

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 30, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2005-54-M
Petitioner	:	A.C. No. 13-00691-42086
	:	
v.	:	
	:	IA Portable #1
HIGMAN SAND & GRAVEL, INC.,	:	
Respondent	:	

**DECISION**

Appearances:           Thomas J. Pavlat, Conference & Litigation Representative, Mine Safety and Health Administration, Duluth, Minnesota, for Petitioner; Jeffrey A. Sar, Esq., Baron, Sar, Goodwin, Gill & Lohr, Sioux City, Iowa, for Respondent.

Before:                   Judge Manning

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Higman Sand and Gravel, Inc. (“Higman Gravel”), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). A hearing was held in Sioux City, Iowa.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Higman Gravel operates the IA Portable #1 (the “plant”) in Plymouth County, Iowa. It is a small gravel-processing facility that includes a pit as well as a plant where the excavated rock is crushed and screened. MSHA Inspector Christopher Willett inspected the plant on September 14, 2004, and he issued the citations at issue in this case.

**A. Citation No. 6153982**

Inspector Willett issued Citation No. 6153982 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12032. The body of the citation states:

The cover plate for the control box for the rock screw was removed and not replaced exposing energized electrical conductors. This is located on the east wall of the wash plant electrical shed 5.5 feet

above the floor. The rock screw is started and stopped from this area daily. This exposes a person to the hazard of contacting energized components which could result in electrocution.

The inspector determined that it was reasonably likely that someone would be injured as a result of this condition and that, if an injury were to occur, it would be fatal. He determined that the violation was of a significant and substantial nature (“S&S”) and that Higman Gravel’s negligence was moderate. The cited safety standard provides that “[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs.” The Secretary proposes a penalty of \$286.00 for this citation.

Inspector Willett testified that when he entered the electrical shed he noticed that the cover was not on the electrical control box for the rock screw. (Tr. 41; Ex. G-15). Cover plates must be in place except for testing or repair. The box was energized at the time of his inspection. (Tr. 42). The bottom of this electrical control box was about 5½ feet above the floor on a wall with other similar boxes. He believed that a start/stop switch was located underneath the box. (Tr. 45). Terminals inside the box were exposed which carried electricity at 240 volts. Inspector Willett testified that there were no barricades or other impediments to entry into the building. A few miscellaneous hand tools and supplies were kept in the eight by twelve foot building.

Inspector Willett determined that it was reasonably likely that someone would be injured by the cited condition because miners have to enter the building to start and stop the plant. (Tr. 47-48). With the cover off the electrical box, a miner could accidentally come in contact with the energized terminals or wires in the box. Because the violation presented a hazard that someone could be electrocuted, the inspector determined that the violation was S&S. (Tr. 48-49). He determined that the operator was moderately negligent because Justin Higman was not aware that the cover was off the box.

Harold Higman, the owner of Higman Gravel, testified that the switches used by the plant operator to turn equipment on and off are located next to the door of the shed. (Tr. 99-101). He stated that the control box cited by Inspector Willett is about six to seven feet away from these switches. (Tr. 102). It would not be necessary for the plant operator to walk near the control box to operate these switches. Higman testified that the only time that a miner would be near the control box is when the heaters must be reset. The heaters in this box switch the rock screw circuit off whenever the screw motor is pulling more current than its capacity. (Tr. 130-31). The heaters are designed to open the circuit to prevent the motor from overheating. To reset the heaters, the cover is removed from the control box by the plant operator and the reset buttons in the control box are pushed in. (Tr. 104). The control box is de-energized with a knife blade switch before these buttons are reset. (Tr. 110, 126, 129, 136). Higman testified that the hand tools and other supplies are on the opposite side of the electrical shed. (Tr. 109). He does not believe that it is reasonably likely that anyone would be injured by the condition cited by the inspector. (Tr. 111-12).

Frank Rollins operates the plant for Higman Gravel. He testified that, on the day of Inspector Willett's inspection, the rock screen became overloaded with rock which caused the motor for the screw to overheat, causing its heaters to pop out. (Tr. 149). Rollins removed the accumulated rock from the screw and the screen. When he entered the electrical shack, he opened the knife blade switch to cut off power to the control box. (Tr. 156-57). Next, he reset the heaters and closed the knife blade switch. (Tr. 150, 172, 174, 185). He turned the plant on with the switches located by the door of the shed. (Tr. 186). Rollins testified that he forgot to put the cover back on the control box that morning after he reset the heaters. (Tr. 169). The shed has a wooden floor which is kept clean and free of tripping hazards. (Tr. 152). Rollins operates a payloader and he enters the electrical shed only twice a day, unless there is a breakdown. (Tr. 193).

I find that the Secretary did not establish that this violation was S&S. Higman Gravel admits that the cover was off the control box so it does not contest the fact of violation. A violation is classified as S&S "if based upon the facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission set out a four-part test for analyzing S&S issues. Evaluation of the criteria is made assuming "continued normal mining operations." *U. S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984). The question of whether a particular violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (April 1988). The Secretary must establish: (1) the underlying violation of the safety standard; (2) a discrete safety hazard, a measure of danger to safety, contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature. The Secretary is not required to show that it is more probable than not that an injury will result from the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996).

The Secretary did not prove that there was a reasonable likelihood that the hazard contributed to by the violation would result in an injury, assuming continued normal mining operations. The Secretary established the first, second, and fourth elements of the *Mathies* criteria. The IA portable is a small operation. The only individual working at the plant was Mr. Rollins. All other employees work in the pit. Rollins spends most of his time loading customers' trucks with product. He enters the electrical shack each morning to get supplies necessary to grease equipment before the start of the shift. He then enters the shack to turn on the plant. He stands at the door and turns on the equipment in sequential order while watching the equipment through the door. The switches he uses to perform this task are only a foot inside the door. He reverses the process to shut down equipment at the end of the shift. None of these tasks require him to be at the end of the shack where the cited control box is located.

The only times that Rollins is near the cited control box is when there is a problem at the screen and rock screw that causes the heaters to pop out. To reset the heaters, Rollins enters the

shack, walks up to the control box, and turns off the power using the knife-blade switch near the box. He removes the cover for the control box to reset the heaters. After he resets the heaters, he should replace the cover. On September 14, 2004, however, Rollins reestablished power with the knife-blade switch and then started the plant operating using the switches near the door to the shed, as described above, without replacing the cover to the control box.

Rollins' exposure to the hazard was quite low. It was highly unlikely that he would come in contact with energized components within the control box. There were no tripping or stumbling hazards in the area. The bottom of the box was over five feet above the floor. No other miners would have entered the shack, assuming continued normal mine operations. Although there was a slight hazard presented by the violation, it was not reasonably likely that anyone would be injured by the cited condition.

### **B. Citation No. 6153983**

Inspector Willett issued Citation No. 6153983 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.14107(a). The body of the citation states:

A guard was not provided for the drive pulley or counterweight for the rock screen. Material was built up under the drive and counterweight to where they are 6 feet above grade. This exposes a person to the hazard of contacting moving machine parts which could result in crushing or dismembering injuries.

The inspector determined that it was unlikely that someone would be injured as a result of this condition but that, if an injury were to occur, it would be permanently disabling. He determined that the violation was not S&S and that Higman Gravel's negligence was moderate. The cited safety standard provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, . . . and similar moving parts that can cause injury." The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Willett testified that the drive pulley was about eight feet above the ground, but that it was about six feet above material that was built up under the rock screen. (Tr. 26-27, 215; Ex. G-5). The inspector, who is about 6' 3" tall, did not measure the height of the pulley above the built-up material but he stood about three feet away and estimated that the pulley was at eye level. (Tr. 223). The inspector testified that the built up material was rock which had fallen from the screen and that the rock appeared to have been there for "quite some time because it was solid and stable." (Tr. 27-28). He testified that there were no barricades to prevent miners from walking through the area. Willett estimated that built-up material to be about six feet wide and two feet deep. (Tr. 216). The conditions around the counterweight for the pulley, which was on the opposite side of the rock screen, were the same. (Tr. 29-30; Ex. G-6).

Inspector Willett determined that it was unlikely that anyone would be injured by the cited conditions because miners do not normally travel through the area. (Tr. 30-31). He said

that the rock screen is a “wet operation” and that, at the time he wrote the citation, water was running off the sides of the screen. (Tr. 62). He considered the operator’s negligence to be moderate because Justin Higman, the company official who accompanied him on the inspection, was not aware that material had built up in the area. (Tr. 31).

Harold Higman testified that the area cited by Inspector Willett is not a walking or working surface. (Tr. 114-15). Miners cannot walk through the area because the hopper under the screen is in the way. He believes that a miner would have to get on his hands and knees to get through the area. In addition, Higman testified that anyone who traveled under the pulley or counterweight would get a shower from water running off the screen. (Tr. 115; Ex. G-5, G-6). He stated that employees do not walk in the area under the cited pulley and counterweight. (Tr. 119). Spilled rock is usually cleaned up during the shift and “for sure” before the start of the following shift. (Tr. 134). A payloader is used to clean up the material. Higman testified that material does not usually build up to a depth of two feet before it is cleaned up. (Tr. 134). He also testified that such an accumulation can develop in a few hours if there is a problem at the screen. (Tr. 144).

Frank Rollins testified that when the screen became overloaded with rock on September 14, a lot of material fell to the ground. This material piled up to a depth of several feet. (Tr. 151). Rollins testified that he could not reach the pulley or the counterweight without jumping while standing on the accumulations. (Tr. 159). He further testified that nobody ever walks under or near the counterweight or the pulley. He always cleans up accumulations with his payloader and he has never used a shovel to clean up the material. If he can, he will clean up any spills during the day but, if he is too busy loading trucks, he will clean up any spills first thing the following morning. (Tr. 168-69). Any spills in the area will be in a pile rather than flat. (Tr. 197). Justin Higman testified that he could reach the pulley from the top of the material only with a great deal of effort. (Tr. 198).

I find that the Secretary did not establish a violation of the safety standard. Subsection (b) of section 56.14107 provides that “[g]uards shall not be required where exposed moving machine parts are at least seven feet away from walking or working surfaces.” I find that the condition cited by Inspector Willett fits within this exception. There is no dispute that the pulley and counterweight were more than seven feet above the ground. The parties dispute whether they were more than seven feet above the material that had built up under the rock screen. For purposes of this decision, I assume that the distance between the pulley and the counterweight to the top of the built-up material was less than seven feet. I find, however, that these locations were not walking or working surfaces.

The top of the accumulations was not a walking or working surface for a number of reasons. First, the evidence establishes that miners would not have any reason to work or walk through the area. I credit the testimony of Higman Gravel’s witnesses that miners would not want to stand or travel on the accumulations because water rains down from the top of the screen on a fairly constant basis. Anyone in the area would get quite wet. The photographs show water running off both sides of the screen. (Ex. G-5, G-6). In addition, I credit the testimony of

Higman Gravel's witnesses that a miner could not use that route to get from one area of the plant to another without getting on his hands and knees to crawl under equipment. Frank Rollins, the only employee who works around the plant, cleans up accumulations using his payloader. Rollins testified that he tries to clean up the accumulations at least once a shift. He credibly testified that he never uses a shovel to clean up material in the area and that he never enters the area while equipment is running for any other purpose. Thus, I conclude that the nearest possible working or walking surface was, at best, several feet back from the accumulations. A miner working or walking several feet back from the accumulations would be more than seven feet from the pulley and the counter weight.

The Commission interprets this safety standard to "import the concept of reasonable possibility of contact and injury." *Thompson Bros. Coal Co.*, 6 FMSHRC 2094, 2097 (Sept. 1984). In that case, the Commission held that this standard must be interpreted to consider whether there is a "reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness." *Id.* The Commission made clear that citations issued under this standard must be "resolved on a case-by-[case] basis." *Id.* I find that the Secretary did not establish that there was a reasonable possibility of contact because, as stated above, the built-up area under the screen was not a walking or working surface and the nearest possible walking or working surface was more than seven feet away from the pulley and counterweight. There was no risk that anyone stumbling or falling would come into contact with the moving parts or that anyone would make contact due to inattention or careless behavior. Other Commission administrative law judges have vacated citations under similar circumstances. See *Hamilton Pipeline, Inc.*, 24 FMSHRC 915, 922-23 (Oct. 2002) (ALJ); *Chrisman Ready-Mix, Inc.*, 22 FMSHRC 1256, 1259-61 (Oct. 2000) (ALJ); *Allied Custom Gypsum, Inc.*, 22 FMSHRC 654, 657-58 (May 2000) (ALJ); and *Knock's Building Supplies*, 20 FMSHRC 535, 540-41 (May 1998) (ALJ) ("spillage [from a wash screen] did not convert what was not normally a walking or working area into one.")

### **C. Citation No. 6153984**

Inspector Willett issued Citation No. 6153984 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12004. The body of the citation states:

The outer jacket of the power cord to the rock stacker was cut exposing inner conductors to damage. The cut was 3/4 of an inch long and located near the cord hanger, 5 feet high, at the tail pulley of the conveyor. This exposes a person to the hazard of contacting stray electrical current which could result in electrocution.

The inspector determined that it was unlikely that someone would be injured as a result of this condition but that, if an injury were to occur, it could be fatal. He determined that the violation was not S&S and that Higman Gravel's negligence was moderate. The cited safety standard

provides, in part, that “[e]lectrical conductors exposed to mechanical damage shall be protected.” The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Willett issued the citation because the power conductor (the “cord”) was damaged. (Tr. 33; Ex. G-9). The damage appeared to be a half-inch long nick in the outer jacket of the cord. (Tr. 34). The inner conductors were not damaged. He believed that the power cord carried 240 volts. The inspector determined that it was unlikely that anyone would be injured as a result of the cited condition because there was nobody working in the area and no bare electrical conductors were exposed. (Tr. 35). He did not know whether the power cord was live at the time of the inspection, but the stacker was operating. (Tr. 73, 217). Inspector Willett believes that the cord provided power to the stacker. (Tr. 217-18). He considered the operator’s negligence to be moderate because Justin Higman was not aware of the violation.

Harold Higman testified that the power cord was not energized and it was not connected to a power source. (Tr. 120). He stated that the cord had been out of service for years. (Tr. 121). Power to the rock stacker was provided from overhead power lines through a different electrical cord. *Id.* Rollins testified that the power cord was not energized and that the cord had not been used for at least 16 years. (Tr. 161). He also testified that power was supplied to the rock stacker from overhead power lines. *Id.* Justin Higman testified that he was not aware that the stacker did not receive its power from the cited cord at the time of the inspection. (Tr. 203).

I find that the Secretary did not establish a violation. I credit the testimony of Higman Gravel’s witnesses that overhead power lines provided electricity to the rock stacker. The power cord cited by the inspector was not energized and had not been used for years. Although the cited electrical cord was damaged, it had apparently been used when power was supplied to the rock stacker by a portable generator. I hold that, under the circumstances, the cited cord was not an electrical conductor for purposes of the safety standard.

The Secretary questions the testimony of the operator’s witnesses because Inspector Willett had not been advised of this alleged fact at the time of his inspection. Harold Higman usually accompanies MSHA inspectors during inspections of the plant, but he was not available at the time of Inspector Willett’s inspection. Justin Higman is not directly involved in the operation of the plant because he concentrates on sales, marketing, and office work. (Tr. 189). Justin Higman accompanied the inspector on September 14 and I credit his testimony that he was not aware that the cited cord was not used.

The Secretary defines “conductor” as “a material, usually in the form of wire, cable, or bus bar, capable of carrying an electric current.” 30 C.F.R. § 56.2. An argument can be made that, because the cited cord was “capable of carrying electric current,” it was an electrical conductor which had to be protected against mechanical damage despite the fact that it was not being used. Ordinarily, a citation should not be vacated on the basis that a cited electrical cord was not being used at the time of the inspection. In this case, however, the cited cord had not been used for a significant length of time and there was no indication that it would be used in the

future. Rollins testified that he had worked at the plant for 16 years and that he could not recall that the cord had ever been used.

Because the cited electrical cord had not been used for a considerable length of time and it does not appear that it would be used, I find that it no longer functioned as a conductor as that term is defined by MSHA. Thus, the conditions presented did not violate the safety standard.

**D. Citation No. 6153985**

Inspector Willett issued Citation No. 6153985 under section 104(a) of the Mine Act alleging a violation of 30 C.F. R. § 56.12004. The body of the citation states:

The outer jacket to the feed bin conveyor at the Spec Plant was damaged exposing inner conductors to mechanical damage. The damaged area is exposing inner conductors for 1.5 inches. The cord is not energized, but inner conductors are faded from being exposed to the sunlight for a period of time. This exposes a person to the hazard of contacting stray electrical current which could result in electrocution.

The inspector determined that it was unlikely that someone would be injured as a result of this condition but that, if an injury were to occur, it could be fatal. He determined that the violation was not S&S and that Higman Gravel's negligence was moderate. The Secretary proposes a penalty of \$60.00 for this citation.

Inspector Willett issued the citation because the outer jacket of the power cord to the feed bin was damaged. (Tr. 36-37; Ex. G-12). The damage appeared to be a tear about an inch and a half long in the outer jacket of the cord. (Tr. 37). The inner conductors were not damaged but they were faded, which indicated that the condition had not been recently created. Small particles of rock and sand were in the cord. (Tr. 38). The cord was hanging alongside the conveyor. Although the cord was not energized, it controlled the feed bin to the spec plant. A portable generator would have to be started to energize the cord. The inspector determined that it was unlikely that anyone would be injured as a result of the cited condition because the conveyor was not in operation. (Tr. 39). He considered the operator's negligence to be moderate because Justin Higman was not aware of the violation.

Harold Higman testified that the cited power cord was not energized and that the generator which provided power to the cord was out of service because the battery for the generator was dead. (Tr. 122). He stated that the equipment would have been inspected before the conveyor was started. (Tr. 123). Higman testified that the conveyor had not been used for "some time" and it was taken apart and removed from the property shortly after the inspection. He believes that the tear was created by a loader operator when the area around the conveyor was cleaned up the last time it was used. The spec plant was in a separate location from the rest of the plant and it had no "operating association with the other equipment" at the plant. (Tr. 143).

Rollins testified that the spec plant was about 100 feet away from the other equipment. (Tr. 180).

Justin Higman testified that he told Inspector Willett that the spec plant was shut down and was scheduled to be torn down and removed from the plant. (Tr. 204). The spec plant had been out of service for some time. (Tr. 206-07). The spec plant was not tagged out. (Tr. 210). Inspector Willett recalls being told that other equipment at the plant had been abandoned, but he did not believe that this conversation applied to the spec plant. (Tr. 216).

I find that the Secretary did not establish a violation. The spec plant was shut down and was not being used. I credit the testimony of Harold Higman that the battery to the portable generator that supplied power to the cord was dead. The equipment was torn down shortly after the inspection and removed from the property. The cited cord did not function as an electrical conductor at the time of the inspection so the damage to the cord did not present a safety hazard. Inspector Willett recognized that the cord was not energized at the time of his inspection. I find that this cord had not been used for some period of time and there is no evidence that the cord had ever been used to conduct electricity in the damaged condition. My analysis of Citation No. 6153984 set forth above, also applies to this citation.

**E. Citation Nos. 6153986, 6153987, and 6153988**

Higman Gravel agreed to withdraw its contest of these citations at the hearing. As a consequence, these citations are affirmed as written.

**II. APPROPRIATE CIVIL PENALTIES**

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. The IA Portable #1 has a history of 12 citations issued during the 24 months preceding the inspection. (Ex. G-1). Higman Gravel is a small operator and the IA Portable #1 is a small mine. All of the violations were abated in good faith. The penalties assessed in this decision will not have an adverse effect on Higman Gravel's ability to continue in business. With respect to Citation No. 6153982, the gravity was non-serious and the negligence was moderate. With respect to the remaining citations, the gravity and negligence are as set forth in the citations. Based on the penalty criteria, I find that the penalties set forth below are appropriate.

### III. ORDER

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

<u>Citation No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
6153982	56.12032	\$60.00
6153983	56.14107(a)	Vacated
6153984	56.12004	Vacated
6153985	56.12004	Vacated
6153986	56.14107(a)	60.00
6153987	47.44(b)	60.00
6153988	56.12004	60.00

Accordingly, the citations contested in these cases are **AFFIRMED**, **MODIFIED**, or **VACATED** as set forth above and Higman Sand & Gravel, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$240.00 within 30 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

Distribution:

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