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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. BARB 79-222-PM A/O No. 54-00120-05002 F
v.	
SAN JUAN CEMENT COMPANY, INC., RESPONDENT	Docket No. BARB 79-283-PM A/O No. 54-00120-05003 Cantera Espinosa Mine

DECISION

Appearances: James J. Manzanares, Esq., Office of the Solicitor, U.S. Department of Labor, Hato Rey, Puerto Rico, for Petitioner; Alex Gonzalez, Esq., and Mario Arroyo Davila, Esq., Dubon, Gonzalez and Vazquez, San Juan, Puerto Rico, for Respondent

Before: Judge Cook

I. Procedural Background

The Mine Safety and Health Administration (Petitioner) filed petitions for assessment of civil penalty in Docket Nos. BARB 79-222-PM and BARB 79-283-PM on January 18, and February 15, 1979, respectively. The petitions were filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a) (1978) (1977 Mine Act), and collectively allege three violations of various provisions of the Code of Federal Regulations. On March 19, 1979, San Juan Cement Company, Inc. (Respondent) filed both answers to the petitions and a motion requesting consolidation of the cases. On March 26, 1979, Petitioner filed a motion to authorize discovery. The parties respective motions were granted by orders dated June 13, 1979.

On August 24, 1979, a notice of hearing was issued scheduling the hearing to commence on December 11, 1979, in Hato Rey, Puerto Rico. On December 3, 1979, the parties filed joint motions to approve settlement and Petitioner filed supplementary motions pertaining thereto. The joint motions were denied by an order dated December 7, 1979. Additionally, the December 7, 1979, order recounted the results of a December 5, 1979, telephone conference during which the representatives of the parties agreed to continue the hearing to December 20, 1979.

The hearing was held as scheduled with representatives of both parties present and participating. Following the presentation of the evidence, a schedule was agreed upon for the posthearing filing of Exhibits O-8 and O-9 and for the filing of posthearing briefs. The exhibits were received in evidence by an order dated April 3, 1980. On April 22, 1980, Petitioner filed its posthearing brief and proposed findings of fact and conclusions of law. No posthearing brief was filed by Respondent.

II. Violations Charged

A. Docket No. BARB 79-222-PM

Citation No. 94602, March 20, 1978, 30 C.F.R. 56.12-71.

B. Docket No. BARB 79-283-PM

Citation No. 94601, March 20, 1978, 30 C.F.R. 50.10.

Citation No. 93262, April 20, 1978, 30 C.F.R. 56.20-11.

III. Witnesses and Exhibits A. Witnesses

Petitioner called as its witnesses Pedro Sarkis, a Federal mine inspector; Salvador Lugo Cortes, area engineer for the electric power company; Luis Figueroa Arroyo, a maintenance employee of the San Juan Cement Company; and Francisco Martinez Ortiz, safety officer of San Juan Cement Company.

Respondent called as its witnesses William Miranda Marin, senior vice president of San Juan Cement Company; Salvador Torros, vice president of marketing and sales for San Juan Cement Company; and David Cintron, chief engineer of Arnold Green Testing Laboratories in Puerto Rico.

B. Exhibits

1. Petitioner introduced the following exhibits in evidence:

M-2 is a drawing prepared by Salvador Lugo during the course of his testimony.

M-3 is a drawing prepared by Salvador Lugo during the course of his testimony.

M-4 is a copy of Pedro Sarkis' curriculum vitae (resume).

M-5 is a copy of Citation No. 94602, March 20, 1978, 30 C.F.R. 56.12-71.

M-6 is a copy of a subsequent action form pertaining to M-5 extending the time period for abatement to 2 p.m., April 28, 1978.

M-7 is a copy of a subsequent action form pertaining to M-5 extending the time period for abatement to 9 a.m., May 11, 1978.

M-8 is a copy of the termination of M-5.

M-9 is a photograph.

M-10 is a memorandum to James J. Manzanares from Debbie L. Hines, supervisory assessment clerk, addressing Respondent's history of previous violations.

M-11 is a copy of Citation No. 93262, April 20, 1978, 30 C.F.R. 56.20-11.

M-12 is a copy of a subsequent action form pertaining to M-11 extending the time period for abatement to 3 p.m., April 24, 1978.

M-13 is a copy of the termination of M-11.

M-14 is a photograph.

M-15 is a drawing prepared by Pedro Sarkis during the course of his testimony.

M-16 is a copy of Citation No. 94601, March 20, 1978, 30 C.F.R. 50.10.

M-17 is a copy of a modification of M-16.

M-18 is a copy of a document styled "Mine Accident, Injury, and Illness Report."

M-19 is a copy of a memorandum from Francisco Martinez Ortiz, safety officer of San Juan Cement Company, to Federal mine inspector Pedro Sarkis wherein the author reports the results of his investigation of the fatal accident.

M-19-A is an initial report pertaining to the subject matter of M-19.

M-20 is a photograph.

M-21 is a photograph.

M-23-A is a request for admission of facts filed by petitioner in Docket No. BARB 79-222-PM.

M-23-B is Respondent's response to M-23-A.

M-23-C is a request for admission of facts filed by Petitioner in Docket No. BARB 79-283-PM.

M-23-D is Respondent's response to M-23-C.

2. Respondent introduced the following exhibits in evidence:

O-1 is a copy of a letter dated April 11, 1978, from the electric power company to William Miranda Marin.

O-2 is a letter dated March 27, 1978, from San Juan Cement Company to the electric power company.

O-3 is a copy of a letter dated April 20, 1978, from San Juan Cement Company to the electric power company.

O-4 is a copy of a check in the amount of $3,461 drawn on the account of San Juan Cement Company and made payable to the electric power company.

O-5 is a topographic survey plan of the subject plant.

O-6 is a copy of a memorandum dated December 18, 1979, from Luis M. Gonzalez to William Miranda Marin addressing the number and distribution of persons employed at the subject plant.

O-7-A is a set of interrogatories from Respondent to Petitioner.

O-7-B contains petitioner's answers to O-7-A.

O-8 is a certified copy of Respondent's 1977 Commonwealth of Puerto Rico tax return.

O-9 is a certified copy of Respondent's 1978 Commonwealth of Puerto Rico tax return.

3. X-1 is a drawing prepared by Salvador Lugo during the course of his testimony. IV. Issues

Two basic issues are involved in the assessment of a civil penalty: (1) did a violation of the 1977 Mine Act occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. The legal name of the Respondent is San Juan Cement Company, Inc.

2. The identification of the mine where the inspection was conducted is "Cantera Espinosa."

3. The location of said mine is Dorado, Puerto Rico.

4. San Juan Cement Company, Inc., is the operator of said mine.

5. San Juan Cement Company, Inc., operates an open pit limestone quarry where it extracts limestone for use in the production of cement. This establishment is a mine within the meaning of section 3(h) of the 1977 Mine Act.

6. The products of the Cantera Espinosa Mine enter and affect commerce.

7. Petitioner's requests for admissions and the answers thereto which are not denials, and Respondent's interrogatories and the answers thereto are part of the record and in evidence.

8. Assessment of the original penalty that was assessed by the Office of Assessments will not affect Respondent's ability to remain in business (Tr. 20-21).

9. Benjamin Alicea Diaz was the person who was electrocuted on March 16, 1978. He was 5 feet 6 inches tall (Tr. 232).

10. Exhibit 0-5 is drawn to scale such that one inch equals approximately 50 feet (Tr. 413).

11. The terms "Water Resources Authority," "Power Company" and "Authority of Electrical Energy" have been used interchangeably to refer to the electric power company (Tr. 343).

B. Jurisdiction

Respondent entered into two stipulations of particular significance to the issue of jurisdiction. First, Respondent stipulated that it operates an open-pit limestone quarry where it extracts limestone for use in the production of cement and that such establishment is a mine within the meaning of section 3(h) of the 1977 Mine Act. This stipulation is further refined by Respondent's answers to Petitioner's request for admissions which reveal that the Cantera Espinosa Mine is the facility referred to in the stipulation and that Respondent actually operates a cement production plant at the mine site (Admissions 2, 3 and 4 as set forth in Exhs. M-23-A through M-23-D). Second, Respondent stipulated that the products of the Cantera Espinosa Mine enter and affect commerce.

The parties evidenced considerable disagreement as to the legal effect of these stipulations, with Petitioner contenting that they have the legal effect of admitting jurisdiction and Respondent contending that no such effect was intended. However, counsel for Respondent unequivocably admitted that the Federal Mine Safety and Health Review Commission (Commission) has jurisdiction over Respondent in this proceeding (Tr. 12-18).

A careful review of Respondent's position has revealed essentially two arguments outlining the issues that Respondent wishes the Judge to resolve.

First, Respondent appears to contend that it was improperly cited for violations of mandatory safety standards set forth in Part 56 of Title 30 of the Code of Federal Regulations because the Cantera Espinosa Mine is not a sand and gravel operation. Respondent characterizes its operation as an open pit mine and, by implication, appears to argue that its activities are subject exclusively to the provisions of Part 55 of Title 30 of the Code of Federal Regulations (Tr. 12). I disagree. Part 56 sets forth particularized requirements applicable to sand, gravel and crushed stone operations. The activities conducted by Respondent at the Cantera Espinosa Mine fall within the definition of a "crushed stone operation" and, accordingly, the requirements of Part 56 apply.

For purposes of the instant case, the key consideration is that the subject mine is an open pit limestone quarry from which Respondent extracts limestone for use in the production of cement and that cement production occurs at the mine. "Cement" is defined, amongst several definitions, as "a finely ground powder which, in the presence of an appropriate quantity of water, hardens and adheres to suitable aggregate, thus binding it into a hard agglomeration that is known as concrete or mortar." Paul W. Thrush (ed.), A Dictionary of Mining, Mineral, and Relate Terms (Washington, D.C.: U.S. Department of the Interior, Bureau of Mines) (1968) at p. 186. [Emphasis added.] "Crushed stone" is defined as the "product resulting from the artificial crushing of rocks, boulders, or large cobblestones, substantially all faces of which have resulted from the crushing operation," and is a "[t]erm applied to irregular fragments of rock crushed or ground to smaller sizes after quarrying." Paul W. Thrush (ed.), op cit., p. 284. These definitions establish that cement production at the Cantera Espinosa Mine requires, at a minimum, the crushing of limestone to produce a finely ground powder used in the finished product. Accordingly, the Cantera Espinosa Mine is a "crushed stone operation" subject to the requirements of Part 56 of Title 30 of the Code of Federal Regulations.

Respondent's second argument appears to imply that compliance with the safety regulations imposed by the Commonwealth of Puerto Rico somehow absolves Respondent from a duty to comply with Federal mandatory safety standards (Tr. 15-17). Respondent never clearly articulated the principles underlying its argument, and the record contains only one specific reference to the requirements imposed by the Commonwealth, i.e., that the Electric Safety Code of Puerto Rico requires 38,000-volt powerlines to be maintained at least 20 feet above the ground (Tr. 88). As set forth later in this decision, the powerlines involved in the instant case met the Commonwealth's height requirements. However, assuming for purposes of argument that Respondent maintained compliance with all safety regulations mandated by the Commonwealth, such compliance in no way absolved Respondent from its obligation to

comply with the more stringent requirements imposed by the 1977 Mine Act. Accordingly, Respondent's argument has no foundation.

In view of the foregoing considerations, I conclude that Respondent and its Cantera Espinosa Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings and that Respondent was properly charged under Part 56 of Title 30 of the Code of Federal Regulations.

C. Respondent's Motion to Dismiss

Respondent moved to dismiss the above-captioned cases at the close of Petitioner's case-in-chief (Tr. 346-354). The motion was preliminarily denied by the undersigned Administrative Law Judge, but made subject to reconsideration at the time of the writing of the decision (Tr. 355-356).

Respondent set forth essentially two grounds in arguing for dismissal: (1) that Petitioner had failed to establish a prima facie case as to the three violations charged; and (2) that, assuming for purposes of argument that the violations existed, the evidence presented established the existence of circumstances mitigating against the imposition of any civil penalties.

The evidence contained in the record at the time the motion was made has been reviewed carefully, and I conclude that the evidence in the record at that stage of the proceedings was more than sufficient to establish a prima facie case as to the occurrence of the three violations charged. The arguments advanced by Respondent are more appropriately addressed to civil penalty assessment determinations that must be made under the six statutory assessment criteria set forth in section 110 of the 1977 Mine Act and, accordingly, have been considered fully as relates to the penalty assessment stage of the proceedings.

Two arguments raised by Respondent are worthy of individual discussion at this time. First, Respondent appeared to argue that proof of operator negligence is essential to proving violations of the mandatory safety standards. This argument is specifically rejected as a ground for dismissal. It is well settled that mine operators are liable for violations of mandatory health and safety standards without regard to fault. United States Steel Corporation, 1 FMSHRC 1306, 1979 OSHD par. 23,863 (1979). Second, Respondent's argument that mitigating factors can warrant the assessment of no civil penalty for a proven violation is contrary to law. The 1977 Mine Act mandates the assessment of a civil penalty for any violation of a mandatory safety standard. Island Creek Coal Company, 2 FMSHRC 279, 1980 OSHD par. 24,248 (1980).

In view of the foregoing considerations, the oral determination made at the hearing denying Respondent's motion to dismiss is AFFIRMED.

D. Occurrence of Violations, Negligence, Gravity and Good Faith

At approximately 2 p.m. on March 16, 1978, Benjamin Alicea Diaz, a truck driver working for a customer of Respondent identified as Rio Grande Ready Mix, sustained a fatal injury at

Respondent's Cantera Espinosa Mine

when he accidentally either achieved physical contact with a high-voltage powerline which crossed the main access road to the plant, or came sufficiently close to such powerline to be electrocuted.1 All vehicular traffic entering or leaving the plant passed beneath the powerlines in question. The circumstances surrounding his death are clear and relatively uncontroverted.

Mr. Alicea drove a cement bulk carrier onto the premises at approximately 2 p.m. to pick up a load of cement for Rio Grande Ready Mix. He parked his truck on the access road while waiting in line to reach the weighing station known as the scale house. The scale house was located approximately 90 feet from the site of the accident. Parked in this location, the truck was positioned directly beneath the high-voltage powerlines. The voltage passing through the lines was described as 38,000 volts, phase-to-phase, and 27,500 volts, phase-to-ground.

Mr. Alicea got out of the truck cab and proceeded to climb atop the bulk carrier in order to open the hatches. In his hand, he had a 14- to 16-1/2-inch long hammer composed entirely of metal. Mr. Alicea achieved physical contact with, or came within close proximity of, one of the high-voltage power lines while atop the bulk carrier. Witnesses to the accident reported hearing an explosion as the powerline broke, observed the victim fall to the pavement in flames and observed tires on the bulk carrier catch fire.

The three citations at issue in the above-captioned cases were issued as a result of an investigation into the circumstances surrounding the fatal accident. (FOOTNOTE 1.)
Citation No. 94602, March 20, 1978, 30 C.F.R. 56.12-71
Occurrence of Violation

This citation alleges a violation of mandatory safety standard 30 C.F.R. 56.12-71 in that "[t]he high tension cables that are located in the access road to the scale house do not have the minimum 10 feet of separation between the vehicles that drive under this electric line. (Measure must be taken from the highest vehicle that will move under the above-mentioned electric lines)" (Exh. M-5). The cited mandatory safety standard provides as follows: "When equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

The evidence in the record reveals that Mr. Salvador Lugo Cortes area engineer for the electric power company, visted the Cantera Espinosa Mine on March 16, 1978, to investigate the accident and that he measured the height of the powerline involved in the accident after it had been repaired and raised. The measurement was made by using a telescopic rod usually utilized to disconnect energy circuits which was in turn measured with a tape measure. This revealed that the powerline was 21 feet 3 inches above the ground. Mr. Lugo provided expert testimony revealing that the powerline was at approximately the same height before the accident as after it was repaired and raised based upon the type of repair and raising operation performed. His testimony reveals that the height of the lines after the completion of the repairs could have varied by approximately 2 or 3 inches from the height at the time of the accident (Tr. 42-43, 50-52, 87). Mr. Lugo's testimony on this point is confirmed by the testimony of Mr. Salvador Torros, Respondent's vice president of marketing and sales. Mr. Torros testified that he observed the powerline before the accident and after it was repaired and raised, and that there could not have been much difference in the height. It was his belief that any difference in the height would not have been noticeable (Tr. 424-425).

In addition to taking the above measurement, Mr. Lugo also measured the height of the lowest powerline that had not fallen and testified that it measured 21 feet 6 inches above the ground when measured from the side of the truck away from the victim's body.

In view of the foregoing, it is found that the powerline involved in the accident was within 2 or 3 inches of 21 feet 3 inches above the ground at the time of the accident, and that the lowest of the remaining powerlines was 21 feet 6 inches above the ground when measured from the side of the truck away from the body.

The evidence in the record further reveals that Mr. Lugo measured the height of the truck while it was still under the powerlines at the site of the accident. Mr. Torres Tome, an engineer employed by Respondent, and Mr. Francisco Martinez Ortiz, Respondent's safety officer, were present when the measurement was made. The measurement was taken from the ground to the highest point on the truck, and the testimony reveals that the measurement was taken with reference to the point located directly beneath the powerline where it was believed that Mr. Alicea was standing at the time of the electrocution. It can be concluded that this point could have been deduced with reasonable accuracy since Federal mine inspectors observed blood on the truck during the course of their March 17, 1978, investigation. The measurement revealed a height of 13 feet.

The accuracy of Mr. Lugo's height measurement was disputed by the testimony of Mr. David Cintron, chief engineer of Arnold Greene Testing Laboratories. Mr. Cintron examined the truck involved in the fatality. The examination was performed on the premises of Rio Grande Ready Mix. The truck was resting on

wooden blocks with the tires removed when Mr. Cintron's height measurement was made. In this position, Mr. Cintron obtained a height measurement of 12 feet 3 inches and thereafter calculated a correction factor to to determine that the truck, with tires installed, would have measured approximately 12 feet in height.

Mr. Lugo's height measurement is deemed the more probative of the two for the following reasons: First, Mr. Cintron admitted that he could not establish a specific height for the truck. Second, Mr. Lugo's height measurement was obtained at the site of the accident with the truck in the same position it occupied at the time of the accident. Company employees, one of whom was an engineer, observed the measurements being made. There is no indication that any company employee interposed an objection to the accuracy of the measurement obtained or that they even expressed concern as to any perceived irregularities in the measurement procedure used. In fact, the evidence clearly reveals that Respondent's safety officer accepted the measurement as correct and included it in his report.

Accordingly, it is found that the truck measured 13 feet in height.

In view of the foregoing findings of fact, it is found that a violation of 30 C.F.R. 56.12-71 has been established by a preponderance of the evidence.

Negligence of the Operator

On February 27 and 28, 1978, and March 1, 1978, Federal mine inspectors conducted an inspection at the Cantera Espinosa Mine pursuant to the provisions of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 721 et seq. (1971) (Metal-Nonmetal Act).(FOOTNOTE 2) No citations were issued at that time as relates to the subject powerlines because the inspectors made no observations specifically attracting their attention to those lines. Additionally, the testimony of Mr. Lugo establishes that the powerlines complied with the 20-foot height requirement established by the Commonwealth of Puerto Rico.

Respondent places great reliance on these considerations in its arguments germane to the issue of operator negligence. Respondent's reliance thereon is misplaced. The failure of Federal mine inspectors to detect a given violation of a mandatory health or safety standard during the course of an inspection does not conclusively establish that the mine operator, through the exercise of due diligence, could not have detected the violative condition. The fact that Mr. Martinez, Respondent's safety officer, had no knowledge on the date of the accident as to the height of the lines (Tr. 320) indicates that Respondent had made no effort to ascertain whether they complied with the Federal height requirement in spite of actual knowledge that all vehicular traffic entering or leaving the plant passed under

the lines and in spite of the fact that the area where the accident occurred was clearly visible from the plant office building located approximately 90 feet away. Respondent is lawfully charged with a duty to comply with the Federal mandatory safety standards notwithstanding its adherence to the less exacting standards imposed by the Commonwealth of Puerto Rico.

The fact that the lines may have been the property of the electric power company is of no assistance to Respondent. The evidence presented as to abatement of the violation reveals that the power company would raise the lines on request from the customer upon payment of the requisite costs.

Respondent attempts to characterize Mr. Alicea's conduct in climbing atop the bulk carrier as a voluntary act on his part beyond Respondent's control. However, Mr. David Cintron, who visited the plant to familiarize himself with the location of the accident, testified that during his visits to the site he discovered that the hatches on bulk carriers are always opened at the weighing station so as to make certain that the cargo compartment is empty or free of water. Respondent presented no evidence establishing that the procedure ordinarily employed around the time of the accident differed from those observed by Mr. Cintron and, in fact, the testimony of Mr. Martinez implies that it was the same. The evidence further reveals that most union employees staged a walkout at the Cantera Espinosa Mine on March 16, 1978, and that the plant was being operated by supervisory personnel and the remaining workers. The walkout resulted in slow service to the trucks arriving at the plant which, in turn, resulted in a backup of trucks waiting to reach the weighing station. According to Mr. Torros, the trucks usually remain on the scale for a short period of time and, accordingly, there is no delay.

It can be inferred from this testimony that the slow service resulting in the backlog of trucks was at least partially attributable to a shortage of personnel at the weighing station. Under these circumstances, it is highly foreseeable that a truck driver would undertake to open the hatches on his bulk carrier while waiting in line so as to save time upon reaching the scales, and it is equally foreseeable that the line of trucks would extend under the powerlines since only three trucks had to be in line for the last one to be positioned under those powerlines. Accordingly, the occurrence of the accident was foreseeable notwithstanding the fact that the actions of Mr. Alicea can legitimately be characterized as voluntary. It was therefore incumbent upon Respondent, since it chose to operate the plant that day, to make doubly certain that the high-voltage powerlines met Federal height requirements or that adequate precautionary measures were taken. Respondent's failure to so undertake these actions indicates that the occurrence of the accident was not completely beyond Respondent's control.

Of greater significance to the issue of operator negligence, is the testimony of Mr. Martinez and Inspector Pedro Sarkis. Inspector Sarkis testified that he observed vehicles parked under

the powerlines during his March 20, 1978, and April 20, 1978, visits to the Canteral Espinosa Mine. The walkout referred to by Mr. Torros lasted only "a couple of days," thus

implying that the facility was operating at normal capacity at least as of April 20, 1978. Accordingly, it can be inferred that vehicles had parked under the powerlines prior to the date of the accident when the plant was operating normally. Additionally, the emphasized portion of the following passage from Mr. Martinez' testimony indicates that it was customary to perform work under the powerlines prior to the date of the accident:

Q. Following the date of the accident, did you see trucks, bulk carriers of the type that was involved in the accident, go to the San Juan Cement Company, Inc., to pick up cement?

A. There were trucks which went in of the bulk carrier type, but I cannot say whether they were the same type as the truck involved in the accident.

Q. Did they drive under the electric lines under which the truck that was involved in the accident was parked at the moment of the accident?

A. Would you repeat the question?

Q. Did those trucks that we're talking about now, did they pass while being driven under the electric lines?

A. All types of trucks have to go under.

Q. Under the electric lines?

A. Yes, because they are aerial lines and they pass under.

Q. Under the electric lines that were involved in the accident?

A. Exactly. What was not done was the usual work under.

(Tr. 318-319). [Emphasis added.]

In view of the foregoing considerations, it is found that Respondent demonstrated far more than ordinary negligence.

Gravity of the Violation

The testimony of Mr. Cintron, an individual with impressive credentials in the fields of electrical engineering, occupational safety, and accident reconstruction, implies that mandatory safety standard 30 C.F.R. 56.12-71 is not specifically directed against the occurrence of an injury of the type involved in this case. However, Mr. Cintron's opinion notwithstanding, the evidence reveals that Respondent's failure to comply with the mandatory safety standard significantly contributed to the occurrence of the accident.

Accordingly, it is found that the violation was extremely serious.

Good Faith in Attempting Rapid Abatement

Inspector Sarkis testified that increasing the height of the powerlines was necessary to abate the violation. The citation set forth 1 p.m., April 3, 1978, as the termination due date (Exh. M-5). Extensions were issued on April 20, 1978, and May 1, 1978, which ultimately extended the time period for abatement to 9 a.m., May 11, 1978 (Exhs. M-6, M-7). The extensions were issued based upon arrangements with the Electric Authority to increase the height of the lines and based upon the existence of a prolonged strike at the power company (Exhs. O-1, O-2). The violation was abated by replacing the 45-foot telephone poles with 55-foot telephone poles, thus raising the height of the lines by approximately an additional 10 feet (Exhs. O-1, M-8). The Electric Authority charged Respondent $3,461 to raise the lines (Exh. O-4).

Inspector Sarkis did not know the exact date of abatement, but testified that it was safe to assume that Respondent raised the lines by 9 a.m. on May 11, 1978. The citation was terminated at 4 p.m. on May 16, 1978 (Exh. M-8).

Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement. 2. Citation No. 93262, April 20, 1978, 30 C.F.R. 56.20-11 Occurrence of Violation

This citation was issued at 1:45 p.m. on April 20, 1978, alleging a violation of mandatory standard 30 C.F.R. 56.20-11 in that "[t]here is no warning or sign to alert the operators of the equipment to the electric lines of high-voltage in the area which cross the entrance of the plant" (Exh. M-11). 30 C.F.R. 56.20-11 provides as follows: "Areas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required."

The findings of fact set forth previously in this decision reveal that the area in which the high-voltage powerlines crossed the main access road was an area where a safety hazard existed and that the hazard was not immediately obvious to employees. The testimony of Inspector Sarkis reveals that neither barricades nor warning signs were present when the citation was issued.

Accordingly, it is found that a violation has been established by a preponderance of the evidence. Negligence of the Operator

On March 17, 1978, Federal mine inspectors requested Mr. Marcos Corrada, the plant manager, to post a warning sign to protect the lives of other individuals using the subject portion of the access road (Tr. 167-168, 189).

Yet, the sign had not been posted as of April 20, 1978, nor had barricades been installed. Vehicles similar to the one involved in the fatality continued to use the access road and, in fact, vehicles were observed parked under the powerlines during Inspector Sarkis' March 20, 1978, and April 20, 1978, visits to the plant. The area involved was clearly visible from the plant office.

The electrocution of Mr. Alicea should have apprised Respondent of the actual dangers, given the proper circumstances, posed to individuals using the area beneath the powerlines. It was entirely foreseeable that another electrocution could occur. The thought that first springs into the mind of a reasonable man upon the occurrence of a fatality of the type involved in this case, under the type of circumstances present in this case, is the need to post effective warnings or to take other steps so as to prevent the occurrence of a similar tragedy. Yet, Respondent did absolutely nothing. The issuance of a citation was required in order to force Respondent to discharge the basic and self evident duty that could, and should, have been undertaken with minimal effort immediately following Mr. Alicea's death.

Accordingly, it is found that the violation was accompanied by a wanton disregard for the safety of others. Gravity of the Violation

One fatality had occurred in the area and the occurrence of another fatality was foreseeable. Accordingly, it is found that the violation was extremely serious. Good Faith in Attempting Rapid Abatement

The citation set forth 3 p.m., April 22, 1978, as the termination due date (Exh. M-11). When Inspector Sarkis returned to the Cantera Espinosa Mine on April 24, 1978, Respondent had posted a warning sign 30 inches long by 14 inches wide on one of the telephones poles (Exh. M-14). The sign was so small that a truck driver would have been unable to read it. Accordingly, at 9 a.m., Inspector Sarkis extended the time period for abatement to 3 p.m., April 24, 1978 (Exh. M-12). The citation was terminated at 8:40 a.m. on April 25, 1978, following the posting of an adequate warning sign (Exh. M-13).

Respondent's conduct between April 20, 1978, and April 24, 1978, indicates that Respondent viewed the requirement to post a warning sign as a nuisance, and therefore undertook half-hearted action which was clearly not designed to provide adequate warning to others. Accordingly, it is found that Respondent demonstrated extreme bad faith in attempting rapid abatement of the violation.

3. Citation No. 94601, March 20, 1978, 30 C.F.R. 50.10

Occurrence of Violation

This citation alleges a violation of 30 C.F.R. 50.10 in that "[t]he fatal accident that occurred on March 16, 1978, was not immediately notified to MSHA by officials of the company.

The fatal accident was discovered by

inspectors from MSHA who arrived on the property for other reasons one day after the accident" (Exhs. M-16, M-17). At all times relevant to this proceeding, 30 C.F.R. 50.10 reported at 42 Fed. Reg. 65536 (1977) (effective date: January 1, 1978), provided as follows:

> If an accident occurs, an operator shall immediately contact the MESA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MESA District or Subdistrict Office, it shall immediately contact the MESA Headquarters Office in Washington, D.C. by telephone, toll free, at 800-737-2000.

The evidence presented reveals that Federal mine inspectors visited the Cantera Espinosa Mine at approximately 3:30 p.m. on March 17, 1978, to provide Respondent with a print on safety load operations. Mr. Luis Gonzalez Rivo, Respondent's personnel manager, thereupon apprised the inspectors of the March 16, 1978, fatality. Notification was not provided immediately following the accident as required by the regulation.

Accordingly, it is found that a violation of 30 C.F.R. 50.10, reported at 42 Fed. Reg. 65536 (1977), has been established by a preponderance of the evidence. Negligence of the Operator

Immediately following the accident, Respondent contacted the police and the insurance company and summoned an ambulance (Tr. 152). There is no indication that the failure to immediately notify the appropriate Federal mine safety authorities was the result of anything other than inadvertence.

Accordingly, it is found that Respondent demonstrated ordinary negligence. Gravity of the Violation

Failure to notify the appropriate Federal mine safety authorities is potentially serious in that one of the purposes of the notification provision is to enable Federal mine inspectors to ascertain the cause of an accident and order the mine operator to institute corrective action designed to prevent the future occurrence of another accident. Additionally, the mine operator's failure to comply with the notification requirement can prevent the collection of evidence needed for a variety of legitimate Governmental purposes.

The evidence presented reveals that Federal authorities were able to gather the information necessary to determine the cause of the accident and order the implementation of corrective action, notwithstanding Respondent's failure to comply with the regulation. Accordingly, it is found that the violation was nonserious.

Good Faith in Attempting Rapid Abatement

The citation was terminated when the operator gave his assurance of future compliance (Exh. M-16). Accordingly, it is found that Respondent demonstrated good faith in attempting rapid abatement. E. History of Previous Violations

Respondent had no previous violations for which assessments had been paid as of the dates of the violations involved in these proceedings (Exh. M-10). Accordingly, Respondent has no history of previous violations cognizable in these proceedings. Peggs Run Coal Company, 5 IBMA 144, 82 I.D. 445, 1975-1976 OSHD par. 20,001 (1975). F. Size of the Operator's Business

Respondent is rated as a medium-size operator based upon the number of annual man-hours worked. G. Effect of a Civil Penalty on Respondent's Ability to Remain in Business

In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 OSHD par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to the issue as to whether a civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty. The parties stipulated in these proceedings that assessment of the civil penalties proposed by the Office of Assessments will not affect Respondent's ability to remain in business (Tr. 20-21). The proposed assessments are identified as follows:

Citation No.	Date	30 C.F.R. Standard	Proposed Assessment
94602	3/20/78	56.12-71	$1,150
94601	3/20/78	50.10	122
93262	4/20/78	56.20-11	255

Accordingly, the question presented is whether Respondent has sustained its burden of proof by establishing that assessment of an otherwise appropriate civil penalty in an amount greater than that proposed by the Office of Assessments will adversely affect its ability to remain in business.

The sole evidence presented on this point was the testimony of Mr. William Miranda Marin, vice president and treasurer of Respondent, and the posthearing receipt in evidence of certified copies of Respondent's 1977 and 1978 Commonwealth of Puerto Rico tax returns, denominated Exhibits O-8 and O-9, respectively.

A careful review of this evidence does not indicate that the civil penalty ultimately assessed in these proceedings would have an effect upon the Respondent's ability to remain in business.

VI. Conclusions of Law

1. San Juan Cement Company, Inc., and its Cantera Espinosa Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. Federal mine inspectors Pedro Sarkis and Juan Perez were duly authorized representatives the Secretary of Labor at all times relevant to these proceedings.

4. The oral determination made at the hearing denying Respondent's motion to dismiss is AFFIRMED.

5. The violations charged in the three subject citations are found to have occurred as alleged.

6. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

Petitioner submitted a posthearing brief and proposed findings of fact and conclusions of law. Additionally, both parties set forth arguments on the record during the hearing. Such brief and arguments, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

VIII. Penalty Assessed

Upon consideration of the entire record in these cases and the foregoing findings of fact and conclusions of law, I find that the assessment of penalties is warranted as follows: A. Docket No. BARB 79-222-PM

Citation No.	Date	30 C.F.R. Standard	Penalty
94602	3/20/78	56.12-71	$2,000

~2619

B. Docket No. BARB 79-283-PM

Citation No.	Date	30 C.F.R. Standard	Penalty
94601	3/20/78	50.10	$ 85
93262	4/20/78	56.20-11	$3,000

ORDER

1. The oral determination made at the hearing denying Respondent's motion to dismiss is AFFIRMED.

2. Respondent is ORDERED to pay civil penalties in the amount of $5,085 within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE_ONE

1 The testimony of Mr. David Cintron reveals that electrocution could have occurred absent physical contact with the powerline. According to Mr. Cinton, high voltage electricity will jump, or arc, on air. Arcing on air depends upon such atmospheric conditions as humidity, rain or temperature. Experiments have established that under normal conditions, 38,000-volt, phase-to-phase, electricity can arc 12 to 18 inches on air. The National Electric Code specifies that it is safe for a man to work 36 inches or more from a 38,000-volt line under standard atmospheric conditions. The 36-inch figure contains a built in safety factor (Tr. 433-434).

~FOOTNOTE_TWO

2 The Federal Mine Safety and Health Amendments Act of 1977 (Amendments Act) was signed into law by President Carter on November 9, 1977. Pursuant to section 307 of the Amendments Act, all provisions of the 1977 Mine Act relevant to these proceedings became effective on March 8, 1978. The Amendments Act repealed the Metal-Nonmental Act, but all mandatory standards relating to mines issued under the Metal-Nonmetal Act, in effect on the date of enactment of the Amendments Act, remain in effect as mandatory standards under the 1977 Mine Act until such time as new or revised standards are issued by the Secretary of Labor. See sections 301(b)(1) and 306(a) of the Amendments Act.