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SOL (MSHA) V. MORTEN SALT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. CENT 79-48-M A.O. No. 16-00512-05005
v.	Docket No. DENV 79-161-PM A.O. No. 16-00239-05001
MORTON SALT DIVISION, MORTON-NORWICH PRODUCTS, INC., RESPONDENT	Docket No. DENV 79-423-PM A.O. No. 16-00512-05003 Weeks Island Mine & Mill

DECISIONS

Appearances: Douglas N. White, Attorney, U.S. Department of Labor,
Dallas, Texas, for the petitioner James M. Day,
Esq., Washington, D.C. for the respondent

Before: Judge Koutras

Statement of the Proceedings

These consolidated civil penalty proceedings concern proposals 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). Respondent filed timely answers contesting the alleged violations and its defense is based on the assertion that the citations for which civil penalties are sought were in fact committed by an independent contractor, Frontier-Kemper Contractors (FKC), and that petitioner's refusal to cite the contractor is arbitrary, capricious, unreasonable, and contrary to law.

After initial discovery, exchange of interrogatories, and rulings by me on several motions filed by the respondent, the cases were docketed for hearings at Baton Rouge, Louisiana, June 5, 1980, and the parties were so advised by notice of hearings issued by me on March 11, 1980. Subsequently, the parties advised me that the cases could be disposed by stipulation and agreement without the necessity for an evidentiary hearing. Under the circumstances, I issued an order on April 29, 1980, continuing the hearings

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and directed the parties to submit their stipulations and arguments in support of their respective positions. Subsequently, by joint motion and stipulation filed May 19, 1980, the parties moved for summary decisions in two of the dockets, CENT 79-48-M and DENV 79-423-PM, and filed a settlement proposal in Docket No. DENV 79-161-PM.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulation as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

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 Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).
3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Stipulations

The parties are in agreement that there is no genuine issue as to any material fact in these proceedings and that all pertinent facts have been agreed to by stipulation, pertinent portions of which are as follows:

1. Respondent, Morton Salt Division, Morton-Norwich Products, Inc., is the operator of salt mining operations at Weeks Island, Louisiana, the products of which enter and affect commerce, and respondent is an operator as defined under the Act.

2. Frontier-Kemper Contractors ("FKC") is an independent contractor hired by Morton to perform services and construction; namely, to sink two shafts and perform certain development work for a new mine at Weeks Island.

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3. During the course of an inspection of Morton's Weeks Island mining operations, MSHA issued the subject citations to Morton based on violations of mandatory health and safety standards in 30 C.F.R. Part 57.

4. All violations specified in the citations were the result of acts or omissions committed by FKC employees during the construction of the new mine shafts in performance of development work.

5. The only employees exposed to the violations set forth in the citations were employees of FKC; no Morton employees were exposed to the hazards caused by these violations.

6. All violations specified in the citations were corrected or abated by FKC.

7. Morton did not control the day-to-day activities of FKC, and the contract between Morton and FKC specified that FKC would control the details of the work.

8. All of the citations were issued by MSHA against Morton and the proposed civil penalty assessments for said citations were also issued against Morton.

9. Morton agrees that the conditions specified in the citations constituted violations of the mandatory health and safety standards specified in each respective citation.

10. Although the parties agree that the facts concerning negligence and gravity, as set forth in attachment F to the stipulation are correct, Morton denies that it was responsible for the acts of omissions which led to these violations.

11. The parties agree that petitioner's proposed assessments are proper and appropriate under the conditions which existed at the time the violations were committed and that said proposed penalties took into consideration the six statutory criteria set forth in the Act. Nevertheless, Morton asserts that such penalties should be assessed against FKC and not against Morton.

12. The size of Morton for the year preceding the issuance of the subject citations (1977) was 2,677,189 man-hours worked. The size of the Week Island Mine & Mill for the year preceding the issuance of the subject citations (1977) was 4,504,918 man-hours worked.

13. For the period prior to March 1978, the subject mine had had no assessed violations and no inspection days. For the period preceding August 1978, the subject mine had eight assessed violations and had had 31 inspection days. For the period preceding October 1978, the subject mine had nine assessed violations and had had 37 inspection days. These facts are submitted as a stipulation of the history of violations as said history existed at the time the citations were issued.

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14. A high degree of good faith was exhibited with respect to all of the citations in that each of the violations were corrected and abated within the specified time and rapid compliance was achieved.

15. Payment of the proposed assessed penalties will not adversely affect Morton's ability to continue in business.

Findings and Conclusions

The Independent Contractor Issue

Respondent takes the position that the citations in these proceedings should have issued to the independent contractor and that it is improper and contrary to law to cite the respondent owner-operator for the acts attributable to the contractor. Further, respondent's attempts to interplead the contractor as a party-respondent in these proceedings and its requests that I accept the contractor's agreement to pay the civil penalties so that the citations will not be part of respondent's history of violations have all been rejected by me and my rulings in this regard are a matter of record.

It seems clear to me from the facts presented in these proceedings that at the time the citations were issued and the petitions for assessment were filed, MSHA's enforcement policy was that owner-operators were liable for the violations of their independent contractors. This policy of enforcement has been affirmed by the Commission, Old Ben Coal Company, VINC 79-119 (October 29, 1979), and Monterey Coal Company, HOPE 78-469 and 78-476 (November 13, 1979), and I conclude that these decisions are controlling and dispositive of the independent contractor defense raised by the respondent in these proceedings. Accordingly, respondent's defense in this regard is again rejected, and I conclude and find that respondent is liable for the citations and the resulting civil penalties assessed for the citations in issue in these proceedings. Although I agree with many of the arguments stated by respondent's counsel in his posthearing brief filed on June 4, 1980, concerning MSHA's rigid enforcement policy concerning contractors and have stated my position on this issue in a number of "independent-contractor" decisions, I am constrained to follow the present and controlling decisions of the Commission on this issue.

In view of the foregoing, respondent's motions for reconsideration of my previous rulings concerning its motion to dismiss, to implead the contractor as a third-party respondent, and to assess the penalties imposed against the contractor rather than the respondent are DENIED, and my previous rulings and reasons of record for such denials are herein REAFFIRMED and incorporated by reference.

Docket No. CENT 79-48-M

This docket deals with the following citations:

Citation No.

Date

30 C.F.R.
Section

156452

10/18/78

57.17-10

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156453	10/18/78	57.17-10
156454	10/18/78	57.19-100
156547	10/18/78	57.17-10
156455	10/19/78	57.12-16
156456	10/19/78	57.12-16
156508	10/19/78	57.9-40(c)
156510	10/19/78	57.9-40(c)
156551	10/19/78	57.3-22
156553	10/23/78	57.9-40(c)
156509	10/24/78	57.19-120

Fact of Violations

Aside from the independent contractor defense advanced by the respondent in these proceedings, respondent does not dispute the fact that the conditions or practices described by the inspectors on the face of the citations issued in these proceedings constitute violations of the cited mandatory safety standards. Accordingly, I find that the fact of violation as to each of the citations enumerated above has been established and they are all AFFIRMED.

Gravity and Negligence

The parties stipulated as follows with respect to the questions of gravity and negligence:

Citation Number	Gravity	Negligence
156452	Only one employee exposed; improbable that an injury would result; no lost work days expected	Low ordinary negligence; failure to assure that all employees had their lamps underground
156453	Only one employee exposed; improbable that accident would occur; no lost work days expected	Low ordinary negligence; lack of cap lamp could have been observed
156454	One employee exposed; serious injury could result; improbable that accident would occur because of other safeguards	Low ordinary negligence; superintendent could have seen condition
156547	One employee exposed; Power failure could make it difficult for employee to see how to get to safe location; serious injury could result	Ordinary negligence; condition was obvious to supervisor
156455	Two employees exposed; permanently disabling injury could result;	Low ordinary negligence; supervisors should have assured that power was

	improbable that accident would occur	turned off
156456	More than two employees exposed; minor injuries could result; very improbable that accident would occur	Low ordinary negligence; electrical switches were off, but supervisor had not assured of lock-out
156508	Two employees exposed; lost-time injury could result; accident would probably occur	Very little negligence; violation was not predicted and employees were violating safety rules
156510	Two employees exposed; lost-time injury could result; probable that accident would occur	Supervisor may have been aware; actions were in violation of safety rules
156551	One employee exposed; lost-time injuries could result; probable that accident could occur	Low ordinary negligence; violation was in area which was obvious to supervisors
156553	One employee exposed; lost-time injuries could result; probable that accident could occur	Low ordinary negligence employee was violating safety rule
156509	Up to 20 employees exposed; serious injuries could result; probable that accident could occur	Supervisor conducted inspections of shaft; however, provisions were not made to check areas which were not clearly visible

Based on the stipulations by the parties, I conclude and find that all of the citations in question were serious and that each resulted in ordinary negligence. In assessing the penalties for the citations, I have considered the fact that all of the citations resulted from acts committed by the independent contractor who had exclusive control over the worksite. I have also considered the fact that respondent's employees were not exposed to any of the hazards resulting from the cited conditions and practices. In these circumstances, I cannot conclude that the contractor's negligence should be imputed to the respondent or that the assessments levied against the respondent should be increased as a result of acts committed by the contractor.

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Docket No. DENV 79-423-PM

This docket deals with the following two citations:

Citation No.	Date	30 C.F.R. Section
153272	3/29/78	57.5-5
156490	8/10/78	57.6-30

Fact of Violations

Respondent concedes that the conditions described by the inspectors who issued the citations in question constitute violations of the cited mandatory health and safety standards. Accordingly, I find that the fact of violation has been established as to each citation and they are AFFIRMED. I take note of the fact that respondent still disputes the applicability of 30 C.F.R. 57.5-5 to salt dust, and has reserved its right to challenge the application and validity of that standard in other proceedings which may be brought against it by the petitioner.

Gravity and Negligence

The parties stipulated as follows with respect to the factors of gravity and negligence:

Citation Number	Gravity	Negligence
153272	One employee exposed; improbable that illness would result; effects of salt dust are disputed	Hazard was not easily ascertained; no previous overexposure
156490	One to four employees exposed; serious injuries or death could result if explosion occurs	Should have been readily observed by supervisors; area is used during each shift

Based on the stipulations by the parties, I conclude and find that the citations in question were serious and that each resulted from ordinary negligence. However, as indicated in the previous dockets, I cannot conclude that the contractor's negligence should be charged to the respondent.

Size of Business and Effect of Civil Penalties Assessed on the Respondent's Ability to Continue in Business

Based on the information presented as part of the stipulated facts, I conclude that respondent is a large operator and find that the civil penalties assessed will not adversely affect respondent's ability to remain in business (applicable to both Docket Nos. CENT 79-48-M and DENV 79-423-PM). I also take note of the fact that the parties are in agreement that the civil penalties proposed by the petitioner in these proceedings are

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and appropriate under the conditions which existed at the time the violations were committed and that the proposed assessments took into account the six statutory criteria set forth in section 110(i) of the Act.

Good Faith Compliance

The parties stipulated that a high degree of good faith was exhibited with respect to the abatement of the cited violations and that each condition or practice cited as a violation was corrected and abated within the specified time and rapid compliance was achieved. I adopt this stipulation as my finding with respect to Docket Nos. CENT 79-48-M and DENV 79-423-PM.

History of Prior Violations

Based on the stipulated prior history of violations by the respondent during all times pertinent to these proceedings (Stipulation No. 13 above), I cannot conclude that respondent's prior history is such as to warrant any increase in the assessed civil penalties levied in Docket Nos. CENT 79-48-M, and DENV 79-423-PM.

Docket No. DENV 79-161-M

This docket concerns the following citations:

Citation	Date	30 C.F.R. Section
153284	3/16/78	57.11-58
153264	3/21/78	57.15-7
153265	3/28/78	57.18-10
153325	3/28/78	57.11-12

By order issued on April 24, 1979, I dismissed that portion of the petitioner's civil penalty proposal which sought civil penalties against respondent Morton Salt for Citation Nos. 153264, 153265, and 153325, and my reasons for the dismissal are set forth in detail in the order which is a matter of record in these proceedings. A subsequent appeal taken by the petitioner with respect to my dismissal of its pleadings was denied by the Commission on June 4, 1979, on the ground that my order was not a final decision and that the appeal was premature.

With respect to the remaining Citation No. 153283, issued March 16, 1978, alleging a violation of 30 C.F.R. 57.11-58, the parties now seek my approval for a proposed settlement disposition for the citation.

Respondent Morton Salt has accepted liability for this violation and has agreed to pay the full initial assessment of \$34 in satisfaction of the citation.

After consideration of the arguments presented in support of the proposed settlement disposition of Citation No. 153283,

including the information submitted by the parties concerning the six statutory factors set forth

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in section 110(1) of the Act, I conclude and find that the proposed settlement is reasonable, and pursuant to 29 C.F.R. 2700.30, IT IS APPROVED.

ORDER

Respondent is ordered to pay a civil penalty in the amount of \$34 in satisfaction of Citation No. 153283, payment to be made within thirty (30) days of the date of the decision and order. With respect to the remaining three citations, my previous dismissal of petitioner's proposed assessments as noted above is hereby REAFFIRMED.

Penalty Assessments

On the basis of the foregoing findings and conclusions made in Dockets No. CENT 79-48-M and DENV 79-423-PM, and after review of all of the circumstances, including the conditions and practices cited as violations, I find that the initial assessments proposed by the petitioner are appropriate and I accept them as the civil penalties which should be assessed in the proceedings, and they are as follows:

Docket No. CENT 79-48-M

Citation No.	Date	30 C.F.R. Section	Assessment
156452	10/18/78	57.17-10	\$44
156453	10/18/78	57.17-10	44
156454	10/18/78	57.19-100	84
156547	10/18/78	57.17-10	44
156455	10/19/78	57.12-16	52
156456	10/19/78	57.12-16	38
156508	10/19/78	57.9-40(c)	72
156510	10/19/78	57.9-40(c)	84
156551	10/19/78	57.3-22	52
156553	10/23/78	57.9-40(c)	72
156509	10/24/78	57.19-120	66

Docket No. DENV 79-423-PM

Citation No.	Date	30 C.F.R. Section	Assessment
153272	3/29/78	57.5-5	\$48
156490	8/10/78	57.6-30	98

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ORDER

The respondent IS ORDERED to pay the civil penalties assessed by me in these proceedings, in the amounts shown above, within thirty (30) days of the date of these decisions. Upon receipt of payment by MSHA, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge