

CCASE:  
SOL (MSHA) V. ASARCO INC.  
DDATE:  
19800603  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-274-M

v.

A/O CONTROL NO. 02-00855-05007

ASARCO, INCORPORATED,

MINE: MISSION MILL

RESPONDENT

DECISION

Appearances: Judith G. Vogel, Esq., Office of Daniel W. Teehan,  
Regional Solicitor, United States Department of  
Labor, 450 Golden Gate Avenue, Box 36017, Room  
11071 Federal Building, San Francisco, California  
94102 William O. Hart, Esq., ASARCO, Incorporated,  
120 Broadway, Room 3719, New York, New York 10005

Before: Judge John J. Morris

STATEMENT OF THE CASE

In this case Petitioner seeks an order affirming a citation  
and assessing a civil penalty therefor. The issues arise under  
the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.  
(as amended, 1977),

CITATION NO. 378557

It is undisputed that a violation of 30 CFR 55.16-6(FOOTNOTE 1)  
occurred at ASARCO's mine on February 27, 1979. The parties also  
agree that an employee of Peco Steel, an independent contractor,  
was responsible for the violation (Stipulated Facts).

ISSUE

The single issue is whether ASARCO can be held liable for  
the violation herein.

CONTENTIONS

ASARCO contends it cannot be held responsible for the actions of an independent contractor. Further, ASARCO argues that Secretary v. Old Ben Coal Company VINC 79-119-P (October 1979) is not applicable to this case.

DISCUSSION

For the reasons hereafter stated, the citation and penalty are affirmed.

ASARCO's initial argument seeks to reargue the merits of Old Ben. The writer lacks the authority to overturn Commission precedent. Cf Duval Corporation, WEST 79-194-M (March 1980).

ASARCO's second contention is that the citation should be vacated in view of the failure of the Secretary to have implemented rules to proceed against independent contractors on mine property at the time the citation was issued. ASARCO points out that the citation in Old Ben was issued a mere 33 days after the Act became effective; the citation here was issued February 27, 1979, some 11 months after the Act became effective. Respondent contends that this distinction negates the applicability of Old Ben to this case.

The difficulty with ASARCO's position is that in Old Ben the Commission in effect approved the action of the Secretary in filing his proposed regulations on August 14, 1979. Any charge sounding in the nature of laches against the Secretary could not apply to a citation issued before August 1979. Specifically, it could not apply to this citation issued in February 1979.

The ruling of the Commission in Old Ben is clear.

If the Secretary unduly prolongs a policy that prohibits direct enforcement of the Act against contractors, he will be disregarding the intent of Congress.

The time appears to be approaching when the Old Ben doctrine will eviscerate rather than insulate the Secretary.

For the foregoing reasons, I conclude that Citation 378557 and the proposed

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penalty(FOOTNOTE 2) should be affirmed.

CITATIONS NOT LITIGATED

A motion to dismiss the proposed penalty assessments for Citation Nos. 378543, 378547, 378549, 378551, and 378555 was filed by Petitioner on November 2, 1979. Good cause having been shown, such motion is granted.

On the uncontroverted record and based on the conclusions stated herein, I enter the following:

ORDER

1. Citation 378557 and the proposed penalty therefor are AFFIRMED.

2. Citations 378543, 378547, 378549, 378551, 378555 and all proposed penalties therefor are VACATED.

John J. Morris  
Administrative Law Judge

~FOOTNOTE 1

30 CFR 55.16-6. Mandatory. Valves on compressed gas cylinders shall be protected by covers when being transported or stored, and by a safe location when the cylinders are in use.

~FOOTNOTE 2

Post trial briefs of the parties.