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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. CENT 79-13-M A.C. No. 23-00254-05001F
v.	
WELTON GRAVEL AND LIMESTONE COMPANY, RESPONDENT	Ava Quarry

DECISION AND ORDER
APPROVING
SETTLEMENT OF CIVIL PENALTY PROCEEDING

Appearances: Robert S. Bass, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
James E. Curry, Esq., Ava, Missouri, for Respondent

Before: Administrative Law Judge Michels

The above-captioned civil penalty proceeding was brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petition for assessment of civil penalties was filed by the Mine Safety and Health Administration on April 3, 1979, and Respondent filed a timely answer thereafter. A hearing was held on September 5, 1979, in Kansas City, Missouri, at which both parties were represented by counsel.

At the beginning of the hearing, counsel for Petitioner moved for the court to approve a settlement for the two violations which are docketed in this case. (Footnote 1) As grounds for the proposed settlement, counsel stated the following:

MR. BASS: The penalty proposed for 191425(d) was $3,000.00. The parties have reached an agreement in which Respondent agrees to pay $1,500.00 for that violation. The proposed penalty for 191425(g) is $5,000.00. The Respondent has agreed, and I've accepted their offer of, to pay $3,000.00. Both of these violations came under a general classification of electrical violations.

The violation in 191425(d) is a violation of 30 C.F.R. 56.12-8; and that specific standard requires that power cables, going into metal boxes and other enclosures, have bushings or fittings, some kind of insulation around the particular conduit; [and] in this case [the cable] did not have a, I think it's referred to as a squeeze connector or a bushing around it.

Part of the insulation around the live cable came in contact with the metal box, starter box, on a conveyer and thereby energized the conveyer, the framework around the conveyer.

That particular violation, as I said, we have agreed to settle for $1,500.00. It's the opinion of the mine inspector, Ernest Scott, that the particular violation was the result of the ordinary negligence of the Respondent; and that it was not nearly as directly related to the fatality in the case as the other violation.

One of the other reasons that we've, that I've agreed to accept less than the full amount for this violation is that the Office of Assessments, who I personally consulted yesterday, had not given any credit at all to Respondent for good faith in his abatement of the violation.

It has, it's brought out in the file that--and I believe Your Honor has a copy of the prehearing response filed by Mr. Curry * * * it's brought out in there that immediately after the withdrawal order was issued to Respondent, Respondent caused the plant to be shut down for a period of approximately two months, during which time Respondent expended around $22,000.00 to have the entire plant rewired. Mr. Scott personally went back to the plant and viewed what had been done; and he can confirm that their steps were far and above that which was required to abate the violation. They could have very easily have done it for a very small outlay of money; but instead they chose to really reshape the plant up, converted from their diesel power generator to utility

power; and they changed the method. I think they went from a three-phase Y to [a corner crowned delta system.] * * * I confirmed with him [Mr. Scott] this morning that the plant is in excellent shape from an electrical standpoint; and Mr. Scott is an electrician.

One of the other factors we consider [in] mitigation is the prior history. Mr. Welton [Respondent's owner] has not been cited for any violations of the Act prior to this order. Specifically, he has been inspected on several occasions, by employees of what used to be MESA, under the Department of Interior; and never has an electrical violation been pointed out to him concerning, that concern the starter box or the grounding requirements at his plant.

So we believe those factors, together with the fact that the Office of Assessment didn't properly evaluate good faith, lend credence to a lesser penalty than was originally proposed. We both believe, all the parties believe, that this would effectuate the purposes of the Act. Mr. Welton has come into compliance with the mandatory standards and has demonstrated some very, very good faith in his abatement requirement, abatement procedures; and I believe that the public interest would be served by accepting a $1,500.00 penalty for this violation.

With respect to 191425(g), which is a violation of 30 C.F.R. 56.12-25, that standard requires that the, that electrical equipment, or systems such as the one in this case, be grounded. Now, Mr. Welton had a type of grounding system in effect when the accident occurred. That [system] is no longer approved by MSHA. It had been inspected prior, on previous occasions by MESA; and * * * there had never been any indication there was anything wrong with it. It consisted of having a lead wire coming off the framework of the generator and attached to a coal-metal pipe driven into the ground.

Now, in this particular case, that system didn't prove to be effective because there, the framework of the side conveyer did become energized and an employee was electrocuted when he came into contact with it.

It's Mr. Scott's opinion that this violation was far more severe than the other violation. Consequently, the higher penalty that was proposed. The parties agreed that the degree of negligence in this particular case was greater than ordinary negligence. However, there are

mitigating circumstances, as I've already outlined. He had been inspected before by officials at MESA; and this system had been approved.

It's our opinion that this indicates that it wasn't a willful negligence on the part of Mr. Welton to do anything, that the system is no longer approved. They are not disputing that there's a violation; but we don't believe the degree of negligence goes so far as to be a willful conduct on his part.

We also believe that the element of good faith was not properly evaluated, as I've previously outlined. The company did spend a great deal of time and a great amount of money to get things in shape to protect its employees in the future; and we'd also submit that the gravity is not -- even though there was a fatality in this case -- Mr. Scott would support me in this, that * * * it was almost like a fluke accident, this wire that came in contact with the frame, with the box, that caused the frame to be energized.

When he came out the next day, it wasn't in contact with it any more. It was just a fluke accident that caused -- due to the vibration of the equipment -- caused it to make contact, an arc, that the condition could have existed for a long period of time and no injury have occurred. As a matter of fact, employees have been climbing all over this piece of equipment during the same day that the employee, who was killed, suffered his fatal injuries. So it was merely an unfortunate fortuitous event that the wire contacted the metal box the particular time the employee started to step up onto the framework.

It's our opinion that payment of the $3,000.00 penalty is in the public interest and that with respect to both of these violations, we would submit that [consideration should be given to the financial condition of the company.] Mr. Welton is the sole proprietor. He operates the Ava Quarry and another small quarry, both of which qualify as the smallest operations that the Act recognizes.

His profit for the past year was very low and payment of the full $8,000.00 for these two cases would amount to about 80 or 90 percent of his profit for the past year; and due to his financial condition, and the other factors I've outlined, we believe that the settlement is in the

~1697
public interest and will effectuate the purposes of the Act; and we would request that you approve it.

(Tr. 4-10).

Following this, Respondent's counsel elaborated on the company's financial condition:

> MR. CURRY: May I? I want to commend Mr. Bass for his very fair statement of the facts, as I understand them. I would go one step further with respect to something about the company.
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> As Mr. Bass indicated, the company is a sole proprietorship, owned solely by Mr. Welton, who, some two years ago, purchased the interest of a deceased partner. Up until that time, this business had been operated as a partnership. He went into considerable debt at that time in order to accomplish the take-over of a business; and just before the hearing today, in that connection, I asked him if he could tell me what his debts were at this time.
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> I thought it might have some bearing on this matter; and he tells me that he now owes C.I.T. in the neighborhood of $100,000.00. He owes the Citizen Bank at Ava approximately -- these are not exact figures -- $40,000.00; and, then, Production Credit Association, he owes the sum of $300,000.00.
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> Now, that last item is not in connection with this business. He has a farm and -- which his wife operates -- and that last item was in connection with the operation of the farm.
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> This business is a seasonal business in that the chief customer of Welton Gravel is the State of Missouri, purchasing aggregate chips and gravel and crushed stone for the construction of the system of state highways in Missouri and down in that area. Those purchases are made on a bid basis. Mr. Welton has to bid against other gravel contractors to secure these jobs.
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> Now, the reason I mention that at this time, Your Honor, is the fact that there are no bid lettings in the offing in Missouri at this time, for the balance of this year; and possibly for most of next year.

(Tr. 10-11).

~1698

After considering the parties' representations, the following decision was delivered from the bench approving the proposed settlement:

> THE COURT: Well, thank you very much, gentlemen, for the clear and comprehensive recitation of all the significant elements. I agree that the settlement arrived at here is wholly appropriate. As I understand it, and I'll just restate it for the record, the parties have agreed -- and you may affirm after I finish -- have agreed that in the case of 191425(d), in which case an assessment of $3,000.00 was originally levied, to settle for the sum of $1,500.00; and in the case of 191425(g), which was originally assessed at $5,000.00, the parties have agreed to settle for $3,000.00; and for the reasons stated by the parties on this record, I accept that settlement and those sums as being appropriate.

(Tr. 12).

This decision is hereby AFFIRMED.

ORDER

It is ordered that Respondent pay the agreed-upon penalties of $4,500 within 60 days of the date of this decision. (Footnote 2)

Franklin P. Michels
Administrative Law Judge

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1 Exhibit "A" of the petition for assessment of civil penalties listed six other alleged violations besides the two involved in this case. At the hearing, Petitioner advised that these other violations had been settled at the assessment conference level. Thus, the petition had been incorrect in so listing these (Tr. 3-4).

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2 This time period was requested by the parties at the hearing (Tr. 12-13).