 278-79, 351. Gojkovich was also a highly experienced miner, who had worked at the Elfrida facility for many years, and was intimately familiar with virtually all aspects of the equipment and its operation. Nelson determined that the training plan violation, Citation No. 6330984, was unlikely to result in an injury because Ammon's "people were experienced." Tr. 258.

Under the limited circumstances presented here, I find that the Secretary has not carried her burden of proving that the hazard contributed to by the violation was reasonably likely to result in a reasonably serious injury. I also disagree with the Secretary's assessment of negligence. Peter Ammon certainly was quite familiar with training requirements, as Inspector Nelson noted. However, he believed, in good faith, that he had sufficiently separated Gojkovich from the mining operation, such that he was not required to have annual refresher training. His belief was erroneous. However, it was not so unreasonable that it failed to qualify as a mitigating factor, and I find that Ammon's negligence was moderate, rather than high.

Citation No. 6330984

Citation No. 6330984 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 46.3(a), which requires that mine operators "develop and implement a written training plan . . . that contains effective programs for training new miners and newly hired experienced miners, training miners for new tasks, annual refresher training, and site-specific hazard awareness training." Ex. P-21. When Nelson visited Ammon's office in Dragoon, he asked to see the training plan and was shown an MSHA form for a training plan that had virtually none of the required information filled in. Consequently, he issued the violation. He determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would result in lost work days or restricted duty, that the violation was not S&S, that two persons were affected, and that the operator's negligence was moderate. A civil penalty in the amount of $193.00 has

[7] Gojkovich told Nelson that he had had no training for six years. Tr. 67. However, he had received three days of first aid training in 2003, and Peter Ammon testified at his deposition that Ammon had fulfilled all training requirements through 2003. Ex. P-62 at 48-49. The Secretary notes that Ammon did not produce records of such training. However, there were MSHA inspections in that time frame, and there is no evidence that training violations were issued. I accept Ammon's testimony, and find that Gojkovich had received all required training through 2003.

been proposed for this violation.

Ammon's jurisdictional defense to the training violations has been discussed above. It also contends that it "had updated training records that reflected the owners signed documents." Resp. Br. at 13-14. However, such records were not shown to the inspector, were not offered into evidence, and are not part of the record. Moreover, Peter Ammon agreed that, at the time of the inspection, the training plan was incomplete. Tr. 266; ex P-62 at 47. I find that Ammon did not have a written training plan at the time of the inspection, and that the regulation was violated. I agree with the inspector's assessment of gravity and that the operator's negligence was moderate.

Citation No. 6331001

When Nelson returned to the Elfrida site on August 23, 2006, he found Gojkovich working at the site, loading trucks and cleaning up the shop area. Ex. P-24. Gojkovich confirmed that he had not received annual refresher training. Nelson issued Citation No. 6331001 alleging a violation of section 104(g)(1) of the Act, which requires that a miner who has been ordered withdrawn from the mine because of a lack of training, not reenter the mine until an authorized representative of the Secretary has determined that the requisite training has been provided. Ex. P-24. Nelson determined that there was no likelihood of injury because of the new violation, that the violation was not S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of $1,000.00 has been proposed for this violation.

The analysis of this alleged violation is complicated by the fact that Ammon operates several non-mining businesses which share use of equipment and facilities used in its mining operations. The Secretary argues, in support of the violation and the high negligence assessment, that "instead of providing eight hours of training to Gojkovich, or taking action to obtain a determination of Gojkovich's status, Ammon largely ignored the withdrawal order." Sec'y. Br. at 11. However, Ammon did take steps to obtain a determination of whether it was properly cited for violations based upon Gojkovich's status as a miner. While it did not immediately contest the original order and related citations, it did contest the proposed penalties, and it temporarily closed its mining operations in September 2006. In addition, Gojkovich had been "excluded" from what Ammon considered to be the mining area, the screening plant. Tr. 279-81; ex. 62 at 51. Peter Ammon elected to keep him employed in the excavation portion of the business. Resp. Br. at 14. He loaded trucks from the stockpiles of materials and cleaned up the shop area. Gojkovich testified that he did not use the loader after the withdrawal order had been issued, except to load trucks and push weeds. Tr. 306. He also had been instructed to work on the shaker buddies when he was finished grading roads. Ammon's intent was to make them operational for an impending project at another site.

The regulations addressing training, as noted above, define a miner as a person who works at a mine and is engaged in mining operations. While the shop and other areas of the

Elfrida property fall within the broad definition of a coal or other mine, not all of the activities that take place on the site are mining activities. In light of Ammon's non-mining businesses, a reasonable interpretation of the order is that it precluded Gojkovich's performance of mining operations, such as, extraction, milling, screening, and maintaining and repairing mining equipment. It did not preclude his presence at the site, or his performance of non-mining operations.[8]

It is clear that no milling of materials was being performed, and there is no evidence that Gojkovich extracted gravel from the pits. However, he was engaged in the maintenance and repair of mining equipment, the shaker buddy. The loading of trucks from the stockpiles may also have qualified as a mining operation.[9] In keeping with the broad interpretation of Mine Act jurisdiction discussed above, I find that Gojkovich was assigned to work at mining operations in the face of the order, and that Ammon violated section 104(g) of the Act. However, it did not ignore the order. It attempted to confine Gojkovich's activities to what it viewed as non-mining operations. Gojkovich's work on the shaker buddy, to make it ready for a project at a different site, satisfied the "engaged in mining operations" test. However, it appears that, if the shaker buddy had been removed from the site, he could have performed those tasks without running afoul of the order. Similarly, if the stockpiles were not on the mine site, loading of customer or Ammon Enterprise trucks would not come under MSHA jurisdiction. Tr. 94-98. It is highly likely that the same would have been true if Ammon had temporarily closed the mine, i.e., ceased mining activities, which it later did. Under these specific circumstances, I find that the operator's negligence was low, rather than high.

Citation No. 6330983

Citation No. 6330983 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.18010, which requires that mine operators assure that an "individual [currently trained and] capable of providing first aid shall be available on all shifts." Ex. P-20. Nelson issued the

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[8] As noted above, Ammon notified MSHA that its mining operation was temporarily closed as of September 15, 2006. In keeping with the ruling on jurisdiction, that means that it would not be extracting gravel from the pits, or milling material in the screening plant or shaker buddies. Closing of the mining operation did not force Ammon to shut down its septic system, road, and excavation businesses, or to cease loading material from the stockpiles into trucks being used in those businesses.

[9] Nelson testified that retail sales conducted from a yard separate from a mine site would not come under MSHA jurisdiction, but that loading of customer trucks from stockpiles located at the ends of conveyor belts depositing material processed by a screening plant would be MSHA's responsibility. Tr. 95-98. Loading of truck from stockpiles separated from the screen, but still on mine property would be inspected, but could present a gray area. Tr. 95-96. It appears that if Ammon's mining operation had been closed, that the loading of trucks from the stockpiles would not be considered within MSHA's jurisdiction.

citation because he determined that Gojkovich, generally the only person at the site, did not have current first aid training. He determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was high. A civil penalty in the amount of $327.00 has been proposed for this violation.

Gojkovich, who worked at the Elfrida site two-to-three days a week, was working as a miner. Consequently, Ammon was obligated to have a person trained and capable of providing first aid on each shift that he worked. Gojkovich had been provided three days of first aid training in 2003, but his certification had expired. I find that the regulation was violated. However, the Secretary has not carried her burden of proving that any injury that might result from the violation would be permanently disabling, or that the operator's negligence was high. Since Gojkovich was typically the only person working at the site, he was the person who would have had to have been trained, and he was also the only miner who might have been injured and would have required first aid. He had been fully trained in 2003, and there is no evidence as to whether, or to what extent, he failed to retain the information and skills learned at that time. It is highly unlikely that, because his training had not been kept current, the effects of an injury could have been exacerbated to the extent that a separate injury might be said to be attributable to the violation, much less a permanently disabling one. Nelson explained that if there were a neck injury and the injured person were moved due to the absence of an individual with current first aid training, a permanent injury could result. Tr. 247. That person would have been Gojkovich, who might have moved himself. I find the likelihood of the violation resulting in a permanent injury too speculative, and that the more likely result would have been a lost work days injury. As I have found with respect to the other training violations, I find the operator's negligence to have been moderate.

Citation No. 6330970

Citation No. 6330970 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.4402, which requires that "[s]mall quantities of flammable liquids . . . shall be kept in safety cans labeled to indicate the contents." Ex. P-1. Section 56.4000 defines the term "safety can" as a "container of not over five gallons capacity that is designed to safely relieve internal pressure when exposed to heat and has a spring-closing lid and spout cover." Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

There were several small gasoline containers in the shop, at least one of which had a quantity of gasoline in it. Tr. 111-15, 127; ex. P-36. Peter Ammon confirmed that the containers, which met State of Arizona requirements, did not have spring-closing lids, and did not meet MSHA requirements. Tr. 118. His defense to this citation is that the shop is not

associated with his mining operation, and that no part of the mining operation uses gasoline. Ex. P-62 at 8, 16.

As noted above in the discussion of jurisdiction, the shop is part of the mining operation and it, and things located in it, must be in compliance with the Secretary's regulations. I find that the regulation was violated, and agree with the inspector's assessment of gravity, and that the operator's negligence was moderate.

Citation No. 6330971

Citation No. 6330971 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.4601, which requires that "[o]xygen cylinders shall not be stored in rooms or areas used or designated for storage of flammable or combustible liquids, including grease." Ex. P-2. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

There was an oxygen cylinder within a few feet of the gas cans. Ex. P-2, P-36. Nelson did not check to determine whether there was oxygen in the cylinder. Both Gojkovich and Ammon testified that it was empty. Tr. 128, 129-30. I find that the cylinder was empty. Nevertheless, I find that the regulation was violated. The plain wording of the regulation applies to all oxygen cylinders, whether full, partially full, or empty. *See Ideal Basic Ind., Cement Div.*, 2 FMSHRC 1352, 1371 (June 1980) (ALJ). The goal of the regulation, ensuring that oxygen does not exacerbate any fire that might occur involving stored combustible materials, is reasonably advanced by interpreting it to preclude the storage of any oxygen cylinder in areas where combustible materials are stored. However, the fact that the cylinder was empty dictates that there was no likelihood of an injury resulting from the violation, and the operator's negligence was low.

Citation No. 6330972

Citation No. 6330972 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.4201(a)(2), which requires that annual maintenance checks be made on fire extinguishers, including the amount of extinguishing agent and expellant, to determine that they will operate effectively. Ex. P-3. Sub-section (b) requires that the person making the inspection must certify that the inspection or test has been made, and indicate the date thereof. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $237.00 has been proposed for this violation.

Nelson found two fire extinguishers in the shop and one on the 621 loader. None of them bore any indication that they had been inspected, as required by the regulation. Tr. 131; ex. P-3, P-39, P-40, P-41. They were fully charged and in operable condition. Tr. 133; ex. P-3. Ammon's defense to this alleged violation is that none of the fire extinguishers was located in the area of the screening plant, its mining operation. Tr. 139. Ammon may have had records of inspections, but they were not produced. Tr. 139. Having rejected Ammon's jurisdictional arguments, I find that the regulation was violated. However, because the fire extinguishers were fully charged and operable, there was no likelihood of an injury resulting from the violation. I also find that Ammon's negligence was low. The maintenance checks had apparently been made, but not recorded on the fire extinguishers, which Ammon believed were not involved in mining operations.

Citation No. 6330973

Citation No. 6330973 was issued on August 8, 2006, and alleges a violation of 30 C.F.R. § 56.12023, which requires that "[e]lectrical connections and resistor grids that are difficult or impractical to insulate shall be guarded, unless protection is provided by location." Ex. P-4. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

While inspecting the shop, Nelson observed a Lincoln welder/generator that did not have insulation or a guard covering the welding lead lugs. Tr. 141; ex. P-4. The condition is depicted in a photograph. Ex. P-25. Aside from its jurisdictional argument, Ammon contends that the welder was in "as manufactured" condition, and a representative of the manufacturer represented to Peter Ammon that, to his knowledge, MSHA had never issued a citation with respect to the cited condition on that type of welder. Tr. 145. Ammon introduced a standard of the National Electrical Manufacturer's Association, which provides that welding leads need not be enclosed in a case or cabinet, and that protection is usually afforded by recessing the terminal lugs behind the vertical plane of the access opening. Ex. R-19.

As depicted in the photograph, the welding lead lugs were recessed a few inches into a relatively small opening in the welder's cabinet. Under the circumstances, I find that protection was provided by the location of the lugs, and that the standard was not violated.

Citation No. 6330974

Citation No. 6330974 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14130(i), which requires that seat belts on mobile equipment be maintained in functional condition, and replaced when necessary to assure proper performance. Ex. P-6. Nelson determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was

moderate. A civil penalty in the amount of $354.00 has been proposed for this violation.

When Nelson examined the 613 scraper, he observed that the seat belt was frayed at the edges, and had tears in it. Tr. 148-50; ex. P-6.[10] The condition is depicted in photographs taken at the time of the inspection. Ex. P-42, P-43, P-60. In describing the defects, with reference to the pictures, Nelson identified a "rip." Tr. 157-58; ex. P-42. The seat belt was four inches wide, and the rip was about 0.75 inches deep. Tr. 158-59. Nelson agreed that the seat belt was functional. Tr. 159. Nelson's assessment of the gravity of the violation was predicated upon the seat belt failing during a serious accident, e.g., a rollover. Tr. 152; ex. P-6. Nelson did not attempt to test the strength of the belt. His determinations were based solely upon his visual examination. Tr. 160.

I find that the Secretary has failed to carry her burden of proof on this violation. While the seat belt showed obvious signs of wear, it was functional. It was not so obviously defective that Nelson noticed it before having Gojkovich operate the scraper to test the brakes.[11] Nelson's descriptions of the belt's defects were somewhat inconsistent, and the pictures do not confirm the existence of a serious defect. It is not apparent that a tear of 0.75 inches on a four-inch wide belt would so weaken it that it would pose a danger, even if the edges were somewhat frayed.

Citation No. 6330975

Citation No. 6330975 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14100(b), which requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons." Ex. P-7. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would result in lost work days or restricted duty, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $178.00 has been proposed for this violation.

While inspecting the 613 scraper, Nelson observed that much of the padding on the seat was missing. Tr. 165-68; ex. P-42, P-43. When Gojkovich activated the brake lights and tail

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[10] Nelson erroneously referred to the scraper as an excavator in his notes and on the citation. The error is of no consequence. Ammon does not have an excavator, and it is clear that the condition cited was on the 613 scraper.

[11] Consistent with its position on jurisdiction, Ammon protested Nelson's efforts to have Gojkovich, a "non-miner," operate equipment. Its protest is reinforced with respect to the scraper, because Nelson obtained Gojokovich's agreement to operate the scraper to test the brakes, despite his citing of the seat belt violation, which he determined to have been reasonably likely to result in a fatal injury. Nelson explained that he "believed" that he didn't notice the seat belt problem until after the brake test had been done. Tr. 76. Ammon's protests, at least as to this alleged violation, are well-founded.

lights, at Nelson's request, they did not function. Nelson believed that, on extended use, an operator of the equipment could suffer back or kidney injuries, and that the non-functioning lights could result in rear-end collisions when the equipment was operated in areas where other mobile equipment operated. Tr. 165-68. He determined that such injuries were unlikely to occur, because the scraper was not operated extensively, and was rarely operated in the presence of other mobile equipment. I find that the standard was violated and agree with Nelson's gravity determinations. He also determined that the operator's negligence was moderate, because it should have been realized that the defects existed and needed to be corrected. However, Ammon was in the process of attempting to bring this newly leased piece of equipment into operating condition. Considerable work had been done on the machine, and the fact that these particular defects had not yet been addressed does not indicate as high a level of negligence as if the defects had been allowed to exist on equipment that had been integrated into the everyday work process. Under the circumstances, I find the operator's negligence with respect to this violation to have been low.

Citation No. 6330976

Citation No. 6330976 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14101(a)(1), which requires that "[s]elf-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels." Ex. P-8. Nelson determined that it was reasonably likely that the violation would result in a fatal injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $354.00 has been proposed for this violation.

Nelson asked Gojkovich to load the scraper and travel to a hill on the property. The service brakes would not hold the equipment on the grade. Tr. 170. Nelson believed that the scraper had been operated in that condition. However, Gojkovich told Nelson before the test, that he believed that there were no problems with the brakes because they had been worked on recently. Tr. 173-74. Even if the scraper had been operated briefly after the work had been done, the deficiency in the brakes may not have been apparent. The site is fairly flat. Gojkovich had operated the scraper for only about two hours since it had arrived at the site, and most of that time was devoted to diagnosing hydraulic leaks and other maintenance needs.

I find that the standard was violated, and that the violation was S&S. However, I find that the brakes had been worked on, and there was little reason for Ammon to believe that they were not operational. Consequently, I find the operator's negligence to have been low. I also find that the gravity was somewhat lower, in that the violation was highly unlikely to result in a fatal injury. The grader was operated at relatively low speeds on fairly level, open ground, where other mobile equipment did not normally operate. Any injury reasonably likely to result from the violation would have involved lost work days.

Citation No. 6330977

Citation No. 6330977 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14132(a), which requires that "[m]anually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition." Ex. P-9. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $237.00 has been proposed for this violation.

The horn was tested while Gojkovich was operating the scraper, and it did not work. I find that the standard was violated, and agree that an injury was unlikely to result. However, for the reasons discussed with respect to Citation No. 6330975, I find that the operator's negligence was low, and that the violation would more likely have resulted in lost work days, rather than permanent disability.

Citation No. 6330979

Citation No. 6330979 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.14101(a)(2), which requires that "[i]f equipped on self-propelled mobile equipment, parking brakes shall be capable of holding the equipment with its typical load on the maximum grade it travels." Ex. P-12. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $291.00 has been proposed for this violation.

At Nelson's request, Gojkovich parked the 621 loader on an 8% grade, with a load in the bucket, set the parking brake and released the service brake. The parking brake could not hold the loader, which rolled down the grade. Tr. 197-98; ex. P-12. The only grades of consequence on the property were on a ramp to facilitate loading of the screening plant and in the pit area. The loader was rarely used in the pit area, and was parked, unloaded, on flat ground with the bucket down. Ex. P-12. There is no indication that it was, or ever would have been, parked on a grade, much less the 8% grade that it was tested on. There is also no evidence as to how effective the parking brake was, e.g., whether it could hold the loader on a lesser grade, or on the 8% grade if it were not loaded. Under the circumstances, I find that the standard was violated, and that there was no possibility of an injury occurring due to the violation. Nelson determined that Ammon's negligence was moderate because it should have conducted a proper test of the parking brake and discovered the deficiency. I agree with Nelson's determination of negligence.

Citation No. 6330978

Citation No. 6330978 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.12002, which requires that switches on electrical circuits "shall be of approved design and

construction and shall be properly installed." Ex. P-10. Nelson determined that it was unlikely that the violation would result in an injury, but that if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

While inspecting the screening plant, Nelson observed an electrical switch box on the control panel that had two openings in it. One was a hole on the side of the box that he estimated to be two inches in diameter. The other was an open rigid conduit leading from the bottom of the box, a few inches down into another box that was uncovered. Nelson believed, from his discussions with Gojkovich, that power was provided to the box at 480 volts. Tr. 178-82; ex. P10, P-34, P-35. He felt that electrical connections inside the box could be "damaged by moisture, dust or nesting insects," such that the box itself could become energized, exposing persons in the area to "potential shock or burn injuries from leaking 480 volts." Tr. 187; ex. P-10.

Peter Ammon testified that the box was energized with 110 volts, not 480 volts, and that no electrical connectors were visible through the small hole in the side of the box, which was plugged with a one-inch fitting to terminate the citation. Tr. 191-93; ex. P-62 at 33-34. Nelson confirmed that the box and the electrical panel were grounded, and that Ammon's grounding and continuity testing were up-to-date. Tr. 188. Nelson was unable to explain how the grounded box could become energized with power "leaking" from the electrical connections inside it. He stated "[m]y understanding of why we cite it is because if it bypassed the grounding system into the metal enclosure and stuff." Tr. 188. Ammon also pointed out that electrical equipment, such as the box, is not required to be weather-proof, that moisture, dust and nesting insects could get into the box, even in the absence of the hole, and that the conduit leading from the bottom of the box provided drainage. Tr. 185-86.

Ammon contends that the box was properly installed by an electrician, and that it had been inspected several times at the Elfrida site and never cited. Tr. 191. I agree with the Secretary that a properly installed switch box would not have openings that were left unplugged. Consequently, I find that the regulation was violated. However, there was no possibility of inadvertent contact with energized conductors inside the box and, because of the grounding system, no possibility of the box becoming energized. I find that no injury could be expected to result from the violation. The unexplained possibility that the grounding system could somehow be bypassed is not sufficient to increase the gravity beyond that level. I also find that the operator's negligence was low. The defect was very minor, and had existed for a considerable period of time. Ammon had relied upon the expertise of the electrician that it had retained to rebuild the screening plant at its Elfrida site.

Citation No. 6330980

Citation No. 6330980 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.4430(a)(3), which requires that storage tanks for flammable or combustible liquids shall be

"[i]solated or separated from ignition sources to prevent fire or explosion." Ex. P-13. Nelson determined that it was reasonably likely that the violation would result in a permanently disabling injury, that the violation was S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $99.00 has been proposed for this violation.

There are two fuel storage tanks located approximately 200 feet north of the shop. One was elevated approximately four feet, and one was on the ground. They are depicted in photographs taken by Nelson. Ex. P-26, P-27, P-28. There was a small patch of dried tumbleweed underneath the elevated tank and alongside one end of the lower tank. There were also some "plyboards" and a ladder on the ground next to the lower tank. Tr. 205-06. Peter Ammon testified, without contradiction, that the ladder was made of aluminum, not wood. Tr. 216, 219-20. Nelson viewed those combustibles as ignition sources which could, in turn, be ignited by discarded smoking materials, lightning, vehicle exhaust, or a spark from a fire in the area. Tr. 208-12. He did not see any signs of smoking in the area, and Ammon has a non-smoking policy. Tr. 211, 219. Nelson also believed that any fuel spillage on the ground could contribute to the hazard, although he did not identify any spillage, and vehicle refueling is done at the south end of the long tank on the ground, which was not adjacent to the combustible materials. Tr. 214, 218.

The presence of combustible materials in close proximity to the fuel tanks establishes the violation. However, it does not appear reasonably likely that any of the materials would be ignited in the normal course of continued mining activities, or that any fire that might result would cause one of the tanks to explode or cause an injury to persons, who were rarely in the area. The weeds might burn intensely, as Nelson claimed. However, that extremely small quantity of weeds would burn for a very short period of time, and would be highly unlikely to threaten the tanks.

I find that the regulation was violated, but that the violation was not S&S, and that no injury would be expected as a result. I also find that the operator's negligence was moderate.

Citation No. 6330981

Citation No. 6330981 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.4101, which requires that "[r]eadily visible signs prohibiting smoking and open flames shall be posted where a fire or explosion hazard exists." Ex. P-15. Nelson determined that it was unlikely that the violation would result in an injury, but if it did, the injury would be permanently disabling, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

There was a faded "No Smoking" sign on the lower tank that Nelson did not notice during the inspection. Tr. 226-27; ex. R-13. The sign is barely readable, and Peter Ammon

noted that it was faded and not in good condition during his deposition. Ex. P-62 at 41. I find that the faded sign was not "readily visible," as required, and that the regulation was violated. I also find that the violation was unlikely to result in an injury. Any injury that would be expected to result from the violation would be a burn that would most likely result in lost work days, rather than permanent disability. I agree that the operator's negligence was moderate.

Citation No. 6330982

Citation No. 6330982 was issued on August 9, 2006, and alleges a violation of 30 C.F.R. § 56.12008, which requires that "[p]ower wires and cables shall be insulated adequately where they pass into or out of electrical compartments. Cables shall enter metal frames of motors, splice boxes, and electrical compartments only through proper fittings. When insulated wires other than cables pass through metal frames, the holes shall be substantially bushed with insulated bushings." Ex. P-18. Nelson determined that it was unlikely that the violation would result in an injury but, if it did, the injury would be fatal, that the violation was not S&S, that one person was affected, and that the operator's negligence was moderate. A civil penalty in the amount of $60.00 has been proposed for this violation.

A water tank, installed on a concrete pad, was located about 200 feet north of the shop. An electrical switch box was located adjacent to the pad, and wires ran from it to a water pump and a diesel fuel pump. The wire running to the water pump entered an opening in the box that had no bushing. The insulation on the inner conductors was intact and in good condition. The condition is depicted in photographs taken by Nelson. Ex. P-30, P-31. The water system supplied by the pump was primarily associated with the shop and a toilet located therein. Running water was supplied to the shop following the inspection, but was shut down after the pipes froze during the following winter.

Ammon's defense to this violation is based on its jurisdictional argument, i.e., that no water was used in the screening operation. Resp. Br. at 20. As depicted in the photographs, there was no bushing or proper fitting where the wire passed into the box. I find that the regulation was violated, and agree that a fatal injury was unlikely and that the operator's negligence was moderate.

The Appropriate Civil Penalties

Ammon Enterprises is a very small mine operator, with no larger controlling entity. The vast majority of the material extracted from its pits is used in its other business enterprises. A small amount of gravel is sold to local consumers. It has no violations that were paid or otherwise became final within the 24-month period preceding the issuance of the subject order and citations. Although Ammon claims to have had negative income in 2005, it does not claim that imposition of the proposed penalties would affect its ability to remain in business. Several of the alleged violations were not timely abated, which was taken into account in the penalty assessment process. With one exception, Ammon's defense to those violations was based upon

its jurisdictional arguments, and no further enforcement action was taken, apparently because of Ammon's temporary closure of its mining operations in September of 2006. Under the normal penalty assessment formula in effect at the time, failure to abate a violation resulted in ten additional penalty points and no application of the 30% reduction factor for good faith. 30 C.F.R. § 100.3(f) (2006). In view of the temporary closure, full imposition of both enhancement factors is not entirely warranted, except as to Citation No. 6330979, the violation related to the 621 loader's parking brake. The gravity and negligence associated with the violations have been discussed above.

Order No. 6330985 is affirmed. However, the violation is found to have been non-S&S and the operator's negligence moderate, rather than high. A specially assessed civil penalty in the amount of $500.00 has been proposed for this violation. Rejection of the S&S designation and lowering of the negligence designation justify a lowering of the civil penalty. I impose a penalty in the amount of $150.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330984 is affirmed. A civil penalty in the amount of $193.00 has been proposed for this violation. Upon consideration of the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty of $120.00.

Citation No. 6331001 is affirmed. However, the operator's negligence is found to have been low, rather than high. A specially assessed civil penalty in the amount of $1,000.00 has been proposed for this violation. The lowering of the negligence designation justifies a lowering of the civil penalty. I impose a penalty in the amount of $250.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330983 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than permanent disability, and the operator's negligence moderate, rather than high. A civil penalty in the amount of $327.00 has been proposed for this violation. Reductions in the severity of possible injury and the negligence designations justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of $125.00.

Citation No. 6330970 is affirmed. A civil penalty in the amount of $60.00 has been proposed for this violation. Upon consideration of the factors enumerated in section 110(i) of the Act, I impose a penalty of $60.00.

Citation No. 6330971 is affirmed. However, it is found that no injury was likely because of the violation and the operator's negligence was low, rather than moderate. A civil penalty in the amount of $60.00 has been proposed for this violation. The absence of a possible injury and lower negligence rating justify a reduction to the civil penalty. I impose a penalty in the amount

of $30.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330972 is affirmed. However, it is found that no injury could have been expected and the operator's negligence was low, rather than moderate. A civil penalty in the amount of $237.00 has been proposed for this violation. The lowering of the gravity and negligence determinations justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of $70.00.

Citation No. 6330975 is affirmed. However, the operator's negligence is found to have been low, rather than moderate. A civil penalty in the amount of $178.00 was proposed for this violation. The lowering of the negligence designation justifies a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of $80.00.

Citation No. 6330976 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than a fatality, and the operator's negligence low, rather than moderate. A civil penalty in the amount of $354.00 has been proposed for this violation. Reductions in the severity of possible injury and operator's negligence justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of $100.00.

Citation No. 6330977 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than permanent disability, and the operator's negligence low, rather than moderate. A civil penalty in the amount of $237.00 has been proposed for this violation. Reductions in the severity of possible injury and operator's negligence justify a lowering of the civil penalty. Upon consideration of the above, the factors enumerated in section 110(i) of the Act, and reducing the impact of the non-abatement due to Ammon's temporary closure, I impose a penalty in the amount of $80.00.

Citation No. 6330978 is affirmed. However, it is found that no injury was expected to result from the violation, and the operator's negligence was low, rather than moderate. A civil penalty in the amount of $60.00 has been proposed for this violation. Reductions in the severity of possible injury and operator's negligence justify a lowering of the civil penalty. I impose a penalty in the amount of $30.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330979 is affirmed. However, it is found that no injury was expected to result from the violation. A civil penalty in the amount of $291.00 has been proposed for this violation. Lowering of the gravity justifies a lowering of the civil penalty. I impose a penalty in

the amount of $110.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330980 is affirmed. However, the violation is found to have been non-S&S, and no injury was expected to result from it. A civil penalty in the amount of $99.00 has been proposed for this violation. Rejection of the S&S designation justifies a lowering of the civil penalty. I impose a penalty in the amount of $60.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330981 is affirmed. However, the violation is found to have been likely to result in an injury resulting in lost work days, rather than permanent disability. A civil penalty in the amount of $60.00 has been proposed for this violation. Lowering of the gravity of the violation justifies a modest reduction to the civil penalty. I impose a penalty in the amount of $40.00, upon consideration of the above and the factors enumerated in section 110(i) of the Act.

Citation No. 6330982 is affirmed. A civil penalty in the amount of $60.00 has been proposed for this violation. Upon consideration of the factors enumerated in section 110(i) of the Act, I impose a penalty of $60.00.

ORDER

Citation Nos. 6330970, 6330984 and 6330982 are **AFFIRMED**; Order No. 6330985 and Citation Nos. 6331001, 6330983, 6330971, 6330972, 6330975, 6330976, 6330977, 6330978, 6330979, 6330980 and 6330981 are **AFFIRMED, as modified**; Citation Nos. 6330973 and 6330974 are **VACATED**; and, Respondent is directed to pay a civil penalty of $1,365.00 within 45 days.

Michael E. Zielinski
Administrative Law Judge

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