

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

2 JUL 1980

_____)	
SECRETARY OF LABOR,)	
MINE SAFETY AND)	
HEALTH ADMINISTRATION)	
(MSHA),)	CIVIL PENALTY PROCEEDING
)	
	Petitioner,)	DOCKET NO. CENT 79-174-M,
)	A/O No. 41-01505-05005
v.)	DOCKET NO. CENT 79-210-M
)	A/O No. 41-01505-05006
)	DOCKET NO. CENT 79-356-M
BORSBERRY CONSTRUCTION COMPANY, INC.,))	A/O No. 41-01505-05008H
Respondent.))	Mine: El Paso Quarry and Plant
)	
_____)	

DECISION AND ORDEK

APPEARANCES: Fred J. Haas, Esq., Office of the Solicitor, United States Department of Labor, Dallas, Texas, for the Petitioner,

James H. Lockett, Esq., El Paso, Texas, for the Respondent.

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

These proceedings are brought pursuant to section 110, 30 U.S.C. § 820, of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1978). The Petitioner seeks an order assessing proposed civil monetary penalties against the Respondent for violations alleged in five citations. By way of answer the Respondent did not deny the violations alleged, but challenged the amount of penalties proposed by the Petitioner.

The cases were consolidated and a hearing was held in El Paso, Texas on April 15, 1980. The opportunity to file post hearing briefs within 30 days after the transcript was completed was allowed, but neither party elected to do so.

FINDINGS OF FACT

1. At all times relevant to this proceeding, Respondent operated a rock crushing facility in El Paso, Texas.

2. A duly authorized representative of the Petitioner, an MSHA inspector , issued citations and a withdrawal order based upon five alleged violations observed during the course of inspections of the facility on March 2, 1979, March 7, 1979, and April 26, 1979; all of which are the subject of these proceedings.

3. The imposition of civil monetary penalties in these proceedings will not effect Respondent's ability to continue its business.

4. Production at Respondent's facility consisted of approximately 33,800 production tons or manhours per year (Tr.8).

5. Respondent has not had a significant history of previous violations. (Tr.77).

DOCKET NUMBER CENT 79-174-M
CITATION NUMBER 161218

This citation alleges a violation of 30 CFR §56.6-44¹, on March 2, 1979.

L/Mandatory. When vehicles containing explosives or detonators are parked, the brakes shall be set, the motive power shut off, and the vehicle shall be blocked securely against rolling.

6. A pickup truck containing explosives was parked on an incline of 20 degrees on Respondent's property and the wheels of the vehicle were not blocked. (Tr. 18, 19, 156).

Blasting activities were taking place on Respondent's property and the evidence was that the blasting was under the supervision of someone other than an employee of the Respondent. Although the Respondent attempted to show that ammonium nitrate is not an explosive, the MSHA inspector on rebuttal testified that it was not the ammonium nitrate that he was referring to in the citation as being the explosive, but the four boxes of dynamite which were also located in the truck bed. The inspector further testified that the truck could have slipped out of gear, allowing the truck to roll down the hill, possibly striking other objects or crossing a public highway located approximately 300 yards away. The situation could have resulted in a fatal explosion.

The citation should be affirmed.

CITATIONS NLJMBER 160293 and 160294

Both of these citations allege a violation of 30 CFR §56.9-2².

7. On March 7, 1979, two front end loaders, in actual operation at the time they were observed by the MSHA inspector, had no audible backup signal alarms working. (Tr. 48).

2/Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

8. The front end loaders were loading trucks from stock piles of rock material located at Respondent's crusher. (Tr. 48).

Respondent's safety director, who accompanied the MSHA inspector on the inspection, also testified that the backup signal alarms were not working. (Tr. 113). He further testified that there *was* difficulty in keeping the backup alarms in operation because they were frequently disabled by employees who became annoyed at their sound. The Respondent was very prompt in abating the two citations issued, completing repairs within one-half hour. (Tr. 113).

The safety hazard involved was the inability of the loader operator to observe persons behind him while he backed up the machine. The only worker that normally would have been exposed to the danger was the plant clean-up man. (Tr. 55).

These two citations should be affirmed.

DOCKET NUMBER 79-210-M
CITATION NUMBER 160295

This citation alleges a violation of 30 CFR § 56.9-11³.

9. On March 7, 1979, an MSHA inspector observed a front end loader in operation at the stock pile area on Respondent's property, and its windshield was cracked. (Tr. 59).

Z/Mandatory. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

10. The windshield was approximately 3 feet by 4 feet. The crack, which had a spider web effect, was in the center and extended out 24 to 36 inches. (Tr. 59, 60).

The MSHA inspector testified that there were haul trucks in the area in which the front end loader was working, and that the operator's vision was impaired due to the condition of the windshield. There was a danger of the operator running the loader into an unseen vehicle. The Respondent abated the citation by replacing the window the same morning that the citation was issued.

The citation should be affirmed.

DOCKET NUMBER CENT 79-356-M
CITATION NUMBER 160306

This citation alleges a violation of 30 CFR §56.15-5⁴. In connection with the citation the MSHA inspector issued a withdrawal order.

11. On April 26, 1979, an MSHA inspector, while accompanied by Respondent's safety director, observed three employees of the Respondent inside the feeder bin of the primary crusher throwing rocks down toward the jaws of the crusher. (Tr.64).

12. The jaws of the crusher were in operation at the time of the incident, and the employees were not wearing any safety belts or lines. (Tr. 68).

4/Mandatory. Safety belts and lines shall be worn when men work where there is a danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

The jaws, of the crusher were about 4 feet wide and about 6 feet in length. The jaws open at the top to about 3 feet in width and a feeder belt carries rock material to this opening. The employees were standing on the rocks located above the feeder belt, but the feeder belt was not operating. The three employees were approximately 6 or 7 feet from the mouth of the operating jaw crusher. (Tr.70).

The inspector issued the withdrawal order, and the three employees left the bin within about 30 seconds. The inspector concluded, and I agree, that the condition was one which could have reasonably been expected to cause death or serious physical harm before such condition could have been abated. The employees had placed themselves in that dangerous location before, even though it was not permitted by Respondent's safety regulations unless the entire crusher was "locked out. " It would have taken several minutes to lock out the equipment, more than enough time for the three employees to have received fatal injuries.

The citation and withdrawal order should be affirmed.

I find the facts to be as stated in paragraphs number 1 through 12, and in addition find the following:

13. Respondent's business is a small operation.

14. The Respondent demonstrated good faith in achieving rapid compliance after notification of the violations.

15. The Respondent was negligent in that the violations resulted from the failure of the Respondent to exercise reasonable care to prevent the conditions or practices which caused the violations, and which Respondent knew or should have known existed.

16. The gravity of the violation involving Citation Number 160306 was serious, and the gravity of the other violations was not serious.

CONCLUSIONS OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding. At all time relevant, Respondent was subject to the provisions of the Federal Mine Safety and Health Act of 1977.

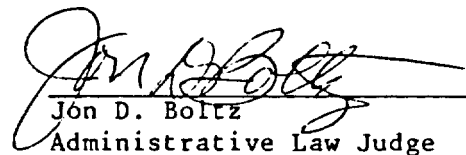
2. The Respondent violated the regulations cited in Citations Number 161218, 160293, 160294, 160295, and 160306.

ORDER

The withdrawal order issued on April 26, 1979, and all of the above citations are AFFIRMED, and based upon the criteria set forth in section 110(i) of the Act the penalties are as follows:

<u>CITATION NUMBER</u>	<u>AMOUNT</u>
161218	\$150
160293	25
160294	25
160295	30
160306	500

It is further ordered that the Respondent pay the total penalties in the above amount of \$730 within 30 days from the date of this decision.



Jón D. Boltz
Administrative Law Judge

Distrubition:

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