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SOL (MSHA) V. TEXAS ARCHITECTURAL AGGREGATES
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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. CENT 79-16-M A/O No. 41-00995-05002
v.	Docket No. CENT 79-17-M A/O No. 41-00995-05003
TEXAS ARCHITECTURAL AGGREGATES, INC., RESPONDENT	Docket No. CENT 79-38-M A/O No. 41-00995-05004
	Docket No. CENT 79-147-M A/O No. 41-00995-05005
	Docket No. CENT 79-357-M A/O No. 41-00995-05006
	Van Horn White Marble Mine

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner Ralph William Scoggins, Esq., El Paso, Texas David M. Williams, Esq., San Saba, Texas, for Respondent

Before: Judge Stewart

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(FOOTNOTE 1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereinafter, the Act). The hearing in these matters was held in El Paso, Texas, on May 14, 15, 16, 1980, and August 27 and 28, 1980.

At the outset of the hearing, Petitioner read a number of admissions by Respondent into the record. Respondent admitted the following: (1) that, in essence, it fell within the jurisdiction of the Act, (2) that the citations listed in Exhibit 1, a copy of the proposed assessment numbered 41-00995-05001, had not been challenged and that the proposed assessment had, therefore, become a final order of the Commission, (3) that Respondent's employees worked a total of 84,456 man-hours in 1978, (4) that its employees worked a total of 8,008 man-hours in 1978 at the Van Horn White Marble Mine.

The proposed assessment, identified as Exhibit 1, showed that the operator had a history of 19 prior violations, for which it was assessed a total of $997.

The parties stipulated that the size of the Van Horn White Marble Mine was a small operation with 8,008 total man-hours worked in 1978 and that Respondent was a small- to medium-sized operator.

After the presentation of evidence and oral argument by the parties on each alleged violation and each of the criteria to be considered in the assessment of a penalty, a decision was announced orally from the bench. The decision is reduced to writing in substance as follows, pursuant to the Federal Mine Safety and Health Review Commission's Rules of Procedure, 29 C.F.R. 2700.65. General findings were made with regard to Respondent's size, its history of violations and the effect of civil penalties assessed herein on its ability to remain in business. Evidence regarding each citation was presented in the chronological order of the citations rather than by docket numbers and the decision on each citation was accordingly announced in that order rather than by docket numbers.

BENCH DECISION

Pursuant to stipulation by the parties, it is found that the Van Horn White Marble Mine is a small-sized operation and that the Respondent is a small- to medium-sized operator. All employees of the operator worked a total of 84,456 man-hours in 1978. The employees of the operator at the Van Horn White Marble Mine worked a total of 8,008 man-hours in 1978.

Exhibit P-1 indicates that the operator has been assessed the amount of $997 total for 19 prior violations, in 1978. Pursuant to Exhibit P-1, it is found that the operator's history of previous violations is moderately good.

It is found that the civil penalties in this case will not affect the operator's ability to continue in business.

Citation No. 162002

Citation No 162002 was issued on November 7, 1978, by MSHA Inspector Sidney R. Kirk. The condition or practice listed on the citation was "Beer bottle, a round stick of 12 inches in length, and an air gauge and hose were in the floor of the operator's cab of company number zero haul truck."

The citation alleged a violation of 30 C.F.R. 57.9-12, which states as follows: "Mandatory. Cabs of mobile equipment shall be kept free of extraneous materials."

The record establishes that a beer bottle, a round stick of 12 inches in length and approximately 1-inch diameter, and an air gauge and air hose were on part of the seat structure of the company No. 0 haul truck. It has not been established that in this particular instance that the beer bottle, the round stick, the air gauge or the air hose were necessary in order to operate the truck on the day in question. While these items might have had some possible use in maintenance of the truck, it is not clearly indicated that it was necessary that they be in the cab of the truck on the day of the inspection. Since these materials were extraneous, the record supports a finding that there was a violation of 30 C.F.R. 57.9-12.

While it is possible that a person might be injured as a result of these conditions, the possibility is quite remote. I believe that an injury is improbable under these conditions, due to the fact that it would be necessary for a series of events to occur in order for an accident to take place. First, the material would have to get from the seat through somewhat restrictive openings to the floor. Then they would have to somehow become entangled with the controls of the truck. Even after that, with the truck moving at a slow rate of speed, perhaps only 5 or so miles per hour, in low gear, an accident might still be averted. For that reason, I find that an injury, as a result of these conditions, is improbable.

The record establishes that the mine was in operation at the time of the violation and that the extraneous articles

were in plain view and obvious. This supports a finding that the operator should have known that the extraneous articles were in the cab of the truck and he should have taken steps to remedy the condition. It has not been established as to what length of time these articles were actually on the seat in the operator's cab. Therefore, the appropriate finding is that the negligence of the operator was slight.

As to the remaining issue of good faith, the record supports a finding that the condition was abated less than an hour after the citation was issued. This demonstrates that once the citation was issued, the operator demonstrated good faith in abating the citation.

In consideration of the foregoing findings of fact and the statutory criteria to be applied in assessing the civil penalty, it is found that a civil penalty of $75 is appropriate for this violation.

An assessment in the amount of $75 is entered.

Citation No. 162003

Citation No. 162003 was issued on November 7, 1978, by Inspector Sidney Kirk. The condition or practice noted on the citation was, "The haul truck number zero, entered the mine portal in total darkness and the headlamps had been torn off. No other illumination was provided."

The record does not support a finding that the truck did, in fact, enter the portal in total darkness. However, it does establish that the truck entered the mine portal from bright sunlight outside to an area where it was considerably darker.

30 C.F.R. 57.9-2 provides: "Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used."

Notwithstanding the fact that the record does not support a finding that the haul truck entered the portal in total darkness, the citation citing a violation of 30 C.F.R. 57.9-2, did apprise the operator and the operator's counsel as to the nature of the alleged violation sufficiently to allow the operator to present its defense. The evidence supports a finding that when the truck is entering the portal from the bright sunlight outside into the darker area, vision is momentarily reduced, creating a safety hazard for a short period of time. The record, therefore, does support a finding that there was a violation.

The record establishes that there was sufficient light to maneuver vehicles and perform loading functions after passing through the portal. The evidence establishes that the probability that the absence of headlights on the No. 0 haul truck would cause an injury is slight. I have made no finding as to the effect of the lack of headlights if the truck was coming out of the mine because the effect as the truck came from the somewhat darker area out into a bright area has not been established by the record. It was also not established that any great hazard would occur in the operation of the truck inside the mine after the driver's vision had adapted itself to the darker conditions. Also, as the truck came in through the portal from the outside, it would be silhouetted by the portal and should be readily visible to the persons or vehicles coming out through the portal. Nevertheless, there was a momentary impairment in vision of the truck driver as he came through the portal. I accept the testimony of the inspector as to this point. However, since that condition was only momentary, I find that the probability was slight.

The record supports a finding that the headlights had been missing from the No 0 haul truck for a considerable period of time prior to the issuance of the citation. It also supports a finding that the operator either knew or should have known that the headlights were missing. Since the operator should have known and failed to take corrective action, this amounts to negligence. However, it is evident that the operator used good faith in reaching its decision not to replace the headlights or furnish the vehicle with headlights. In view of his good faith in this respect, the finding is that the operator's negligence was slight.

In view of the admission by MSHA that the operator did exhibit good faith in abating the violation, the finding is that the operator did display good faith.

In view of the findings of fact and in consideration of the statutory criteria for assessment of a civil penalty, a civil penalty in the amount of $100 is assessed for this violation.

Citation No. 162004

Citation No. 162004 was issued by Inspector Sidney R. Kirk on November 7, 1978. The condition or practice noted on the citation was: "The park brake on the number zero ore haul truck was inoperative. While parked on a grade, two employees removed the boulders from behind the rear wheels while the driver held the truck with engine power."

The citation alleged a violation of 30 C.F.R. 57.9-37, which provides as follows: "Mandatory. Mobile equipment shall not be left unattended unless brakes are set. Mobile equipment with wheels or track, when parked on a grade, shall be either blocked or turned into a bank and the bucket or blade lowered to the ground to prevent movement."

It is clear here that the Secretary is alleging a violation of the first sentence of this regulation which states that mobile equipment shall not be left unattended unless the brakes are set. The record supports a finding that the No.0 haul truck did not have parking brakes and that no brakes were, in fact, set at the time the inspection was made and the citation issued. Since the brakes were not set on the No. 0 haul truck, a violation of 30 C.F.R. 57.9-27 did exist.

It has already been determined as one of the considerations of whether or not there was a violation of 30 C.F.R. 57.9-37, that the vehicle was unattended. This finding was entered since there was no one at the vehicle and no one in attendance nearby at the time of the inspector's arrival. The evidence clearly shows that the vehicle was unattended, that it did not have parking brakes and that the brakes were not set. The record shows that it is probable that this condition could result in serious injury to personnel.

While the evidence shows that a new truck had been ordered prior to the time of the inspection, the evidence does not indicate that truck No. 0 had been removed from service or that it had been tagged to prohibit further use until repairs were completed. The record clearly shows that the operator, either knew or should have known, that the vehicle did not have parking brakes and that the brakes were not set while the vehicle was unattended. Therefore, I find that the operator was negligent.

In view of the statement by MSHA that respondent exercised good faith, a finding is entered that the operator demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

In view of the above findings of fact and the consideration of the statutory criteria for determination of the amount of the civil penalty to be assessed, it is found that an appropriate civil penalty for the violation of this citation is $200.

The operator is assessed the penalty of $200 for the violation set forth in Citation No. 162004.

Citation No. 162005

Citation No. 162005 was issued on November 7, 1978, by MSHA inspector Sidney R. Kirk. The condition or practice noted on the citation was as follows: The No. 0 ore haul truck driver's visibility to the rear was blocked by a cab protector and only one mirror located on the driver's side, backing through the plant yard without a person signaling, and was not equipped with an automatic reverse signal alarm to warn persons in the area.

The citation alleged a violation of 30 C.F.R. 57.9-87 which provides as follows: "Mandatory. Heavy-duty mobile equipment shall be provided with audible warning devices, when the operator of such equipment has an obstructed view to the rear. The equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or a lever to signal when it is safe to back up."

Due to the construction of the cab protector the view of the operator to the rear was obstructed. The record supports a finding that the equipment did not have an automatic reverse signal alarm which was audible above the surrounding noise level. The record also establishes that on the day the citation was issued and at the time the citation was issued, there was no observer to signal when it was safe to back up. While there were other persons in the area, none of them were in the immediate vicinity of the No. 0 ore haul truck. They did not fulfill the function of an observer to signal when it was safe to back up. The record clearly establishes a violation of 30 C.F.R. 57.9-87. The first sentence of 30 C.F.R. 57.9-87 says, "Heavy-duty mobile equipment shall be provided with audible warning devices." The evidence established that the No. 0 ore haul truck was, in fact, heavy-duty mobile equipment, that it was not provided with a horn or other audible warning devices that were in working condition at the time. The evidence indicates that the horn did not, in fact, operate.

The evidence establishes that the truck was subject to being operated in the vicinity of where other miners were working or otherwise present. At times, the truck was subject to being backed up for considerable distances. The record establishes that it was probable that the conditions found by and cited by the inspector could result in serious injury to personnel. The record clearly establishes that the truck was backed for a distance of approximately 125 feet on the 7th of November, 1978, during the inspection. It has not been established, however, that it was backed up at any other time, without an automatic reverse signal alarm or a person to signal and warn persons in the area.

It was established that the horn did not work and that there was no other audible warning device. However, it was not established how long this condition had existed. The only witness for the Government has testified that there was no representative of the operator there and that these conditions could, therefore, have not been known by the operator of the mine. On the basis of this testimony, I find that the negligence of the operator has not been established.

Pursuant to a statement by MSHA that respondent exhibited good faith, I find that the Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

For this violation of 30 C.F.R. 57.9-87, a civil penalty in the amount of $125 is assessed.

Citation No. 162006

Citation No. 162006 was issued on November 7, 1978, by Inspector Sidney R. Kirk. The condition or practice noted on this citation was, "High voltage lines over the truck haul road approximately 40 feet in front of the haul truck dump site were not conspicuously marked."

This citation alleged a violation of 30 C.F.R. 57.9-60 which states: "Mandatory. Where overhead clearance is restricted, warning devices shall be installed and the restricted area shall be conspicuously marked."

The testimony of Inspector Kirk has shown that the lines over the truck haul road that he noted in this citation were not, in fact, high-voltage lines under the regulation in Title 30 of the Federal Regulations. More important, however, is the question as to whether or not the overhead clearance was restrictive. The Secretary asserts that the overhead clearance was restrictive because it is possible that some piece of equipment could contact it, that is, the lines. The record in this case, however, indicates that the highest piece of equipment was in use on this haul road that might contact the lines or any other construction over the road was the Euclid haul truck. With the bed in the dump position, the evidence establishes that there was a 2-1/2-foot to 3-foot clearance.

I, therefore, find that this was not a restricted clearance, within the meaning of 30 C.F.R. 57.9-60.

Citation No. 162006 is, accordingly, vacated. The proceeding concerning Citation No. 162006 is dismissed.

Citation No. 162007

Citation No. 162007 was issued on November 7, 1978, by Inspector Sidney R. Kirk. The condition or practice noted on the citation is: "Handrails were not provided at the truck dump, north side, where personnel observed the ore hopper contents. A drop-off of approximately 20 feet (existed)."

The citation alleged the violation of 30 C.F.R. 57.11-2 which provides: "Mandatory. Crossovers, elevated walkways, elevated ramps and stairways shall be of substantial construction provided with handrails and maintained in good condition. Where necessary, toeboards shall be provided."

The evidence shows that there was a small mound approximately 3 feet in width on one side of a dump ramp. From this mound, there was a drop-off of approximately 16 to 20 feet. This mound was in addition to the berms on the side of the dump ground.

Although the company had issued instructions to the truck drivers that they would dump and receive their instructions from the truck cab, the evidence clearly shows that the mound was used as a walkway. The multiple tracks on it indicated that persons had walked on it. There was testimony to the effect that persons had been observed there watching the feeder contents. This mound is clearly elevated and it is clearly a place where persons walked at times. It, therefore, falls within the purview of the regulations as being a walkway.

Although this mound is built on cribbing, there is no indication that this cribbing extends up above the ramp in any way to act as a guard. The testimony is undisputed that there was no handrail present at this mound, which is in the nature of a walkway. The record supports a finding that the Respondent was in violation of 30 C.F.R. 57.11-2.

As to the gravity, the evidence establishes that if a person were to fall from the elevated mound or walkway that the fall would be at least in the area of a 16-foot or a 20-foot fall and that the person would fall on a hard surface of some type. A fall of this nature could be expected to result in severe injuries to the person.

The testimony has shown that this walkway was on occasion used by persons, specifically some of the truck drivers. However, the number of occasions and the frequency of these occasions was not established by the testimony. Due to the

limited exposure of personnel to the danger of falling, I find that it is improbable that a person would be injured a fall from this elevated walkway.

The evidence has established that there was no handrail at the elevated mound or walkway. It has also established that this condition was obvious and open to view, even from the office. This supports a finding of negligence on the part of the operator. The evidence has, however, failed to show that the operator knew that this area was being used with any frequency by the truck drivers or other persons. Due to the lack of showing as to frequency, the fact that the truck drivers had actually been instructed to remain in their cabins and not use the walkway, I find that the negligence, in this case, is slight.

The record reflects that the citation was issued on November 7, 1978, and that the termination or abatement date was set for November 14. Although the violation was not abated within this time frame, the inspector did modify the citation on November 15, 1978, to give the company until November 20, 1978, to abate the violation. The citation terminating the original citation was not issued until January 4, 1979; however, it has not been established that the operator did actually take that much time in abating the violation.

When the violation was not abated by November 14, the time set, the inspector did see fit to modify the citation to allow additional time. There is no indication that an order of withdrawal was issued for failure to abate in sufficient time. Since the actual time of abatement leading to the termination of the citation has not been established, I will give the operator credit for good faith in attempting to achieve rapid compliance after the citation was issued.

In consideration of the findings of fact and the statutory criteria to be applied in assessing a civil penalty, a penalty of $125 is assessed for this violation.

Citation No. 162008

Citation No. 162008 was issued on November 7, 1978, by inspector Sidney R. Kirk. The condition or practice noted on the citation was, "Access to the cutoff valve on the diesel storage tank on the south side of the crusher was by climbing the slant structure and using pliers to turn off the fuel."

The citation alleged a violation of 30 C.F.R. 57.11-1 which states: "Mandatory. Safe means of access shall be provided and maintained to all working places."

"Working place" is defined in 30 C.F.R. 57.2 as follows: "Working place means anyplace in or about a mine where work is being performed."

There was a great deal of conflict in evidence as to whether or not this was a working place and that it was a place in or about the mine, where work was being performed. However, there is no need to resolve this conflicting testimony, at this stage of the decision.

The violation was abated by Mr. John Aragon on January 4, 1979. The justification for his action on his subsequent action form, which terminated the violation, was as follows: "The diesel fuel storage tank on the south side of the crusher was equipped with a cutoff valve." This was evidently done because the cutoff valve, at the time of the inspection, was not equipped with a valve wheel to operate the valve. The square handle had been rounded off by pliers used to close and to open the valve. The termination form issued by Inspector Aragon did not mention the installation of a ladder or the installation of additional handrails around the area of the valve.

While the access to some of the working places might have been hazardous and a violation, attention has been directed in this case to the access to the cutoff valve on the diesel storage tank. This has been the issue that has been litigated here. Mr. Simpson has testified that the cutoff valve could be operated by reaching from the platform to the valve and this was a safe operation. He also testified that there were steps built on the A-frame structure, holding the diesel fuel tanks, which could be used as a ladder.

Inspector Kirk, in his testimony, stated that, to the best of his knowledge, that the condition was terminated merely by the installation of a cutoff valve. There was nothing to indicate that additional ladders or handrails had been provided.

I therefore find that the record does not establish a violation of 30 C.F.R. 57.11-1, in that it has not been shown that a safe means of access was not provided and maintained to the cutoff valve on the diesel storage tank.

Accordingly, Citation No. 162008 is vacated and the proceeding concerning Citation No. 162008 is dismissed.

Citation No. 162009

At the conclusion of the presentation of evidence with regard to Citation No. 162009, Respondent moved that the proceedings with respect to this

citation be dismissed. It had been alleged that a master control switchbox was not equipped with a ground in violation of section 57.12-25. Respondent argued that testimony had established that the control box was equipped with a ground.

Respondent's motion to dismiss was granted as follows:

> Mr. Kirk has clearly testified that the master control switchbox was grounded with a metal conduit and that a metal conduit was an approved and acceptable method of grounding this particular type of installation. What Mr. Kirk has testified to was that the magnetic starter was not grounded by a conduit between the master switch and the magnetic starter.
>
> Mr. Kirk has testified that he did not check to see whether there was a continuous ground from the magnetic starters through the conduit, through the motor casings to ground, and he has stated that while this might have complied with the regulation, it still might be unsafe due to the different degree of grounding in the three motors which might cause an electric potential. Since Citation No. 162009 refers to the master control switchbox and not the magnetic starter, the citation is vacated.

Citation No. 162010

> Citation No. 162010 was issued on November 8, 1978, and it alleged a violation of 30 C.F.R. 57.18-10. The condition or practice listed on the citation reads as follows: "First aid training had not been made available to all the employees. The selected supervisor had been trained in first aid four years ago in school. The seven employees were working 30 miles from the nearest town and only a pickup truck and a stretcher was available, and no communications."
>
> 30 C.F.R. 57.18-10 reads as follows: "Mandatory. Selected supervisor shall be trained in first aid. First aid training shall be made available to all interested employees."
>
> Notwithstanding what had been told to the inspector by Mr. Arturo Gonzales, foreman, the selected supervisor, the evidence shows that he had in fact been trained in first-aid on September 14, 1977.
>
> As to the second requirement of the regulation, the evidence shows that first-aid training had been made available and had actually been given to some of the employees and it fails to show that the operator failed to make such training available to all interested employees.

Citation No. 162010 is vacated and the proceeding in regard to this citation is dismissed.

Citation No. 162011

Citation No. 162011, issued on November 8, 1978, by inspector Sidney R. Kirk, alleged a violation of 30 C.F.R. 57.11-58. The condition or practice noted on the citation stated: "Two employees were found working underground without any identification. The check-in board tags showed four persons to be underground. When investigated, neither were underground since two of them were no longer employed at this mine."

30 C.F.R. 57.11-58 states as follows: "Mandatory. Each operator of an underground mine shall establish a check-in and check-out system which shall provide an accurate record of persons in the mine. These records shall be kept on the surface in a place chosen to minimize the danger of destruction by fire or other hazards. Every person underground shall carry a positive means of being identified."

It has hardly been disputed that there were persons underground without a positive means of being identified. Inspector Kirk stated in the citation that two employees were found working underground without any identification. His testimony clearly shows that two employees were found working underground without any identification even though at one time he possibly did use language to indicate that perhaps those two persons did have positive identification. This was fully explained in subsequent testimony. The record establishes that there were employees without positive means of identification.

The citation also stated that the check-in tag boards showed four persons to be underground when they were not underground and two of them were no longer employed at the mine.

Although a check-out system had been established by which the miners checked in and out of the mine, or were supposed to check in and out of the mine, the system did not, on the day the citation was issued, provide an accurate record of persons in the mine as required by 30 C.F.R. 57.11-58.

The record establishes that there was a violation of the sentence of the regulation which states: "Each operator of an underground mine shall establish a check-in and check-out system which shall provide an accurate record of persons in the mine."

The record also establishes a violation of the last sentence of 30 C.F.R. 57.11-58 which states: "Every person underground shall carry a positive means of being identified."

The operator was, therefore, in violation of 30 C.F.R. 57.11-58 as alleged in Citation No. 162011.

I do not find that the violation was willful as urged by Petitioner. However, I do find that the operator was negligent and failed to follow the mandates of 30 C.F.R. 57.11-58. The operator had established a system for checking persons in and out of the mine. However, on the day of the violation, the system was not sufficient to provide an accurate record of persons in the mine since it showed four persons underground who were not actually underground. The operator also should have known that there were persons underground without positive means of being identified. Not only had these persons failed to leave their tags at the check-out board in accordance with the check-out system and the check-in system established, but they had not been issued means of identification to be used under that system.

As to gravity, the unrebutted testimony of Inspector Kirk was that the violation posed no hazard to the miners working at the time. However, he further testified that there could have been danger to persons involved in rescue efforts in looking for bodies. Clearly, these persons might also have been miners. Nevertheless, the operator's mine was a small mine and the danger to miners would have been triggered only by a disaster. I therefore find that the possibility of injury due to the violation was remote.

In view of the concession by Petitioner that temporary nametags were immediately issued and that the four nametags were removed from the check-in board, I find that the operator demonstrated good faith in abating the condition after the citation was issued.

Having considered the six statutory criteria, I find that a proper assessment for this violation is $95.

Order No. 161774

Respondent objected on jurisdictional grounds to the assessment of civil penalties for alleged violations in Citation Nos. 161774 and two others; 161776 in Docket No. CENT 79-16-M and Citation No. 161775 in Docket No. CENT 79-38-M. At the conclusion of testimony and oral argument on the issue, the following decision was rendered:

The March 29, 1979, memorandum of understanding between OSHA and MSHA is set forth in a document offered by Respondent on page 344, section 516 of The Commerce Clearinghouse, Inc., a document published in 1980, entitled "Employment Safety and Health Guide."

According to this document the Occupational Safety and Health Act of 1970 (OSHA) gives the Secretary of Labor authority over all working conditions of employees engaged in business affecting commerce except those conditions with respect to which other Federal agencies exercise statutory authority to prescribe or enforce regulations affecting occupational safety or health.

This document also states that the Federal Mine Safety and Health Act of 1977, Pub. L. 91-173, as amended by Pub. L. 95-164 (Mine Act), authorizes the Secretary of Labor to promulgate and enforce safety and health standards regarding working conditions of employees engaged in underground and surface mining extraction (mining), related operations, and preparation and milling of the minerals extracted.

The definition of a coal or other mine in the Act is given in section 3(h)1 as follows:

> Coal or other mine means (a) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (b) private ways and roads appurtenant to such area, and (c) lands, excavations, underground passageways, shafts, slopes, tunnels, working structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

I believe that this definition can be read to mean that a mine is an area of land from which minerals are extracted

in nonliquid form and facilities, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in liquid form.

The MSHA/OSHA agreement of 1979 sets forth certain general principles as to which an agency will have jurisdiction. These are stated as follows: "This agreement is entered into to set forth the general principle and specific procedures which will guide MSHA and OSHA. The agreement will also serve as guidance to employers and employees in the affected industries in determining the jurisdiction of the two statutes involved.

The general principle is that, as to unsafe and unhealthful working conditions on mine sites and in milling operations, the Secretary will apply the provisions of the Mine Act and standards promulgated thereunder to eliminate those conditions.

However, where the provisions of the Mine Act do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites (e.g., hospitals or mine sites), or where there is statutory coverage under the Mine Act but there exists no MSHA standards applicable to particular working conditions on mine sites, then the OSHA Act will be applied to those working conditions.

Also, if an employer has control of the working conditions on a mine site or milling operation, and such employer is neither a mine operator nor an independent contractor subject to the Mine Act, the OSHA Act may be applied to such an employer where the application of the OSHA Act would in such a case provide a more effective remedy than citing a mine operator or an independent contractor subject to the Mine Act who does not in such circumstances have direct control over the working conditions.

This statement of general principle seems to apply in most cases to mine sites and in milling operations. I do not have sufficient information to determine if there was a milling operation at the Van Horn loading dock and will assume that the loading operation there consisted only of the use of hoppers, front-end loading, and railroad cars, and perhaps other associated equipment.

This case does not seem to fall under one of the exceptions in the OSHA/MSHA memorandum of understanding in the case where there is statutory coverage under the Mine Act, but there exists no MSHA standards applicable to particular

working conditions on such sites. There appears to be MSHA standards applicable to particular working conditions at the Van Horn loading dock.

Another exception set forth in the memorandum of understanding is where an employer has control of the working conditions on the mine site or milling operation and such employer is neither a mine operator nor an independent contractor subject to the Mine Act. Here, it appears that the employer is a mine operator who does have control of the working conditions at the loading dock and is, therefore, not under the exception. Also, there is no indication in this case that the application of the OSHA Act would provide a more effective remedy than citing a mine operator subject to the Mine Act.

The memorandum of understanding does not seem to specifically address the jurisdiction of the agencies over a loading facility such as that of Texas Agricultural Aggregates--Architectural Aggregates at Van Horn. However, as stated by counsel for Respondent, there are subgroups of nonmetals listed under the authority of MSHA. These include sand and gravel, and crushed and dimension stone industries, as well as another list including sand, gravel, cement, and marble.

The memorandum of understanding does contain the statement that OSHA regulatory authority commences as indicated in the following types of operations: gypsum board plant, brick clay pipe and refractory plants, ceramic plant, fertilizer products, asphalt mixing plant, concrete ready-mix or batch plants, custom stone finishing, smelting, electrowinning, and salt and cement distribution terminals not located on mine property, and refining. The memorandum of understanding does, therefore, place certain distribution terminals not located on mine propery under the jurisdiction of OSHA. However, these are only salt and cement distribution terminals. No other types of distribution terminals are listed and there are no general words to indicate that OSHA has jurisdiction in this case.

I will, therefore, apply the words of the Federal Mine Safety Act of 1977 in determining whether or not MSHA has jurisdiction over the mine operations or the distribution mine operations at the Van Horn loading dock.

Since the definition of mine includes facilities used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, the loading facility at Van Horn is clearly within the statutory definition of a mine.

Since there is nothing in the memorandum of understanding between OSHA and MSHA to place this facility under the jurisdiction of OSHA rather than MSHA, my ruling is that MSHA does have jurisdiction over that facility.

The bench decision continued as follows:

Order of Withdrawal No. 161774, citing a violation of 30 C.F.R. 57.9-3, was issued on November 9, 1978, by inspector Sidney Kirk. The condition or practice noted on the order of withdrawal stated: "The brakes on the Hough-30 payloader used at the railroad loading facility in Van Horn, Texas was used normally on an appropriate grade of ten to twelve percent. The brake line was broken and when tried, the loader would not stop and/or hold on an approximately three percent grade."

30 C.F.R. 57.9-3 states: "Mandatory. Powered mobile equipment shall be provided with adequate brakes."

The testimony of Mr. Simpson and Inspector Kirk has established that some time between November 3 and the date of the order of withdrawal on November 9, an eye had broken from a tie rod, which, in turn, had broken a brake line to one of the wheels. Mr. Simpson's testimony has established that this line was to the left rear wheel. His rationale was that the tie rod was on the rear wheels used to steer the machine and that is what broke the line. So it was clearly the left rear line that was broken. From reports received by these two witnesses, it was established that the eye bolt had been repaired and that repair to the brakes had been attempted by placing a nail in the brake line and reconnecting it to the master cylinder to create a blockage rendering the brakes on the wheel served by that line inoperative. The repairs were never tested and the testimony of Mr. Simpson has established that brake fluid was never placed in the brake cylinder.

Although the evidence establishes that the machine was never used, it was there and available for use and might have been used, relying on the brakes of only three wheels by placing brake fluid in the cylinder and by making additional adjustments and bleeding.

The machine was never used by Mr. Tranago, the only person other than Mr. Simpson who normally used the machine, after the time of the breakage of the brake line. Mr. Tranago obviously knew that the machine was not fitted with adequate brakes at the time and he did not attempt to use the machine. However, there was nothing to prevent the use of the machine. machine.

There is no evidence that the machine was tagged or locked out in any manner to prevent its use, therefore, I find that there was a violation of 30 C.F.R. 57.9-3.

Since it was obvious that there was a malfunction in the braking system due to the dangling brake line and since the condition was known to the parties at the Van Horn loading facility, the operator either knew or should have known that the vehicle did not have adequate brakes and the operator should have taken appropriate steps to remedy the inadequate brakes. I, therefore, find that the operator was negligent.

In view of agreement by the parties that the gravity was slight, I find that the gravity was low. I find that it was low because, as stated by counsel, the machine was not actually used and it was also not likely that it would be used since the malfunction was known by Mr. Tranago, the person who was ordinarily the only operator of the vehicle other than Mr. Simpson.

Although the order of withdrawal which was issued on November 9, 1978, was not terminated until November 14, 1978, the evidence establishes that efforts had been made to abate the violation promptly and that the repairs were accomplished at a reasonable time after the day of the order. Since reasonable efforts were made to repair the braking system, I find that the operator demonstrated good faith in abating the violation after receipt of the order of withdrawal.

In consideration of the evidence adduced and the statutory criteria which must be considered in determining the amount of a civil penalty, I find that a penalty of $400 is appropriate.

A civil penalty of $400 is assessed for Order of Withdrawal No. 161774.

Order No. 162020

Order No. 162020 was issued by inspector Sidney Kirk on November 8, 1978. It alleged a violation of 30 C.F.R. 57.3-22.

30 C.F.R. 57.3-22 reads in pertinent part: "Loose ground shall be taken down or adequately supported before any other work is done."

The record establishes that drilling was done in the face area and that loose ground in the nature of boulders of marble were in the vicinity of the face area and over the

drill control. The record establishes that the loose fractured rock was there because of blasting operations and was not, as suggested by Respondent, caused by tremors or airplanes flying over. I therefore find that loose ground was not taken down or adequately supported before any other work was done as required by the regulation.

While the inspector acknowledged that there were no persons working in the area at the time the citation was written, he has given evidence sufficient to support a finding that persons had worked in the area underneath the unsupported boulders at a time while they were loose and unsupported. The fractures were obvious and they should have been known by mine management. Since the operator either knew or should have known that work was being done under loose, unsupported ground, action should have been taken to eliminate the hazard. I therefore find that the operator was negligent.

The record establishes that it was probable that a serious injury could occur as a result of this violation. It establishes that there was loose, hanging rock above areas where persons had been working and when scaled down, at least one of those rocks did hit the drill. The drill must have been brought into the mine by some person and it is obvious that the drill had been used in drilling the holes in the face.

In view of the fact that the Petitioner conceded good faith by the Respondent, I find that the operator demonstrated good faith in abating the violation once the citation was issued.

In consideration of the statutory criteria which must be followed in determining the amount of a civil penalty to be assessed, I find that an appropriate penalty for this violation is $300. A penalty of $300 is assessed.

Settlements

Petitioner moved for approval of settlement of a number of citations herein. The proposed settlements and supporting assertions are as follows:

With regard to Citation No. 161773 in Docket No. CENT 79-38-M and Citation No. 161790 in Docket No. CENT 79-357-M, I do not believe that there is a factual dispute. Certain records were kept at the San Saba Office of Texas Architectural Aggregates, Inc.

These records were not kept at either the Van Horn facility or at the Van Horn White Marble Mine, some 30 miles north of Van Horn, Texas. And if the Act and the regulations permit the records to be kept in San Saba, Texas, there would be no violation. But if the Act or the regulations require the records to be kept at the mine, there would be a violation.

Basically, what is involved in these two citations is a question of law. I do not think there is any factual dispute to be determined. And if the Commission could rule as to whether or not the records are allowed to be kept in San Saba, Texas, or allowed to be kept at the location in Van Horn or at the mine itself, I think that this citation could either be vacated, or if not vacated, then settled.

The presiding Judge thereupon rendered a decision with regards the existence of a violation as follows:

Citation No. 161773 was issued on November 9, 1978, by inspector Sidney Kirk. The citation alleged a violation of 30 C.F.R. 57.18-28(d). The condition or practice noted on the citation was as follows: "Records of self-rescue and mine emergency training were not available at the mine office nor the Van Horn, Texas loading facility office. The San Saba, Texas, office confirmed that last training recorded was September 1977."

30 C.F.R. 57.18-28(d) states: "Records of all instruction shall be kept at the mine site or nearest mine office at least two years from the date of instruction. Upon completion of such instruction, copies of the records shall be submitted to the nearest Mine Safety and Health Administration Training Center."

Citation No. 161790 was issued by inspector Sidney Kirk on March 7, 1979. The citation alleged a violation of 30 C.F.R. 50.30(a). The condition or practice noted on the citation was: "Records of quarterly employment reports were not available at the Van Horn, Texas office."

30 C.F.R. 50.30(a) states:

> Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete an MSHA form 7000-2 in accordance with the instructions and criteria in Section 50.30-1 and submit the original to the MSHA Health and Safety Analysis Center, Post Office Box 25367, Denver Federal Center, Denver, Colorado 80225, within 15 days after the end of each calendar quarter. These forms may be obtained from

> MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall retain an operator's copy at the mine office nearest the mine for five years after the submission date."

I take this subsection to mean quarterly employment reports of mines other than the coal mines since the coal production report is required by 30 C.F.R. 50.30(a) which states as follows: "Each operator of a coal mine in which an individual worked during any day of a calendar quarter shall report coal production on Form 7000-2." My ruling on the issue as to whether the retention of records at San Saba, Texas, approximately 400 miles from Van Horn, complies with the rules will be a narrow ruling and it will apply only to the specific facts of this case.

The offices at the mine site and the office at the Van Horn loading facility at the time the citations were issued were not suitable for the retention of records. However, my ruling is that this is not an adequate excuse for failure to retain records at the place reguired by the regulations.

As counsel for Petitioner has pointed out, section 109(a) of the Act does require that at each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine.

This ruling does not reach the issue, since it is not necessary to resolve this case, as to whether the records should be kept at the mine site, at the bus body designated as an office at the mine site, or whether they might be kept at Van Horn, 30 miles away. It is, however, merely a ruling that the retention that the records in San Saba, 400 miles away, does not meet the requirements of the Act and of the regulations.

There seems to be some guidance from the words of 30 C.F.R. 57.18-28(d), where there is a requirement that records of instruction shall be kept at the mine site or nearest mine office. This would seem to infer, even without considering the requirements of section 109 of the Act, that it is expected that the mine office would be maintained near the mine site and not at a point 400 miles away or at some distant corporate office.

My ruling, therefore, is that the retention of records at San Saba, Texas, instead of at Van Horn or at the mine site, 30 miles from Van Horn, was in violation of the regulations as alleged in Citation Nos. 161773 and 161790.

After the decision regarding the existence of a violation was rendered the parties stipulated as follows: "There was no gravity because no employees were exposed to injury by these violations and that the mine operator showed good faith by immediately terminating the violation on being notified that the records should be kept in Van Horn."

Following these stipulations the bench decision continued as follows:

> The stipulation that there was no gravity and that the operator exhibited good faith in abating the condition after the citation was issued is accepted.
>
> I rule that the operator did maintain the records at the facility which was most convenient to him at the time to maintain those records and that he had not become aware that it was necessary at that time to maintain records near the mine. Although ignorance of the requirements of the statute and regulations is no excuse, I feel that the operator acted in good faith in maintaining the records at the site most convenient to him. Therefore, I find that any negligence of the operator was very slight.
>
> In consideration of the six statutory criteria, a nominal penalty of $10 will be assessed in each case.
>
> The assessment for Citation No. 161773 in Docket No. CENT 79-38-M is $10.
>
> The assessment for Citation No. 161790 in Docket No. CENT 79-357-M is $10.

Petitioner also moved for approval of the following settlements:

> With regard to Citation No. 162012 in Docket No. CENT 79-16-M, the proposed assessment was $180. The agreed assessment is $60. In support of this settlement, the Petitioner would show that there was ordinary negligence and that the operator should have known of the violation, that the occurrence of the event against which the standard was directed was improbable, but if the event had occurred, it likely would have resulted in a fatal accident, that only one employee was exposed, and that the Respondent demonstrated good faith in the termination of the violation.
>
> With regard to Citation No. 162016 in Docket No. CENT 79-16-M, the proposed assessment was $180 and the agreed assessment is $87.
>
> In support of this settlement, the Petitioner would show that the Respondent should have known of the condition, that

the accident was probable, and that only a disabling injury would have happened if the accident had occurred, that only one employee was exposed to the condition, and that the Respondent demonstrated good faith in termination of the condition upon receipt of the citation.

With regard to Citation No. 161762 in Docket No. CENT 79-16-M, the proposed assessment was $160 and the agreed assessment is $60.

In support of this disposition, the Petitioner would show that there was ordinary negligence in that the operator should have known of the condition, that the occurrence of an accident was improbable but that if an accident had occurred, it possibly could have been a fatal accident, that only one employee was exposed to the condition and the operator demonstrated good faith in terminating the condition.

With regard to Citation No. 161763 in Docket No. CENT 79-16-M, the proposed assessment was $114 and the agreed assessment is $42.

In support of this disposition, the Petitioner would show that the operator should have known of the condition but that the occurrence of an accident would have been improbable, that only lost work days would have resulted from a possible accident, that only one employee was exposed, and that the operator demonstrated good faith in terminating the condition.

With regard to Citation No. 161769 in Docket No. CENT 79-38-M, the proposed assessment was $160 and the agreed assessment is $87.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition but that the occurrence of an accident as a result from this condition was improbable, that a fatal accident possibly could have resulted, that only one employee was exposed, and that the operator demonstrated good faith in terminating the condition upon receipt of the citation.

In Citation No. 161770 in Docket No. CENT 79-38-M, the proposed assessment was $98 and the agreed assessment is $51.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition, that an accident resulting from this condition was improbable, that only lost work days would be the likely result of an accident, that only one employee was exposed, and that the Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

With regard to Citation No. 161771 in Docket No. CENT 79-38-M, the proposed assessment was $150 and the agreed assessment is $81.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition, that an accident resulting from this condition was improbable, that if an accident had resulted, it possibly could have resulted in disabling injuries, that only one employee was exposed to the condition, and that Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

In Citation No. 161772 in Docket No. CENT-79-38-M, the proposed assessment was $78 and the agreed assessment is $51.

In support of this disposition, the Petitioner would show that the Respondent should have known of the condition, that an accident resulting from this condition was improbable, that only lost work days would have resulted from an accident, and that one employee was exposed, and that the Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

In Citation No. 161777 in Docket No. CENT 79-16-M, the proposed assessment was $98 and the agreed assessment is $36.

In support of this disposition, the Petitioner would show that Respondent possibly should have known of the violation, that the occurrence of an accident was improbable, that lost work days possibly could have resulted from the accident, and that only one employee was exposed, and that the Respondent demonstrated good faith in terminating the condition upon receipt of the citation.

A ruling was accordingly announced that the negotiated settlements were approved in the following amounts: Citation No. 162012, $60; Citation No. 162016, $87; Citation No. 161762, $60; Citation No. 161763, $42; Citation No. 161769, $87; Citation No. 161770, $51; Citation No. 161771, $81; Citation No. 161772, $51; Citation No. 161777, $36."

Petitioner also moved for approval of additional settlements as follows:

With respect to Citation No. 161775 in Docket No. CENT 79-38-M, the proposed assessment was $130. The parties have agreed that an assessment of $42 would be appropriate, subject to the Respondent's exception to the ruling that the Van Horn distribution terminal is covered by MSHA regulations instead of by OSHA

regulations.

In support of this settlement, the Petitioner would show that there was some negligence in that the operator should have known of the condition, that an accident because of this violation would have been improbable, that if such an accident had occurred only lost days would have been attributed to the accident, that only one employee was exposed to the condition, and that the Respondent demonstrated good faith in the termination of the condition.

With regard to Citation No. 162014 in Docket No. CENT 79-38-M, the proposed assessment was $72 and the agreed assessment is $39.

In support of this disposition, the Respondent would show that there was only ordinary negligence in that the operator should have known of the condition, that it was improbable that an accident would have resulted from the condition, that if an accident had resulted, it was unlikely that an employee would have received a lost day injury, that only one miner was exposed, and that the Respondent demonstrated good faith in terminating the condition.

With regard to Citation No. 162017 in Docket No. CENT 79-38-M, the proposed assessment was $180 and the agreed assessment is $27.

In support of this disposition, the Petitioner would show that there was very little negligence involved in that there was only a possibility that the operator could have known of the condition, that it was improbable that the condition would have resulted in an accident and if the condition had resulted in an accident, the likely injury would have not involved lost work days to the miner, that only one miner was exposed to this condition, and that the Respondent demonstated good faith in terminating the condition once the citation was issued.

The negotiated settlements were approved and assessments were entered as follows:

A civil penalty for Citation No. 161775 is assessed in the amount of $42.

For Citation No. 162014, a civil penalty is assessed in the amount of $39.

For Citation No. 162017, a civil penalty is assessed in the amount of $27.

Petitioner proposed that the presiding Judge, after rendering a determination as to whether the condition was in violation of the Act, approve the following settlement:

If the Commission should find that the ramp is an elevated roadway within the meaning of the standard, the parties agree that an assessed penalty of $87 would be appropriate (for Citation No. 161776). Of course, this $87 is subject to the Respondent's exception to the ruling that the Van Horn distribution terminal is covered by MSHA regulations instead of by OSHA regulations,(FOOTNOTE 2) and also, subject to Respondent's exception to any ruling that the loading ramp is an elevated roadway within the meaning of 30 C.F.R. 57.9-22.

In support of the agreed disposition, the Petitioner would show that there was ordinary negligence in that the Respondent should have known that the ramp did not have guardrails. The occurrence of an accident from lack of guardrails was improbable but that if such an accident should occur, possible disabling injuries could have occurred to the operator of any equipment on the ramp, that only one employee was exposed, and that the Respondent demonstrated good faith in termination of the condition.

The bench decision was in substance as follows:

To place the issue in context, I will read the citation, or the applicable parts thereof, on the record. Citation No. 161776 was issued on November 9, 1978, by inspector Sidney Kirk. The citation alleged a violation of 30 C.F.R. 57.9-22. The condition or practice noted on the violation was: "The elevated ramp to the railroad loading facility was not provided with berms or guardrails along the west side where the height was from a flat to approximately six feet high."

30 C.F.R. 57.9-22 provides as follows: "Mandatory. Berms or guards shall be provided on the outer bank of elevated roadways."

Inspector Kirk has testified that the length or ramp was 60 to 70 feet and that it led from an alley to the loading place, where the height was approximately 6 feet. Mr. Simpson, on the other hand, has testified on behalf of the Respondent that the ramp was approximately 25 feet with a short extension and that the maximum height was approximately 4 feet.

Since there is nothing to indicate the actual length and the height, there is no possible way to reconcile this testimony in such a way as to determine the accurate length

of the ramp nor the height of the ramp since Inspector Kirk has stated that he did not make measurements and there is no indication that Mr. Simpson made any actual measurements. In disposing of the issue, it will be considered that the ramp is somewhere between 25 feet and 70 feet in length and that the height is somewhere between 4 to 6 feet.

Counsel have cited no cases directly in point and I know of no such cases. However, I am aware that a Judge of the Federal Mine Safety and Health Review Commission has held in two instances that ramps, loading places, and places where trucks travel were required to be bermed or guarded.

The first of these cases is the Golden R Coal Company, issued by Judge George Koutras on November 5, 1979. The docket number is BARB 79-301-P. That case dealt with an elevated roadway leading to a dump site. In that instance, dump trucks would pull up to a turnaround and the trucks would be placed in reverse to back up the short roadway to the dump site.

The other case which involved berms and also the issue as to whether or not the operation was a mine was Rock Valley Cement Block and Tile. That was Docket No. DENV 79-587-PM, which was issued in July of 1980. A resume of that case is contained in the August 1, 1980, issue of "Mine Productivity Report." The case dealt with a dike which was being constructed to prevent a nearby river from flooding a sand and gravel pit. In that case, a metal/nonmetal operator was required to have berms on the dike being constructed even though the roadway used on the top of the dike was only for the purpose of the construction of the dike. It was held, in essence, that the short duration of the dike construction did not prevent the top of the dike used by trucks from being a roadway.

Now, I do not have these cases or excerpts therefrom before me. However, the first of these cases, the Golden R Coal Company case, did contain a dictionary definition of a road and a roadway which was taken from Webster's New World Dictionary. A road was defined as a "way, path, or course," and a roadway was defined as "that part of a road used by cars, trucks, etc.--traveled part of a road."

It is noted in that decision that a ramp is defined in two ways in the Dictionary of Mines, Minerals, and Related Terms. It is first defined as, "An inclined approach--Used loosely when applied to a loading ramp." The other definition is, "An incline connecting two levels." The facility

used by Respondent clearly was a ramp, but that does not dispose of the issue because we must now determine whether a ramp can also be a roadway.

The ramp was clearly the extension of a roadway used by trucks to load rail cars. Even if, as testified by Mr. Simpson, the length of this ramp was only 25 feet, the record establishes that it was a road used by trucks and that it was a traveled part of a road.

The regulation requires that berms must be built on elevated roadways. Under the circumstances of this case, even if the drop-off were only 4 feet as testified by Mr. Simpson, there could be a serious hazard due to the elevation and it is clear that the ramp was an elevated roadway.

While the cases that I have cited are not binding, they do provide guidance and the reasoning therein is persuasive to some degree, even though the circumstances were different. I believe that they are correct.

A short duration of use (which might be because of the short length of the roadway or because it was used only for a short period of time while loading), does not prevent the ramp in this case from being an elevated roadway and subject to the requirements of the regulation. I therefore hold that the ramp was an elevated roadway subject to the requirements of the regulation.

The parties have agreed that the $160 proposed penalty should be reduced to $87. In its motion that the settlement be approved, counsel for Petitioner has set forth the statutory criteria applied and I am in agreement with the negotiated settlement reached.

For Citation No. 161776, a civil penalty in the amount of $87 is assessed.

Petitioner also moved that Respondent's motion to withdraw its contest be approved as follows:

With regard to Citation Nos. 161764, 161766, and 161767, the Respondent moves to withdraw its contest.

With regard to the citations on which Respondent is withdrawing its contest, the Petitioner would show that in each of these cases, the Respondent could have known of the cited condition, that the condition against which the cited condition was directed, the likelihood of occurrence was probable,

that the Respondent demonstrated good faith in attempting to terminate the condition once it had been called to Respondent's attention.

With regard to Citation No. 161764, the Petitioner would show that lost work days could have resulted had an accident occurred and with regard to Citation Nos. 161766 and 161767, the Petitioner would show that if an accident had occurred, a possible disabling injury would have resulted from it.

And also, in each of those three cases, the Petitioner would show that only one employee was exposed to the hazardous condition.

For Citation No. 161764, the proposed assessment is $84 and the agreed assessment is $84.

For Citation No. 161766, the proposed assessment was $114 and the agreed assessment is $114.

For Citation No. 161767, the proposed assessment was $114 and the agreed assessment is $114.

These settlements were approved.

Withdrawn Citations

Petitioner made an oral motion for withdrawal of the following citations:

Docket No. CENT 79-16-M:	Citation Nos. 162019, 161761 and 161768
Docket No. CENT 79-147-M:	Citation No. 161765
Docket No. CENT 79-17-M:	Citation Nos. 161778 and 161779
Docket No. CENT 79-38-M:	Citation No. 161780

In support of this motion to vacate, counsel for Petitioner asserted the following: "A close examination of the citations and the evidence available to the Petitioner indicates that the Petitioner will not be able to go forward and sustain a proof of a violation in those instances."

The motion was granted and the following citations were vacated: Nos. 162019, 161761, 161765, 161768, 161778, 161779, and 161780.

The following motions for approval of withdrawal of citations were also submitted by Petitioner:

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With regard to Citation No. 162013 in Docket No. CENT 79-16-M, and with regard to Citation Number 162015 in Docket No. 79-16-M, the Petitioner moves to withdraw the citations.

In support of this disposition, the Petitioner would show that the motion to withdraw Citation Nos. 162013 and 162015 is made because the Petitioner has doubtful evidence concerning rather involved electrical violations and is not at all certain that the Petitioner could prevail.

This motion was approved by the presiding Judge. The two citations, Nos. 162013 and 162015, were vacated.

ORDER

IT IS ORDERED that the above bench decision is AFFIRMED.

IT IS FURTHER ORDERED that Respondent pay the sum of $2,502 within 30 days of the date of this order.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE_ONE

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

"(1) 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.

"(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."

~FOOTNOTE_TWO

2 See discussion above, beginning at p. 14.