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SOL (MSHA) V. CAPITOL AGGREGATES
DDATE:
19800827
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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. DENV 79-163-PM A.O. No. 41-00010-05001
v.		Capitol Cement Quarry and Plant
CAPITOL AGGREGATES, INC.,	RESPONDENT	Docket No. DENV 79-240-PM A.O. No. 41-01792-05001
		Pit and Plant No. 4

DECISION

Appearances: Sandra D. Henderson, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner
Robert W. Wachsmuth, Richard L. Reed, Esqs., San Antonio, Texas, for Respondent

Before: Administrative Law Judge Charles C. Moore, Jr.

The above cases were remanded to me by order of the Commission dated May 23, 1980, in order to allow the parties to submit posthearing briefs after receiving copies of the transcript of the hearing. Respondent's posthearing brief deals extensively with the question of whether or not the congressional grant of authority in the Federal Mine Safety and Health Act of 1977 was sufficiently broad to confer jurisdiction(FOOTNOTE 1) over Respondent's operation. It contends in the first place, that it is not a mine subject to the jurisdiction of the Act because its products do not affect interstate commerce and second, that the Secretary failed to submit evidence on this

point. Respondent then proceeded to discuss those citations for which penalties were assessed in my decision of April 14, 1980. The Secretary of Labor's brief confined itself to the issue of jurisdiction.

At the time that I denied the motion to dismiss in Docket No. DENV 79-163-PM, the Government had rested and the only actual evidence on the coverage point as distinguished from the usual assumptions, was the following statement in Respondent's answer: "Respondent's sale of cement is wholly intrastate."

In denying the motion to dismiss, I was in effect ruling that the sale of a mine product in intrastate commerce affected interstate commerce. With respect to Docket No. DENV 79-240-PM which was tried later, it was brought out that the company was a subsidiary of H. B. Zachry and that Respondent sells asphalt to the state of Texas for road building (DENV 79-240-PM, Tr. 55, 57). But in my opinion insofar as DENV 79-163-PM is concerned, the decision must be based on the state of the record at the time the motion was made and denied.

Even though Capitol Aggregates maintains that it is a small producer, that does not preclude it from affecting interstate commerce. In the landmark case of Wickard v. Filburn, 317 U.S. 111 (1942), a wheat farmer consuming his own wheat was held to affect interstate commerce. Similarly, in Andrus v. Kaskan, et al., C.A. 77-259 (W.D. Pa. 1977) [cited with approval in Marshall v. Kraynak, 457 F. Supp. 907, 910 (W. D. Pa. 1978)], the court held that although the defendant operator sold only 2,000 tons of coal annually to a power company, it affected interstate commerce when its production was combined with the production of all the nation's small privately owned mines. Aggregating the intrastate sales of small producers in order to find a substantial impact on interstate commerce was also used by the court in Marshall v. Bosack, 463 F. Supp. 800 (E.D. Pa. 1978). To the same effect, see Fry v. United States, 421 U.S. 542, 547 (1975). But the Act does not require that Respondent's effect on interstate commerce be substantial. Section 803 of the Act (30 U.S.C. 803) subjects every mine, "the products of which enter commerce, or the operations or products of which affect commerce" to its coverage so that any affect on commerce will subject Capitol Aggregates to the Act. The "de minimis" doctrine does not apply to interstate commerce. Mabee v. White Plains Publishing Company, 327 U.S. 178, 181 (1945).

Also, the Act states that a certain class of activities, i.e., unsafe mine operations, burden commerce, 30 U.S.C. 801(f). As stated in Bosack above, "it makes no difference whether a mine sells all of its coal intrastate since the disruption of coal mine activities in itself is what impedes and burdens commerce." 463 F. Supp. at 801. Where the identification of a class by Congress is a reasonable one, the courts are reluctant to disturb that finding. See United States v. Darby, 312 U.S. 100, 115 (1940); Heart of Atlanta Motel v. United States, 379 U.S. 241, 255, 261-262 (1964); and Katzenbach v. McClung, 379 U.S. 294, 303-304, 305 (1964). And "where the

class of activities is regulated and that class is within the reach of federal power, the courts have no power to exise as trivial individual instances of the class." Perez v. United States, 402 U.S. 146, 154 (1970). Also, the Act, as legislation

enacted primarily for the purpose of preserving human life, must be interpreted liberally. Freeman Coal Mining Co. v. Interior Board of Mine Operations Appeals, 504 F.2d 741 (7th Cir. 1974).(FOOTNOTE 2)

For these reasons, I find that Respondent's activities affect interstate commerce, thereby subjecting Respondent to the Act.

In its posthearing brief, Respondent presented arguments concerning those citations for which I assessed penalties in my April 14, 1980, decision. There is nothing in the brief that persuades me that my former opinion should be altered but I do have the following comments.

Citation No. 169697 concerned a failure to post traffic rules at the quarry. I am still of the opinion that one speed limit sign at the entrance to the quarry fails to satisfy the purpose of the standard, which is to periodically remind vehicle drivers of the applicable speed limits and other rules.

Citation No. 169700 was a citation for an undermined coke stockpile. Respondent maintains that the inspector was remiss in failing to conduct a standard "pack test" which would have determined the stockpile's propensity to collapse. In support thereof it cites two OSHA cases; Reliance Universal, Inc., 1975-1976 OSHD 20,027 (1975), and Armor Elevator Company, 1971-1973 OSHD 15,173 (1972). The standard states that stockpile faces shall be trimmed to "prevent hazards to personnel." 30 C.F.R. 56.9-61. It was within the inspector's expertise to determine, based on his visual observation of the stockpile, activities around the stockpile, and the fact that it was already undermined one foot, that it posed a hazard to personnel in the vicinity. Reliance Universal concerned the failure to test for the presence of flammable vapors which are not observable by the naked eye, and Armor Elevator Company concerned the failure of an inspector to measure the distance and angle of a ladder in order to prove that its position at the time a citation was issued was hazardous. There is little similarity between those regulations and the regulation before me. My prior finding of violation is reaffirmed.

With respect to Citation No. 169705, inadequate illumination over the coke storage bin, I find Respondent's argument that its maintenance records did not show any malfunction of the lights unpersuasive and find no reason to disturb my prior finding. If Respondent had produced a witness who saw the light burning the previous night, it might have been a different story.

Citation No. 169706, another illumination violation, is also reaffirmed. In this case, only an electrical outlet was supplied, there were no lights installed in the area around the coke crusher and conveyor. I think a hazard would be created rather than allayed were employees required to carry lighting equipment in one hand and repair tools in the other to make repairs in this area at night. Moreover, the standard applies to "all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites" in addition to work areas. 30 C.F.R. 56.17-1.

Citation No. 170007 of Docket No. DENV 79-240-PM concerns a malfunctioning backup alarm on a haulage truck. A malfunctioning backup device is as much a violation of the standard as a failure to install any backup warning device in that it fails to promote safety in the fashion specified in the standard. There is no evidence in the record that Respondent regularly inspected the backup alarms on its trucks so that barring any evidence that this is the very first instance in which the backup alarm malfunctioned on this truck, I find that my original assessment in this instance was warranted. The Secretary does not need to prove that Respondent's haul truck is regularly operated in a reverse direction without a backup alarm or the assistance of an observer in order to prove a violation of the standard. The Secretary showed that there was no observer specially appointed to guide the haul truck when backing and that the backup alarm was not operating. Perhaps if the haul truck had no reverse gear I would vacate the citation, but that is not the case here. With respect to the two OSHA cases cited by Respondent, Collier Construction Company, 1973-1974 OSHD 21,792 (1974); and Brown-Johnson Company, 1973-1974 OSHD 21,832 (1974), those cases are not binding on this forum.

Respondent maintains that the guarding standard violation contained in Citation No. 170010 was an isolated act of employee misconduct and that Respondent should be thereby relieved of liability. But the acts of an employee are imputed to the operator. Ace Drilling Coal Company, 2 FMSHRC 790 (April 24, 1980) PITT 75-1-P, IBMA 76-60; and Jones & Laughlin Steel, 2 FMSHRC 678 (March 11, 1978), PENN 79-145. I was also forced to disregard the testimony of an employee with respect to whether or not the gear was in motion when the doors to the gear housing were opened as he contradicted himself several times. My finding in this instance will remain undisturbed.

My April 14, 1980, decision which was reversed by the Commission and remanded to me(FOOTNOTE 3) is hereby reaffirmed and a copy is attached as Appendix I. Respondent is ordered to pay to MSHA within 30 days penalties in the total amount of $215.

Charles C. Moore, Jr.
Administrative Law Judge

~FOOTNOTE_ONE

1 I am using the term "jurisdiction" because most of the attorneys and judges have used that term in connection with this problem. Actually "coverage" would be more appropriate because the question is not whether I have jurisdiction over the case but whether a particular mine is covered by the Act. Obviously I have jurisdiction to decide a case brought under the Federal Mine Safety and Health Act, as these cases were, and jurisdiction over the party was obtained when process was served. The effect on interstate commerce is just one of a number of facts that the Government has to prove in order to prevail.

~FOOTNOTE_TWO

2 In my decision of April 14, 1980 (p. 2), 2 FMSHRC 869, 870, I cited Hammer v. Dagenhart, 247 U.S. 251 (1918), for the proposition that Congress has power to regulate instrumentalities of commerce, which it surely does. On page 13 of its brief, Respondent relies on the same case as holding that Congress lacks power to prohibit the interstate transportation of products manufactured by child labor. The holding regarding Congress' lack of power was clearly overruled in United States v. Darby, 312 U.S. 114, 116 (1940), where the court stated:

"The conclusion is inescapable that Hammer v. Dagenhart was departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled."

~FOOTNOTE_THREE

3 After I had issued my decision of April 14, 1980, I learned that although I had received the transcript over two months earlier, the parties had not received copies of the transcript. They had therefore been deprived of the opportunity to submit briefs within 30 days after receipt of the transcript. I attempted to remedy the situation by issuing a stay of my decision, but the Commission ruled that I had no power to stay a decision after issuance. The Commission accomplished the same result, however, by reversing and remanding.

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APPENDIX I

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DECISION

The above cases came on for trial in San Antonio, Texas, on January 8, 1980. In both cases, as soon as the Government had rested its case, Respondent moved for dismissal on the grounds that no showing of an effect on interstate commerce had been made. Both motions were denied principally on the rationale of Wickard v. Filburn, 317 U.S. 111 (1942). That case involved home grown wheat which was used for the grower's own consumption, and the court said at page 91 "but if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home grown wheat in this sense competes with wheat in commerce." Subsequent cases have held that Respondent's activities need not be considered alone in order to measure their effect on commerce but may be combined with others engaged in similar activities.

> Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations. See Heart of Atlanta Motel, Inc. v. U.S. 379 U.S. 241, 255 (1964); Wickard v. Filburn, 317 U.S. 111, 127-128 (1942). [Fry v. U.S., 421 U.S. 542 at 547 (1974).]

Thus, Respondent can be regulated by Congress, i.e., subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("the Act") if its

activities, though purely intrastate, have a substantial affect on interstate commerce when combined with those of the entire industry. That this is true here is beyond dispute.

Turning to the record, Mr. Wesley Bonifay, vice president of Respondent, testified that Respondent's products were shipped chiefly by truck (Tr. II-239). The commerce power extends to instrumentalities of commerce, Hammer v. Dagenhart, 247 U.S. 251 (1917); ICC v. Ill. C.R. Co., 215 U.S. 452 (1909); ICC v. Chi. A.R. Co., 215 U.S. 479 (1909); Welton v. Missouri, 91 U.S. 275 (1875); Sherlock v. Alling, 93 U.S. 99 (1876); Simpson v. Shepard, 230 U.S. 352 (1912); and Carter v. Carter Coal Co., 298 U.S. 238 (1935), so that Respondent becomes subject to Congressional regulation as soon as its products enter the stream of commerce.

The Act applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce * * *" [30 U.S.C.A. 803], and defines commerce as, "trade, traffic, commerce, transportation, or communication among the several States, or between a place in a State and any place outside thereof * * * or between points in the same State but through a point outside thereof * * *" [30 U.S.C.A. 802]. Respondent's activities in using the telephone, in shipping its product, or as a member of the cement industry have the effect of bringing Respondent into the mainstream of commerce and subject Respondent to Congressional regulation. Also, in its answers, Respondent admits that it does sell its products in the State of Texas. In my opinion, that alone would be sufficient.

DENV 79-163-PM

The first case involved Respondent's cement operation wherein it mines limestone and makes it into cement. Respondent employs about 140 men in this operation, but is still the smallest cement company in the United States. It has no prior history of violation and I find that all citations were abated promptly and in good faith.

Citation No. 169703. The allegation is that the Respondent violated 30 C.F.R. 56.9-24 in that the 930 Caterpillar front-end loader operator did not have full control of his loader when idling. The standard in question requires that an operator have full control of his vehicle when it is moving. In this type of front-end loader, steering is accomplished by hydraulically articulating the machine. If the hydraulic pressure is too low an excessive number of turns of the steering wheel is required in order to make the machine articulate. There was testimony by the inspector that at low idle the machine stopped articulating even while the wheel was being turned, but the same inspector also testified that when the articulation had gone far enough to reach the stops the steering wheel would still turn. I cannot see how both statements could be accurate. At higher rpms than low idle however, (low idle was around 500 rpms) the steering was normal according to the

operator of the equipment. The equipment operator, Mr. Aiken, said that he had no trouble steering the machine until the inspector had him stop the equipment and attempt to articulate it at the low idle speed. Mr. Aiken did admit that when the test was being made at low idle an excessive number of

turns were required to articulate the machine from one stop to the other. The front-end loader was defective in that there was some wear on a small cartridge (part of a hydraulic pump) but the mechanic who has worked on many of this type of tractor said that it is perfectly normal for the wheel to continue to turn after the stop has been reached. He said the effect of this worn cartridge would be loss of some steering at idle power. In view of the fact that the inspector's test was made while the equipment was not moving, and the testimony of the machine operator that he had no trouble steering the machine, I cannot find as a fact that the machine operator did not have full control of the equipment while it was in motion. I therefore vacate the citation.

Citation No. 169261. The allegation is that the elevated walkway at the Nos. 3 and 4 belt conveyors had excess material accumulated on it which prevented safe access for employees and thus violated 30 C.F.R. 56.11-1. The inspector stated that the material on the belt was marl, a combination of limestone and clay, and that at one point it was 1-1/2 feet deep. The inspector could not remember whether he had walked on the walkway, but he did state that marl is slippery if on an angle and while some spillage is normal, this was excessive in his opinion. Respondent's Exhibit 4 is a sketch of the two walkways involved and the black areas marked thereon show where the spillage occurred. The Nos. 2 and 3 conveyors were not running at the time of the inspection, and when they are not running there is no reason for anyone to be on the walkways. When they are running, however, the walkways are used to inspect the belt and every morning and every afternoon all of the larger chunks of marl on the walkway are removed and thrown on the belt. Smaller material is cleaned up by the labor crew whenever cleaning is needed or whenever a crew is idle. The pieces on the walkway at the time of the inspection were less than 5 inches in diameter, were scattered and there was no problem in stepping in between the pieces. The transfer point where the spillage occurred is 30 feet in the air but the spilled material was caught in the metal grating floor and would not roll or move when stepped on. After hearing the testimony, I am not convinced that such spillage as existed constituted a hazard to the extent that Respondent failed to provide safe access to a working place. Convincing me of that fact was the Petitioner's burden in this case, and in the absence of the satisfaction of that burden, the citation is vacated.

Citation Nos. 169262 and 169263 alleged that the elevated walkway next to the C-24 clinker conveyor and the platform at the top of that walkway contained accumulations of material which prevented safe access to the area and thus violated 30 C.F.R. 56.11-1. The material accumulated on both the walkway and the platform was clinker which is a product that is created during the process of converting limestone into cement. On the walkway, the clinker had become powdery after having been walked on and had then become moist due to the fact that it was exposed to the rain. Thereafter, it became hard like cement or mortar and could be walked on without a slipping hazard. When in powdery form and not wet, the clinker will fall through the gratings of the

walkway. Again, I am unconvinced that this created a hazard amounting to the failure to provide safe access. A picture might have convinced me otherwise, but the oral testimony that I heard was not sufficient to sustain

the Secretary's burden of proof regarding the walkway. Citation No. 169262 is vacated. As to the accumulation on the platform, inasmuch as the platform was covered by some type of canopy, the clinker had not hardened into a cement-like mass. The pile of clinker on the platform was 3 feet high but covered only about 12 square feet out of a platform area of 60 square feet. The pile was readily visible. There was plenty of room to walk around it since it constituted only one-fifth of the platform area and while I think it would have been better mining practice to clean it up, I do not see how it could be any more hazardous than a tool box or some piece of equipment bolted down in the same area. I find that the Secretary has not carried his burden of establishing that respondent failed to provide safe access to a working area. The citation is vacated.

Citation No. 169698. The citation alleges a violation of 30 C.F.R. 56.14-1 in that a pinch point on the conveyor belt feeder drive pulley was not guarded. There is no question but that the drive pulley for the conveyor belt alongside the walkway was unguarded. But the standard requires that only such pulleys be guarded that "may be contacted by persons, and which may cause injury to persons * * *." Because of the direction of the drive pulley in question, the pinch point was at the bottom of the pulley and that pinch point was 3 feet from the middle of the walkway. The frame of the feeder is channel iron and extends along the walkway between that walkway and the conveyor and is 4 inches above the walkway. The belt moves at about 4 to 5 feet per minute which is slower than the movement of the outer edge of the second hand on a standard issue 13-inch diameter Government electric clock. Anybody could reach down under this conveyor and try to remove something and perhaps get caught in the pinch point. If a person wanted to do that, however, he would have to first remove any guard that was installed; so a guard would not prevent that type of injury. Respondent's Exhibits 7, 8 and 9 are photographs of the area and the pinch point is not even visible in those photographs. I think it highly unlikely that anyone could accidentally get caught in the pinch point of this slow-moving drive pulley. The citation is vacated.

Citation No. 169699. This citation alleges a violation of 30 C.F.R. 56.11-1 (safe access) in that a slipping hazard was created on the floor on the ball mill side of the ring drive because a portion of the floor was covered with crater gear lube. Respondent produced a small bottle of crater gear lube that had been labeled as Respondent's Exhibit 10. Crater gear lube has a thinning agent when it is first taken out of the can so that it can be spread on the gears. After a short bit of use, this thinning agent is disbursed and the gear lube becomes thick and sticky like tar. Respondent's Exhibit 10 was thick and sticky at the time of the trial(FOOTNOTE 1) and could not in my opinion have created a slipping hazard. The citation is vacated.

Citation No. 169700. The charge here is that the 25-foot high coke stockpile was becoming undermined at one point in violation of 30 C.F.R. 56.9-61. The mandatory standard states "stock pile and muck pile faces shall be trimmed to prevent hazards to personnel." I interpret this to mean that a stockpile shall not be undermined or kept at any angle which would present a falling or landslide type hazard. While Respondent's witness stated coke was not subject to sliding and was stable, it was nevertheless the inspector's opinion that the angle which he saw on the face did present a material slide hazard. The front-end loader was equipped with a cab and although the stockpile was 25 feet in height, there was no evidence as to the height of the top of the cab on the front-end loader. I find a violation existed but I find very little hazard and only slight negligence. A penalty of $25 is assessed.

Citation No. 169705. The citation alleges a violation of 30 C.F.R. 56.17-1 in that lights over the coke storage bin and the walkways were not burning which prevented sufficient light for safe working conditions. The inspector did not testify that he used a light meter and in the absence of such testimony, I will presume that he did not. He was not questioned either on direct or cross-examination concerning the extent of light that was in the area. The mere fact that some lights are not burning does not establish a violation but when the inspector testified that in his judgment there was insufficient light, it was then the duty of Respondent, if it thought that there was sufficient light, to come forward with evidence to that effect. The lights failed because of the failure of a photo-electric cell but there is no evidence as to just when that cell failed. If the photo-electric cell failed immediately before the inspector noticed the lights, I would say that no violation was established. On the other hand, if it had failed several weeks before I would say there was not only a violation but that the negligence was high. As the evidence stands, I will find that a violation existed but that no negligence was proved. In the absence of any evidence as to how dark it really was, I will find that the hazard was not great. A penalty of $25 will be assessed.

Citation No. 169697. The charge here is that the company did not have standardized traffic rules including speed and warning signs posted for the quarry roadway in violation of 30 C.F.R. 56.9-71. The only traffic sign on the property was at the entrance to the mine. It displayed a 13 mile an hour speed limit and had arrows pointing towards the receiving and dumping areas. There were no signs in the quarry and it was Respondent's position that it could post rules orally by telling the drivers what to do. There were only three drivers, they had been with the company for a number of years, and had operated safely during that time. The fact remains, however, that Respondent did not post signs and standardize its traffic despite the clear requirements of the safety standard that it do so. The violation is clear, and Respondent's negligence is clear but I cannot find a high degree of hazard in view of the experience that these drivers had and the supervision exercised over them by the

foreman. A penalty of $40 will be assessed.

Citation No. 169706. This citation alleges a violation of 30 C.F.R. 56.17-1 in that there were no lights under the coke impact crusher around the tail pulley of the C-58 conveyor belt and the tail section of the apron feeder under the coke hopper. The inspector testified that there were numerous hazards in walking in such a dark area including the chance of a rattle snake bite. Inasmuch as miners might have to travel in the area at night, this condition did constitute a violation, but since all workers carried flashlights and since all repair work that had to be done was done with the benefit of a plug-in type auxiliary lamp, the hazard was not high, nor was the negligence, and a penalty of $25 will be assessed.

DENV 79-240-PM

At the outset of the hearing on this case, the Solicitor vacated Citation No. 170011 and the parties agreed on a settlement of $40 for Citation No. 170009. The original assessment on Citation No. 170009 was $56 and I accepted the settlement on the record.

Citation No. 170007. The charge is that a 40-foot long Euclid haulage truck was not equipped with an operating backup warning device in violation of 30 C.F.R. 56.9-87. The inspector testified that the truck driver's vision to the rear was obscured by the high bed behind the cab and that he had observed haulage trucks backing up in the vicinity of the dragline where they sometimes had to reposition their trucks in order to receive material from the dragline. He thought they might also back up at the hopper but did not observe any doing so. Nor did he observe any spotters assisting the truck driver when he was backing up near the dragline. There is some possibility that signals between the dragline operator and truck driver might have served the same purposes as a spotter, but the evidence was not sufficiently persuasive for me to make a finding that there was "an observer to signal when it is safe to back up." The backup alarm was therefore required by the standard and failure to have that backup alarm operating did constitute a violation. The drivers of the trucks are supposed to report any defect such as a failure of the backup warning horn, but the driver of this particular truck did not realize that his horn had failed. The cause of the failure was a broken wire. I cannot find a high degree of negligence and in view of the fact that there was no one in the hopper area to be injured and no one in the dragline area except the dragline operator sitting in his machine, I cannot find that this was a very hazardous operation. A penalty of $30 will be assessed.

Citation No. 170010. This citation alleges that the bull gear on the dragline was not guarded in violation of 30 C.F.R. 56.14-1. The bull gear is inside the cab and in order to get to it, the operator has to exit the machine on the righthand side, walk around to the lefthand side and enter through a pair of double doors. Respondent's Exhibit No. 3 depicts the side of the dragline that the operator would have to enter in order to approach the bull gear. Respondent's Exhibit No. 4 is a picture

of the area of the citation after a guard has been attached. The inspector stated that the

operator of the machine informed him that there had been a guard which he had removed for some reason and failed to replace. Respondent's witness Mr. Hawthorne explained that there is a lockout device near the bull gear and when that switch is pulled, none of the parts in that section of the cab move even though the engine is running. The witness contradicted himself five times when testifying as to whether the bull gear would be moving when the machine operator went into the area of the cab through the double doors. Whenever I would ask him if there were moving parts in that area, he would say no, but whenever the Solicitor's attorney asked the same question, he would either say yes or there might be. I am going to have to disregard his entire testimony concerning this aspect of the case. I find that this was a gear which could be moving and could cause injury in the absence of a guard. I find very little negligence on Respondent's part but as any unguarded moving gear of this type can be hazardous, a penalty of $30 is assessed.

ORDER

It is ORDERED that Respondent, within 30 days, pay to MSHA penalties in the total amount of $215.

Charles C. Moore, Jr.
Administrative Law Judge

~FOOTNOTE_ONE
1 The exhibit was given to the reporter and it was returned to me with the transcript. It was wrapped in plastic when I received it and the texture appears to have been altered by virtue of its having been wrapped in the plastic. Also, I cannot find in the transcript any notation that it was received in evidence. It was treated as an exhibit, however, and I am relying on its texture in reaching a decision.