

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

27 AUG 1980

SECRETARY OF LABOR, : Civil Penalty Proceedings
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 80-90-M
Petitioner : A/O No. 41-02541-05006
v. :
: Docket No. CENT 80-151-M
AFFILIATED AGGREGATES, : A/O No. 41-02541-05008
Respondent :
: Affiliated Aggregates Quarry

DECISION

Appearances: Elloise Vellucci, Esq., U.S. Department of Labor, Dallas, Texas, for Petitioner;
Frederick A. Douglas, Esq., Allen and White, San Antonio, Texas, for Respondent.

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(a) 1/ of the Federal Mine Safety and Health Act of 1977 (hereinafter, the Act), 30 U.S.C. § 820. A hearing on the merits was held on May 9, 1980, in San Antonio, Texas.

1/ Sections 110(i), (j) and (k) of the Act provide:

"(i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

"(j) Civil penalties owed under this Act shall be paid to the Secretary for deposit into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the

A single violation was alleged in Docket No. CENT 80-151-M. Eight violations were alleged in Docket No. CENT 80-90-M. At the hearing, the parties proposed to settle these proceedings with regard to five citations. These citations and their corresponding proposed dispositions are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Standard</u>	<u>Proposed Penalty</u>	<u>Disposition</u>
170898	8/7/79	56.14-1	\$ 90	\$ 90
170899	8/7/79	56.14-1	\$ 90	Withdrawn
170900	8/7/79	56.12-8	\$ 90	\$ 25
170901	8/7/79	56.14-1	\$140	Withdrawn
170427	8/8/79	56.9-3	\$620	\$620

In support of the settlement, counsel for Petitioner asserted the following:

The Solicitor wishes to withdraw, in behalf of the Secretary of Labor, Citation Nos. 170899, and 170901 for lack of sufficient evidence.

The parties have agreed that 170900, a violation concerning the energized wires with the motor on the air compressor of the secondary crusher which were not properly bushed, because of the circumstances surrounding it, is a de minimus violation and have agreed to a \$25 penalty.

The reasons for this settlement are that the machinery on which these bushings were supposed to be on, is out of the area of normal traffic, that there is no exposure to this machine when it is working; that the compressor is shut down when men are to work in or around that area, and that, as such, it is not of a serious nature, or substantial, and that a small penalty should be agreed to.

Your Honor, the Respondent agrees to pay the full penalty on Citation Nos. 170898, and 170427, which is under the other docket number.

fn. 1 (continued)

United States brought in the United States district court for the district where the violation occurred or where the operator has its principal office. Interest at the rate of 8 percent per annum shall be charged against a person on any final order of the Commission, or the court. Interest shall begin to accrue 30 days after the issuance of such order.

"(k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."

The Solicitor feels that the settlement of full payment on the two citations just stated is fair and just in that the assessment made was proper under the circumstances.

The information provided in support of the motion was supplemented by that contained in the case file. The settlement was approved by the Administrative Law Judge at the hearing.

At the conclusion of the presentation of evidence and oral argument, a decision in substance as follows was rendered from the bench and the Respondent was ordered to pay assessments in the sum of \$990:

Pursuant to a stipulation by the parties to the effect that for the 2 years prior to the date of the violations, the operator had paid 23 violations, and a stipulation that this number was small, I accordingly find that the operator's history of previous violations is good.

I also find, pursuant to a stipulation between the parties, that the mine was a small-sized mine, with the manhours per year being 104,093.

It is further found that the penalties assessed will not effect the operator's ability to continue in business.

We will now pass to the issue of whether there was a **violation** of Citation No. 170423, concerning loose material on the pit wall. Citation No. 170423 was issued on August 7, 1979, by inspector Alex **Baca**.

The condition or practice listed in that citation was as follows: The south east pit wall had loose material on it, and had not been scaled. The front-end loader was working removing blasted material from this area, creating danger to the front-end loader operator being hit by falling material.

Mr. **Baca** testified that this citation was issued as a result of a visual observation and that there was no way to tell whether or not the material was loose.

Respondent has adduced evidence to show that the one big stone was not loose and that it could not be removed by normal scaling or blasting operation.

Although there were other very small, loose stones of approximate pebble size, the record does not indicate that these stones, or this material were in the area prohibited by the regulation cited.

The citation cites a violation of 30 C.F.R. § 56.3-2 which provides, "**Mandatory.Loose**, unconsolidated materials shall be stripped for a safe distance, but in no case less than ten feet from the top of pit or quarry walls, and a loose unconsolidated material shall be sloped to the angle of repose."

Since the evidence does not establish a violation of this regulation, Citation **No.** 170423 is vacated.

Next to be considered is Citation No. 170424, concerning the grounding of the explosives magazine. Citation No. 170424 was issued by inspector Alex **Baca** on August 7, 1979.

The condition or practice listed on the citation was as follows: "The explosives magazine was not equipped with an **electrical** ground creating a hazard to persons working in the area in case of an electrical storm or static electricity."

It has been established by the record that there was no ground, other than the possible ground created by contact with the surface of the earth by the magazine itself. The citation alleges a violation of 30 C.F.R. § 56.6-201. This regulation provides as follows: "Mandatory. Magazine shall be electrically bonded and grounded if constructed of metal,"

The testimony of the witnesses for the Government and for the Respondent established that the magazine was constructed of metal.

The evidence further established that there was no electric bond or ground other than contact with the surface of the ground, and this contact was by skids underneath the magazine.

The evidence is sufficient to support a finding that the contact by the skids under the conditions cited by the witnesses in their testimony, did not conform with the requirements of 30 C.F.R. § 56.6-20(e).

I therefore find that the Respondent **was** in violation of this standard.

The evidence does, however, indicate that Respondent leased this magazine with the understanding that it was a self-grounding magazine and that the skids resting on the ground were sufficient to comply with regulations and safety requirements.

I therefore find that the negligence of the Respondent was slight.

The testimony of Mr. **Baca** has indicated that, due to the location of the magazine and due to the circumstances, that an injury as a result of this condition was remote.

The testimony of Mr. **Baca** also establishes that the Respondent demonstrated good faith in achieving rapid compliance after notification of the violation.

Accordingly, for violation of this citation, the Respondent is assessed a civil penalty in the amount of \$75.

We will now pass to Citation Nos. 170425, and 170428, concerning noise on the drill and on the primary crusher. Citation No. 170425 was issued by inspector Alex **Baca** on August 7, 1979.

The condition or practice noted on the citation was as follows: The driller at the quarry was exposed to 320 percent of the allowable limit to noise for an 8-hour period, where the TLV was one hundred percent.

Feasible engineering controls had been utilized but did not reduce the noise below the TLV period. Hearing protection was not being used.

Citation No. 170428 was issued by inspector Alex **Baca** on August 8, 1979.

The condition or practice noted in the citation was as follows: The primary crusher operator was exposed to 462 percent of what the allowable limit to noise was for an 8-hour period where the TLV was 100 percent.

Feasible engineering controls had been utilized but had not reduced the level below the TLV. Hearing protection was not being used.

These two citations allege violations of 30 **C.F.R.** § 56.5-50(a).

In pertinent part, this regulation reads as follows:
"Mandatory. A. No employee shall be permitted an exposure to noise in excess of that specified in the table below, Noise level measurements shall be made using a sound level meter meeting specifications for Type Two meters contained in American National Standards Institute (ANSI). Standard S-1.4-1971, general purpose, sound level meters, approved

April 27, 1971, which is hereby incorporated by reference, and made a part hereof, or by a dosimeter with similar **accuracy."**

Under the table entitled, "Permissible Noise Exposure," there is the following: "The duration per day, hours of exposure. For 8 hours of exposure there is the number 90. Under the subheading 'sound level dba, slow response.'

The record establishes that the noise which the operators at the drill and at the primary crusher, were exposed during the 8-hour period exceeded the level allowed by the regulation.'

The record also established that hearing protection was not being used by the drill operator and the primary crusher operator, during these times.

The record does establish, that the Respondent had constructed sound-resistant cabs at **the drill** and at the primary crusher which, at one time, had reduced the noise exposure to permissible levels. The record, however, shows that on the day of the inspection, there was at least one **sizeable** crack in the sound-resistant booth at the drill, and, that at the primary crusher, one of the windows of the booth was not in **place.**

The record also shows that the operator made reasonable efforts to insure that the drill and primary crusher operators were wearing hearing protection. The operator did this by issuing ear plugs and other types of hearing protectors to the miners.

I therefore find that the negligence of the operator was slight.

While the conditions found could cause an impairment to hearing, it was established that it would probably occur over a considerable period of time.

The record indicates that the operator exercised good faith in abating the condition after the citation was issued in each case.

For the violation of these two citations, a civil penalty of \$90 is assessed for the Citation No. 170425, and a \$90 civil penalty is assessed for Citation No. 170428.

This amounts to civil penalties in the amount of \$255 for the three cases that were tried where violations were found,

Settlements in three other cases have been approved for a total of \$735.

The total amount of civil penalties assessed is, therefore, \$990. **It is** ordered that Respondent pay MSHA the amount of \$990 within 30 days of the date of this order.

ORDER

The approval of settlement placed on the record at the hearing and the bench decision rendered at the conclusion of the hearing are hereby AFFIRMED. It is ORDERED that Respondent pay to MSHA the amount of \$990 within 30 days of the date of this decision if it has not already done **so.**

Forrest E. Stewart

Forrest E. Stewart
Administrative Law Judge

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