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SOL (MSHA) V. ARKANSAS LIME
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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 Proceeding

Docket No. CENT 79-213-M
A/O No. 03-00464-05003

v.

Limedale Lime Plant

ARKANSAS LIME COMPANY,

RESPONDENT

DECISION

Appearances: E. Justin Pennington, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for Petitioner
Russell Gunter, Esq., House, Holmes & Jewell, Little
Rock, Arkansas, for Respondent

Before: Judge Cook

On August 16, 1979, the Mine Safety and Health
Administration (Petitioner) filed a proposal for a penalty in the
above-captioned case pursuant to section 110(a) of the Federal
Mine Safety and Health Act of 1977 (1977 Mine Act), alleging
eight violations of various provisions of the Code of Federal
Regulations. An answer was filed by Arkansas Lime Company
(Respondent) on September 14, 1979.

On January 28, 1980, Petitioner filed a motion requesting
approval of a settlement and for dismissal of the proceeding
stating, in part, as follows:

I.

The contested citations in this case and the settlement
are identified as follows:

Number	Date	30 C.F.R. Standards	Assessment	Disposition Settlement
163618	1/30/79	56.12-8	\$ 255	\$ 255 (full amt.)
163619	1/30/79	56.12-30	255	0 (withdrawn)
163620	1/30/79	56.14-6	170	0 (withdrawn)

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164181	1/31/79	56.11-2	\$ 195	\$ 195 (full amt.)
165138A	4/05/79	56.12-8	445	52 (reduction)
165138B	4/05/79	56.12-2	655	52 (reduction)
165140	4/05/79	56.12-13	150	66 (reduction)
165141	4/05/79	56.12-13	225	66 (reduction)

* * * * *

II.

This case disposition/settlement will effectuate the purposes of the Act for the following reasons:

1. After a review of all available evidence, the parties agreed that the settlement, attached hereto and incorporated herein, would be just and proper.

2. The proposed assessments for Citation numbers 00165138A, 00165138B, 00165140, [and] 00165141 * * * shown above as reduced were reduced for the following reasons:

a) Citation 00165138A

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that little or no negligence was involved, the occurrence of the event at which the standard is directed was improbable, and the gravity of injury if it were to occur would result in no lost work days. By agreement the total points assessed are 23 and the proposed penalty is thereby reduced to \$52.00.

b) Citation 00165138B

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that little or no negligence was involved, the occurrence of the event at which the standard is directed was improbable, and the gravity of injury if it were to occur would result in no lost work days. By agreement the total points assessed are 23 and the proposed penalty is thereby reduced to \$52.00.

c) Citation 00165140

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that the operator was only ordinarily negligent, the occurrence of the event at which the standard is directed was improbable, and the operator made extraordinary efforts to insure that the violation was abated within the time given for abatement. By agreement the total points assessed are 26 and the proposed penalty is thereby reduced to \$66.00.

d) Citation 00165141

Upon reconsideration and review of the citation and mine inspector's notes associated therewith, the parties have agreed that the gravity of injury if it were to occur would result in no lost work days, the operator was only ordinarily negligent, and the operator made extraordinary efforts to insure that the violation was abated within the time given for abatement. By agreement the total points assessed are 26 and the proposed penalty is thereby reduced to \$66.00.

* * * * *

3. [Petitioner] has thoroughly reviewed the facts and circumstances pertaining to the violations in citations shown above as "withdrawn". Upon such review and after careful consideration, [Petitioner] has determined that there is insufficient evidence to support said citations and the proposed penalties associated therewith.

4. [Respondent] has agreed to full payment of the proposed assessed penalties as shown above as "paid in full". The parties have agreed that said proposed assessments are fair and reasonable and reflect full consideration of statutory criteria set forth in Section 105(b)(1)(B) of the Act, 30 U.S.C. 801(b)(1)(B).

5. [Respondent] has complied with the disposition/settlement agreement and has paid the penalty sought by [Petitioner] as heretofore set forth and therefore desires to withdraw its notice of contests to all citations except those indicated above as being withdrawn or stayed, if any.

6. [Respondent] has stated it will comply with the Federal Mine Safety and Health Act of 1977, 83 Stat. 742, 30 U.S.C. 801-960.

On February 5, 1980, an order was issued requiring Petitioner to furnish certain additional information necessary to determine whether approval of the proposed settlement would protect the public interest. On March 3, 1980, Petitioner filed a supplement to its motion to approve settlement stating, in part, as follows:

COMES NOW the Secretary of Labor pursuant to the order entered on February 5, 1980, by the Honorable John F. Cook, Administrative Law Judge and supplements the Motion to Approve Disposition/Settlement filed by the Secretary on the 25th day of January, 1980.

I.

Copies of all correspondence between the Assessment Office and the Respondent as to the violations involved, and Inspector's sheets or statements for each of the alleged violations are attached hereto as Exhibit A and are incorporated by reference herein.

II.

Special reasons for the settlement terms of the [three] mentioned citations or orders are as follows:

1. Orders Nos. 165138A and 165138B

After discussing the above orders with the Supervisory Mine Inspector, counsel for Respondent, and the mine inspector involved it was determined that although a technical violation existed, the penalty proposed was totally unreasonable. The condition cited involved a 110 volt wire cord spliced with non insulating tape. This was plugged into a normal wall outlet, requiring one to pull the plug in order to turn off the light fixture at the other end of the cord. The cord was located in a storage area in an attic where temporary work was being conducted. This area would normally be inaccessible to employees of Respondent, and the work was not directly supervised by Respondents' managerial staff. The area was dry, and no other conditions existed which would have increased the possibility of electric shock. In addition, this same condition was cited twice, once under two different standards, thereby duplicating the points assessed for mine size, history, negligence, gravity and probability of occurrence. Because of this, points were assessed for each of the violations based only on the size of the operation, the history of previous violations, and the number of persons affected (1), for a total of twenty-three (23) points.

2. Citation No. 165140

Again after discussion with all parties involved it was determined that a technical violation existed but the penalty proposed was unreasonable. In this case, a multiwired cord was spliced in a manner exposing the inner wires, which were separately insulated. Thus, no bare conductor was exposed. In addition, the spliced cord was laying on the floor or ground, making electrical shock more improbable. Because no bare conductor was exposed, the negligence of the operator was minimal, and was offset by the operator's immediate steps taken to gain compliance. Thus a total of twenty-two (22) points were assessed for size and history, three (3) points for gravity, and one (1) for number of persons affected, with negligence and good

faith points offsetting each other, for an agreed total of twenty-six (26) points.

3. Citation No. [165141]

In this case, a 110 volt cord was spliced with a non insulating tape. No conditions existed which would have made electrical shock more probable, nor did conditions exist which would have made death by electrocution a probability. Rather it was agreed, after consultation with all parties, that because the cord was insulated, although inadequately, the probability of shock was low, and in any event would not have resulted in any lost work days. In addition, any negligence on the part of the operator was offset by its extraordinary steps taken to gain compliance. Therefore, a total of twenty-two (22) points were assigned for size and history, three (3) points for probability, and one (1) for the number of persons affected, with good faith and negligence offsetting each other, for a total of twenty-six (26) points.

On March 26, 1980, an order was issued denying the motion to approve settlement because the information submitted was insufficient for the purpose of determining that approval of the proposed settlement would protect the public interest.

On July 18, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on August 26, 1980, in Little Rock, Arkansas. Subsequent thereto, a telephone conference was held, at Petitioner's request, during which the undersigned Administrative Law Judge and representatives of the parties participated. The purpose of the telephone conference was to discuss the January 28, 1980, motion to approve settlement and the March 3, 1980, supplement thereto and the specific reasons why the motion was denied.

When the hearing convened on August 26, 1980, in Little Rock, Arkansas, Petitioner made an oral motion on the record for approval of settlement. The proposed settlement is identified as follows:

Citation/Order Number	Date	30 C.F.R. Standard	Assessment	Settlement/ Disposition
163618	1/30/79	56.12-8	\$ 255	\$ 255
163619	1/30/79	56.12-30	255	Withdrawn
163620	1/30/79	56.14-6	170	Withdrawn
164181	1/31/79	56.11-2	195	195
165138A	4/5/79	56.12-8	445	195
165138B	4/5/79	56.12-2	655	195
165140	4/5/79	56.12-13	150	140
165141	4/5/79	56.12-13	225	122
		Totals:	\$2,350	\$1,102

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Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The August 26, 1980, motion to approve settlement incorporates by reference the reasons set forth in the January 28, 1980, and March 3, 1980, filings. Additionally, the following discussion took place on the record as relates to Order Nos. 165138A, April 5, 1979, 30 C.F.R. 56.12-8, and 165138B, April 5, 1979, 30 C.F.R. 56.12-2:

[MR. PENNINGTON:] Citation No. 165138(a), which alleges a violation of 30 C.F.R. 56.12-8, the parties again have conferred, and have agreed that the penalty of \$195 would be appropriate in view of the evidence and the criteria set forth in the Act, and would move that the Court approve the disposition of that Citation, as stated.

Citation No. 165138(b), which alleges a violation of 30 C.F.R. 56.12-2, again the parties have conferred and agreed that a penalty of \$195 would be appropriate under the criteria set forth under the Act, and in view of the evidence present, and the Secretary would move that this disposition be approved.

JUDGE COOK: All right. Now, before you proceed further, Mr. Pennington, I realize that in the Motions which you have filed, you did go into a discussion as to why you felt that there should be this kind of a disposition.

I wonder if you can -- I hate to have you belabor this issue, but I wonder if you could give a fairly simple explanation of what it was that was alleged to be a violation, and why you feel that it should be that amount of money?

I hate to catch you off guard if you're really not prepared to go into that, but I would appreciate it if you would put on the record now what it is, so that we can have a final statement on the record as to the circumstances.

MR. PENNINGTON: Well, Your Honor, really there would be no material changes to the supplement to the Motion to Approve Disposition of Settlement, which was filed on -- I don't have the date here when that was filed -- but it was in response to your Order dated -- I don't have a date on that Order either -- February 5, 1980. I can give a --

JUDGE COOK: (Interposing) Can you give us a little

description of what happened here, and what the problem was?

MR. PENNINGTON: I also have the Compliance Officer here who can also provide you with that background, if you would like to do it that way.

JUDGE COOK: Well, either way, but it's not necessary to put this in the form of a sworn statement, because this is purely a settlement discussion, but if you -- whatever way you want to proceed, but I am interested in getting a better idea of what actually happened.

MR. PENNINGTON: All right. I think what is involved here in Citation No. 165138, that is divided into a Sub-Citation (a) and a Sub-Citation (b), is Sub-Citation (a) relates to a condition where the -- where a cable, an electrical conductor cable was rigged in a fashion such that it was not in compliance with the provisions set out in the Act.

Specifically, the cable ran between -- let me see if I can explain this. We have a metal junction box which is attached to the wall. Attached to the junction box is a porcelain light fixture. The cable that is involved, ran between the metal junction box, and the porcelain light fixture, and was attached or connected to the porcelain light fixture in that fashion.

It was not a permanent cable. It was one that had been placed there to serve a temporary purpose. It was strung up along a rafter on the ceiling of the room in which it was located, down the wall through a door into another room, and was then plugged into a light, or just a regular electrical receptacle or socket on the wall.

It is alleged that this violated two provisions of the Act. First, that the electrical, or that electrical cables or conductors pass through metal boxes or junction boxes, only through proper fittings, and only through fittings that have been properly bushed and are adequately insulated.

It is our contention that the wire passing between the metal box and the porcelain light fixture was in violation of this Standard.

On the other end of the cable, we have just a regular plug which is plugged into the receptacle on the wall in order to energize the cable and turn on the lighting at the other end.

It is alleged that this condition violated the provision of the Act which requires that electrical circuits be provided with the proper switches, on and off switches, to energize and de-energize the circuits.

It is the Administration's position that where the only means of energizing or de-energizing a conductor is by pulling on the plug, that it requires one to come into contact with, or possibly to come into contact with a conductor while it is under load, or while it is still energizing.

Not only is this a prima facie hazardous condition, but it is also in violation of the National Electric Code. Such a switch is not approved by the National Electric Code.

These are the conditions that are alleged in it.

JUDGE COOK: Let me ask you a little more about this so I can understand this.

You are saying that there was really a connection, that is a cable, running from a metal box over to a light fixture.

MR. PENNINGTON: That is correct.

JUDGE COOK: And then there was a cable and light fixture going around to the plug?

MR. PENNINGTON: Well, really, we're talking about the same cable.

JUDGE COOK: I would like to understand this cable more then. You said the cable came out of a metal box. Was that the plug that went into the metal box?

MR. PENNINGTON: I have a picture here if it would help.

JUDGE COOK: All right. I would like to see that, if there is no objection by the operator's attorney. In fact, Mr. Gunter, if you would like to come up here.

MR. PENNINGTON: I think this is Exhibit M-5. And it is a photograph that was taken at the plant on April the 5th, 1979, in the lime kiln bridge, the lime bridge kiln, or in the area that is mentioned on the Citation.

This particular cable here is a permanent cable (pointing), which does have the proper fittings, which does pass through the proper fittings and into the box as required by the Electric Code and by the Standards.

However, this cable here (pointing), which as you can see it runs between this metal box here and the porcelain light fixture here, has been connected to the light, and this is the cable that is in issue, the second cable.

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JUDGE COOK: So, are you really saying that the first permanent one really wasn't in operation?

MR. PENNINGTON: This is correct.

JUDGE COOK: Had it been in operation, the second one wouldn't have been necessary?

MR. PENNINGTON: If it had been in operation, the second cable would have been unnecessary.

JUDGE COOK: Unnecessary.

MR. PENNINGTON: Yes. And the condition that is alleged, violating the Standard, is where the cable passes between the porcelain light fixture and the metal junction box there.

JUDGE COOK: Now, was there any problem about touching any wires in the area just near the porcelain part?

MR. PENNINGTON: No. My understanding is that these wires were adequately insulated. The real problem here is that it does not pass through the proper fittings into the metal box, as required by the Standard.

JUDGE COOK: What can go wrong if it doesn't go through the proper fitting?

MR. PENNINGTON: Well, my understanding is that if it doesn't pass through the proper fitting, that the cable is not properly secured, it can be pulled loose for one thing, and it can rub against the side of the metal box and the porcelain fixture here so that the insulation can be worn thin, and possibly create a shock hazard at some time in the future. That's the purpose of the bushing on the metal box.

JUDGE COOK: All right. So, the bushing problem was right in this area of the location of the porcelain and the metal box?

MR. PENNINGTON: That's correct. There is no bushing there.

JUDGE COOK: Now, that is one part that was alleged in the Citation.

MR. PENNINGTON: Right.

JUDGE COOK: The other part, you say, dealt with the plugging in of this second wire into some receptacle in another room?

MR. PENNINGTON: Right. The same wire, just continuing along this wire here (pointing), it goes along this rafter here that the light fixture is attached to, and I'm not quite sure whether or not that it was attached to the rafter in any way, or whether it was just suspended by being wrapped around the rafter, but at any rate, it comes along the rafter, down the wall, and out a screen door, which is being opened and closed, and then into the next room where it was plugged into a receptacle in the wall, which is approximately four and a half feet above the ground.

JUDGE COOK: Now, was the problem of the wire being affected by a screen door, et cetera, also a problem that they were concerned about?

MR. PENNINGTON: This was not cited, but it was one of the conditions which is alleged to enhance the probability or a possibility of an accident occurring with the metal bushing, for one thing, and it's alleged that the condition of passing through the door increases the probability of an electric shock at some point in the future.

JUDGE COOK: All right. Then, what about then though, the plugging in? Why is that a problem?

MR. PENNINGTON: Well, again as I stated, in order to energize this particular light bulb here, what is required is that you pull the plug out of the wall, out of the receptacle, and if you pull it out of the wall, you are coming into contact with the conductor that is energizing at the time.

JUDGE COOK: But isn't that the case when you are plugging in any lamp in a home?

MR. PENNINGTON: This is true.

JUDGE COOK: Is it different though? In this situation that you're describing in this particular mine, is there some difference between that and the plugging in of a normal lamp in a home?

MR. PENNINGTON: Well, the difference would be, in this particular case here, is that we have nothing to break the circuit between the light bulb itself and the receptacle on the wall.

Usually, in a lamp in a home situation, you have a light switch that can be operated to turn the light on and off, so there is a break in the switch.

JUDGE COOK: I understand that, but, see, what I'm really trying to find out though, is as it relates to the plugging and unplugging, is there a difference? As to the safety problem?

MR. PENNINGTON: May I consult with him?

JUDGE COOK: Certainly.

(Short interruption.)

MR. PENNINGTON: Your Honor, one of the, well, conditions that would be different in this particular instance here, relates to the condition of the cable that was involved.

The cable that was involved was old, it was not in the best of condition. Some of the insulation was weathered.

The Mine Inspector's concern was that if the only way of energizing the circuit was to pull on the cable itself, that it created the possibility of cracking the insulation, or possibly pulling it loose from the socket -- not the socket on the plug, I mean, but on the wall, and that is what the Mine Inspector's concern was with respect to this condition.

In addition, I would also like to point out that the National Electric Code does not approve of this type of set-up. Lamps are required to have an off-on switch and the Standard requires that the electrical set-up, or the cable involved, be operated in the way that it is approved, in an approved fashion, and for this, we would look to the National Electric Code.

JUDGE COOK: All right. Now, Mr. Gunter, of course, I realize that we have asked a number of questions here of Mr. Pennington, and have let him set forth his position here. Is there anything that you want to remark about, at this point?

MR GUNTER: At this point, I would -- Obviously, we are in the process of trying to settle this. I don't think the complaint speaks to the condition of the cable. I think the complaint is that there was not an off-on switch somewhere.

Also, this occurs in a hoist house, which is elevated, which is dry, and in which there are normally no employees around. It was done by an employee, from the evidence I've

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been able to ascertain about it, and while we recognize that violations probably did exist in the manner of the rigging, we certainly have very strong differences as to what the consequences of that should be, and we would like to enter into this particular settlement agreement that we feel is a fair settlement.

MR. PENNINGTON: Your Honor, I would just like to reiterate that Mr. Gunter and I have reviewed the evidence, and the Secretary also believes that the settlement that has been proposed is fair and reasonable, under the circumstances.

JUDGE COOK: Apparently in your last filing of information, and supplemental Motion, you did state that you felt that the original proposed penalty was unreasonable.

MR. PENNINGTON: We do believe that the penalty that was proposed was unreasonable.

(Tr. 7-17).

The reasons given above in support of the proposed settlement have been reviewed in conjunction with the information submitted as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

ORDER

Accordingly, IT IS ORDERED that the proposed settlement of August 26, 1980, as outlined above, be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that Respondent be, and hereby is, ASSESSED civil penalties in the amount of \$1,102.

Since Respondent has already paid \$686, IT IS FURTHER ORDERED that Respondent pay the remaining \$416 within 30 days of the date of this decision.

IT IS FURTHER ORDERED that the proposal for a penalty be, and hereby is, DISMISSED as relates to Citation Nos. 163619, January 30, 1979, 30 C.F.R. 56.12-30, and 163620, January 30, 1979, 30 C.F.R. 56.14-6.

John F. Cook
Administrative Law Judge