FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
SKYLINE TOWERS NO. 2, 10TH FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

7 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	Petitioner	: Civil Penalty Proceeding : Docket No. YORK 80-37-M : A.C. No. 30-02411-05001
v.		: East Bloomfield Pit
TOWN OF CANANDAIGUA,	Respondent	:

DECISION

Appearances: William M. Gonzalez, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; James H. Bell, Canandaigua, New York, for Respondent.

Before: Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act." A hearing on the merits was held in Rochester, New York, on July 8, 1980, following which I issued a bench decision. That decision which appears below with only nonsubstantive corrections is affirmed as my final decision at this time:

> This case is, of course, before me under section 110(a) of the Federal Mine Safety and Health Act of 1977 and, in particular, the issue before me is whether the Respondent is guilty of the violations charged in the citations before me and, if so, what is the amount of civil penalty that should be assessed for each of the violations.
>
> The Respondent, the Town of Canandaigua (Town), does not dispute that the violations occurred in this case but claims that it should not pay any penalties under the Act since the inspection at issue was its first inspection by the Mine Safety and Health Administration (MSHA). In fact, it claims that it had never previously been inspected by any state or Federal agency for any health or safety violations.

The Town also contends that the violations were abated either immediately while the inspector was on the premises or, with respect to the backup alarm on the front-end loader, was abated as soon as the backup alarm arrived and was installed on the equipment--and the entire pit operation was stopped until the backup alarm was installed. As I will indicate later in the decision, I have taken these factors into consideration in reaching the penalties that I am going to find in this case.

The Town also seems to urge that no penalty should be assessed against it because, in essence, the Town has not budgeted for paying penalties such as those assessed in this case. This is a spurious argument and I reject it out of hand. If I were to accept this type of argument, every operator subject to the 1977 Act or MSHA jurisdiction would see to it that it budgeted no money or set aside no funds to pay penalties of this nature and the end result would be that no one would be paying any penalties.

In determining the penalties that should be assessed for the admitted violations I, of course, refer to section 110(i) of the 1977 Act and that section requires that in assessing such penalties certain criteria must be considered. Those criteria are the operator's history of previous violations, the appropriateness of the penalty to the size of the business, whether the operator was negligent, the effect of the penalty on the operator's ability to continue in business, the gravity of the violation and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Now as to all the citations in this case, except the citation involving the failure to have a backup alarm on the front-end loader, MSHA found, at least in its initial determination, that the operator was not negligent and in fact the inspector checked the box on his report indicating that the condition or practice cited could not have been known or predicted or occurred due to circumstances beyond the operator's control. Now I certainly agree with that conclusion in light of the fact that the operator had never previously been inspected by MSHA, was not aware of MSHA's involvement or jurisdiction in its operation and had never in fact been inspected by any other Federal or state agency with respect to safety or health violations.

Now with respect to the backup alarm citation which is No. 209054, the inspector who testified today, Inspector Paro, says he disagrees with the inspector who made the initial

determination (Exh. G-3). I agreewith Mr. Paro. I find that his conclusion is consistent with the determinations of "no negligence" in the other citations. I do not see how the previous inspector could-have reached a conclusion here that was inconsistent with his findings as to the other citations. Thus, I find that the condition cited could not have been known or predicted by the operator because of the fact that this was the first inspection of this particular operation by MSHA.

Now with respect to the history, the size of the operator, the effect of the penalties on the ability of this operator to stay in business and the good faith abatement of the violations -- all of the citations are going to be dealt with collectively.

The history of the operator was that there were no previous violations. In fact, this was, as I said, the first inspection by MSHA. The operator is quite small. There were only three employees at the pit area at any one time and the pit operated only 1 month out of the year.

With respect to each of these violations, I find that the operator exercised good faith in achieving rapid abatement. The operator immediately, while the inspector was on the premises, corrected all of the violations except the backup alarm violation on the front-end loader. With respect to that particular violation, he took the front-end loader out of service until the condition was corrected. In fact the pit was closed down until that front-end loader was equipped with a backup alarm. So, I consider that there was extraordinary good faith demonstrated in abatement in these cases.

Consideration of the effect on the operator's ability to continue in business is essentially irrelevant to a Government operation such as this, however, in any event, the small penalties that I am going to impose in this case should have no fiscal impact on the Town.

Now with respect to gravity, I will deal with each citation separately. Citation No. 209053 charges a violation under 30 C.F.R. § 56.14-l. That standard requires that gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, saw blades, fan inlets, and similar exposed moving machine parts which may be contacted by persons and which may cause injury to persons shall be guarded.

It is specifically charged here that the sprockets on the crusher were not guarded on the date of the inspection. The diagram prepared by the inspector (Court Exhibit 1) depicts

the sprockets as being approximately 6 inches to 1-1/2 feet above ground level and protruding from the crusher for a short distance. It also depicts a chain running over the sprockets which moved a slide bar back and forth across the shaker or crusher. It is alleged by the inspector that this chain running over the sprockets created pinch points in which an employee or any person in the vicinity could get his arm caught and cause broken bones and rather severe injuries. This area as I have stated was unguarded. This fact is undisputed. The inspector concluded that injuries were probable as a result of these exposed sprockets. I would disagree with that conclusion to some extent because the inspector was unable to state with any degree of certainty whether any employees or other persons would even be in that vicinity.

It is apparent that persons could, having no particular business in the area, wander in that area. However, the testimony and the uncontradicted evidence is that when the machine was greased or worked upon in that area the machine was actually shut down thereby eliminating any hazard described by the inspector. The inspector did not observe anyone in that area and therefore I conclude that the probability of injury is somewhat decreased from what was found by the inspector.

Citation No. 209054 charges a violation of 30 C.F.R. § 56.9-87. That standard requires that heavy-duty mobile equipment be provided with automatic 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 citation alleges that the front-end loader did not in fact have a backup alarm. The undisputed and uncontested evidence in this case is that the front-end loader did have an obstructed view to the rear and that there was no observer or spotter being utilized to signal when it was safe to back up.

I agree with the inspector's conclusion that this was a serious violation. It produced a hazard that could clearly result in a fatality or grave injuries to employees who might be in the area. The undisputed testimony was that although pedestrians were not normally in the vicinity of the front-end loader the crusher operator could walk in that vicinity particularly when going for lunch or other break. Clearly it was a hazard to that individual. In addition, there was the hazard present with trucks and other equipment being in the vicinity. So I do consider this violation to be a rather serious one.

Citation No. 209055 charges a violation of 30 C.F.R. § 56.9-22. That standard requires that berms or guards be provided on the outer bank of elevated roadways. It is particularly charged in this citation that the ramp leading to the crusher (approximately 15 feet long and up to 3 feet high) had no berm or other protection on either side. The front-end loader was the only piece equipment using the ramp but it was frequently used. The danger present in this situation, of course, is the chance for a vehicle to go over the unbermed portion of the ramp and overturn. I, therefore, agree with the inspector's conclusion that this was a serious violation and that the likelihood of injuries was fairly probable.

Now with respect to Citation No. 209057, that too charges a violation of the standard at 30 C.F.R. § 56.9-22, but regarding an elevated roadway leading into the pit. The exposed area of this roadway consisted of a 20-foot long open stretch with a drop-off of approximately 10 feet. The road was approximately 12 feet wide and wide enough for only one truck to pass at a time. Again, the danger present is the possibility of a vehicle, trucks in this case, going off of the unbermed portion of the roadway and turning over. This is a serious violation and because trucks were frequently using this road, it was probable that an injury or fatality could occur.

Now based on these considerations that I have just discussed, I feel that the following penalties are appropriate in this case. And these penalties are extraordinarily 'minimal, because of these considerations.

With respect to Citation No. 209053, the proposed penalty by the Department of labor was $8. I will reduce that penalty to $5 in light of the limited exposure to the hazard that I previously discussed.

With respect to Citation No. 209054, the Department of Labor had proposed a penalty of $52. Considering the lack of negligence of the operator I reduce that penalty to $20.

With respect to Citation No. 209055, a penalty of $2 had been proposed by the Department of Labor. That penalty is appropriate in this case and I therefore order that a penalty of $2 be paid.

With respect to Citation No. 209057, a penalty of $8 was proposed by the Department of Labor and I feel that that is also an appropriate penalty under the circumstances.

ORDER

Under the circumstances, the operator is ORDERED to pay a penalty of $35 within 30 days of the date of this decision.

Gary Mellick
Administrative Law Judge

Distribution:

William M. Gonzalez, Esq., Office of the Solicitor, U.S. Department of Labor, 1515 Broadway, New York, NY 10036 (Certified Mail)

James H. Bell, Town of Canandaigua, 5130 North Road, Canandaigua, NY 14421 (Certified Mail)