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SOL (MSHA) V. A.J. GILBERT CONSTRUCTION  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
PETITIONER

Civil Penalty Proceeding  
  
Docket No. DENV 78-566-PM  
A.O. No. 02-01843-05001

v.

Don Luis Pit Mine

A. J. GILBERT CONSTRUCTION CO.,  
RESPONDENT

DECISION

Appearances: Marshall P. Salzman, Trial Attorney, Office of the  
Solicitor, U.S. Department of Labor, San Francisco,  
California, for the petitioner;  
A. J. Gilbert III, Bizbee, Arizona, for the  
respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a petition for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), on September 21, 1978, charging the respondent with two alleged violations of the Act and implementing mandatory safety standards. Respondent filed a notice of contest and requested an opportunity for a hearing in the matter. A hearing was conducted in Tucson, Arizona, on March 6, 1979, the parties appeared and participated therein, and waived the filing of posthearing proposed findings and conclusions.

Issues

The issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalty filed in this proceeding, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

#### Applicable Statutory and Regulatory Provisions

1. The Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) et seq.
2. Section 110(a) of the Act, 30 U.S.C. 820(a).
3. Part 2700, Title 29, Code of Federal Regulations, 43 Fed Reg. 10320 et seq. (March 10, 1978), the applicable rules and procedures concerning mine health and safety hearings.

#### DISCUSSION

Section 104(b) Citation No. 376649, dated June 15, 1978, cites a violation of 30 CFR 56.9-87, and states as follows: "The backup warning device on the L4 front-end loader was not working. This loader was being operated in and around the plant area in a backward as much as a forward operation."

30 CFR 56.9-87 provides:

Mandatory. Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The inspector fixed the abatement time as 3 p.m., June 15, 1978, and the termination notice reflects that the condition cited was abated at 1 p.m. on June 15, after a new backup signal was installed.

Section 104(a) Citation No. 376650, dated June 15, 1978, cites a violation of 30 CFR 56.11-2, and states as follows: "The elevated walkway along the crusher above the flywheel that employees use to get to the screen was not provided with handrails."

30 CFR 56.11-2, provides: "Mandatory, crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided."

The inspector fixed the abatement time as 7 a.m., June 15, 1978, and the termination notice reflects that the condition was abated at noon time, June 15, after handrails were manufactured and installed during lunch.

#### Stipulations

The parties stipulated to the following:

1. Respondent is subject to the jurisdiction of the Act and the Administrative Law Judge (Tr. 6).
2. Respondent is a small operator and the initial proposed civil penalties, if finalized and levied, will not adversely affect respondent's ability to remain in business (Tr. 5).
3. Respondent has no prior history of violations (Tr. 6).
4. The conditions cited were abated within the time fixed by the inspector who issued the citations (Tr. 6).

#### Testimony and Evidence Adduced by Petitioner

MSHA inspector Robert M. Hunter confirmed that he conducted an inspection at the mine in question on June 15, 1978, and that he issued the two citations in issue in this proceeding. He described the mining operation conducted by the respondent, and indicated that it is a surface operation entailing the removal of overburden and the mining of silica.

With regard to the citation concerning the inoperative backup alarm on the front-end loader, inspector Hunter testified that he observed the loader in operation, that it operated in a backward motion 50 percent of the time, and forward for 50 percent of the time. The operator had obstructed vision when backing up, and this was due to the physical configuration of the loader. Although he observed no one in close proximity to the machine while it was in operation, since the machine was backing up for a distance of some 200 to 300 feet without an operative backup alarm, he considered the violation to be serious. He also believed that the mine foreman should have been aware of the condition cited because the loader was in operation and the lack of an operative audible alarm was readily apparent. Once the condition was called to the attention of the operator, the loader was immediately taken out of service, taken to the shop, and the condition was corrected before the time fixed for abatement. Under the circumstances, he believed the operator abated the condition rapidly and exercised good faith in this regard (Tr. 10-15).

Regarding the handrail violation, Inspector Hunter testified that the elevated walkway in question was approximately 5 feet long,

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18 to 24 inches wide, and some 15 feet from the ground. Normally, one employee would use the walkway, but on the day in question he observed two employees using it. He believed the lack of a handrail was serious because an employee using the walkway could slip and fall to the ground sustaining injuries or possible death. Since the walk-way was elevated and employees used it, the operator should have been aware of the requirement that it be provided with a handrail. He indicated that the condition was rapidly abated and that the operator immediately called a welder and had a handrail installed immediately during the lunch hour on the day the citation issued (Tr. 20-28).

Inspector Hunter testified that inspections at the respondent's operation began in March 1978, and that respondent has had no previous citations. He also indicated that the respondent is aware of the need to conduct a safe operation, is cooperative, and has made a good faith effort to comply with all applicable safety regulations.

#### Testimony Adduced by the Respondent

A. J. Gilbert III, respondent's vice-president, testified that his company is a small operation engaged in a crushed stone operation in Bisbee, Arizona, and that the operation includes the mining of silica and silica flux which is processed and sold to several smelters in the state. He stated that his company employs four to six permanent employees, but has had as many as thirty on the payroll on a seasonal basis, depending on existing work demands and contracts for the sale of his products.

Regarding the citations in question, Mr. Gilbert candidly conceded that mine management should have been aware of the conditions cited. However, he stated that he does not employ a safety director, and due to the fact that the law in question is new and that his operation is also inspected by state inspectors, he is not as fully informed as he should be with regard to all of the Federal requirements of the Act. He also indicated that he has always welcomed Federal inspectors since they do present an opportunity for him to be advised as to what the requirements are, and that he is aware of the importance of insuring a safe working environment for his operations (Tr. 30-32).

Regarding the audible alarm citation, Mr. Gilbert stated that while he was not present at the time the citation issued, he did not believe that the distance allegedly backed up by the loader was 300 to 400 feet as testified to by the inspector was accurate. He believed the distance was less than 300 feet. He also indicated that in the usual and normal course of loading operations, the loader operator will only backup for a short distance and then travel in a forward direction along a regular route which is known by all of the employees at the site. He also indicated that the loader operator is an experienced worker and that these factors mitigate the seriousness of the violation (Tr. 16-18).

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With respect to the lack of a handrail at the crusher, Mr. Gilbert testified that the walkway is elevated some 9 to 10 feet and that due to the fact that a new protective cage had recently been installed around the crusher, employees who were required to be in the area had to travel around the walkway, and that this was not usually a normal practice. He conceded that the walkway was elevated and that a handrail should have been installed to prevent one from falling to the ground and possibly sustaining injuries and that the failure to install a handrail was an oversight which apparently had not been considered at the time the work was performed on the crusher (Tr. 32).

### Findings and Conclusions

#### Fact of Violations

Respondent did not rebut the conditions cited by Inspector Hunter, and stipulated that the citations were duly served by Mr. Hunter in his capacity as an authorized representative of the Secretary. I find that the testimony and evidence adduced by the petitioner supports a finding that the conditions cited were in fact present on the day in question and that they constitute violations of the mandatory safety standards cited in Citation Nos. 376649 and 376650 as issued by Inspector Hunter on June 15, 1978.

#### Negligence

I find that the respondent knew or should have known of the conditions cited and that it failed to exercise reasonable care to prevent the conditions leading to the two violations. Under the circumstances, I conclude that this constitutes ordinary negligence.

#### Gravity

Although the inspector testified that no employees were within close proximity of the loader, and that the chances of an accident were slim, the fact is that he did observe a helper in the area where the loader was operating (Tr. 20), observed the loader back up for some distance, and he indicated that the loader operated had an obstructed view to the rear. In the circumstances, I find that the violation (376649) was serious.

Regarding the handrail citation (376650), I find that the 18 to 24 inches walkway elevated some 10 to 15 feet off the ground without a handrail presented a serious falling hazard to the men who used it. Accordingly, I find the violation was serious.

#### Good Faith Abatement

I find that the respondent abated the conditions rapidly and in good faith.

Size of Business and Effect of Penalty on Respondent's Ability to

Remain in Business

The parties stipulated that respondent is a small operator and I adopt this as my finding. I also find that the penalties assessed by me in this matter will not adversely affect respondent's ability to remain in business.

Penalty Assessments

It is clear from the evidence presented in this case that the respondent violated the two safety standards cited. While the violations were serious and were caused by the respondent's ordinary negligence, the evidence also establishes that the respondent is a very small operator, has no prior history of violations, and abated the conditions rapidly. With regard to the handrail citation, respondent took extraordinary measures to achieve abatement in the shortest possible time. In the circumstances, I find and conclude that that the penalties initially assessed in this proceeding are appropriate and they are affirmed and adopted as my civil penalty assessments for the two citations namely \$48 for Citation No. 376649 and \$56 for Citation No. 376650.

ORDER

Respondent is ordered to pay the penalties assessed, in the amount of \$104 within thirty (30) days of the date of this order.

George A. Koutras  
Administrative Law Judge