

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 13, 1980

SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	.Docket No. LAKE 80-48-M
	:	A.C. No. 20-2370-5002
Petitioner	:	
V.	:	
	:	Middlemiss Pit
CASH & CARRY GRAVEL, INC.,	:	
Respondent	:	

ORDER DENYING MOTION
TO APPROVE SETTLEMENT;
DECISION

Appearances: Allen H. Bean, Esq., Office of the Solicitor, U.S. Department of Labor, Detroit, Michigan, for Petitioner;
John L. Cote', Esq., and Richard G. Swaney, Swaney and Thomas, Holland, Michigan, for Respondent.

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This proceeding was commenced by the filing of a petition for the assessment of civil penalties for six alleged violations of mandatory safety standards promulgated pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801. Pursuant to notice, the matter was heard on the merits in Holland, Michigan on August 12, 1980. Thomas Wasley, a federal mine inspector, testified on behalf of Petitioner; Cornelius Brewer, president of Respondent, testified on behalf of Respondent. Counsel made closing statements on the record and were given the opportunity to submit written proposed findings of fact and conclusions of law. On October 21, 1980, the parties filed a motion to approve a settlement.

MOTION TO APPROVE SETTLEMENT

The parties have proposed to settle the six violations, originally assessed at \$773 for a payment of \$580. I have reviewed the motion and the evidence received at the hearing and conclude that the proposed settlement does not effectuate the purposes of the Act. Therefore the motion is DENIED.

AFFECTING COMMERCE

Respondent argues that it is not subject to the Act because it sells its product, sand and gravel, entirely within the state of Michigan. The Mine Safety Act applies to mines "the products of which enter commerce, or the operations or products of which affect commerce." **80 U.S.C. § 803**. By this language, taken from the Coal Mine Safety Act of **1969**, Congress intended to exercise its full authority under the Commerce Clause. The evidence establishes that Respondent produces and sells sand and gravel on the open market. Among its customers are a concrete manufacturer and the County Road Commission. These facts bring its operation under the Act. See the discussion of this issue in Secretary of Labor v. Capitol Aggregates, Docket No. DENV **79-163-PM**, 2 FMSHRC 2373 (1980), decision by Judge Moore; and Secretary of Labor v. New York Department of Transportation, Docket No. YORK 79-21-M, Order Denying Motion to Dismiss by Judge **Laurenson**, March 21, 1980, and the cases cited in these decisions.

WARRANTLESS INSPECTION

The inspection which resulted in the citations at issue was made without a warrant, and over Respondent's protest. The Act requires inspections and directs that they be made without advance notice. The legislative history of the Act makes it clear that it is intended that the Secretary has the right to inspect without a warrant. **S. Rep. No. 95-181**, 95th Cong., 1st Sess. 14 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977 (1978). The right to conduct warrantless inspections under the Act has been upheld in Marshall v. Nolichuckey Sand & Gravel Co., Inc., 606 **F.2d** 693 (6th Cir. 1979); Marshall v. Sink, 614 **F.2d** 37 (4th Cir. 1980); and Marshall v. Stoudt's Ferry Preparation Co., 602 **F.2d** 589 (3rd Cir. 1979).

STATUTORY CRITERIA COMMON TO ALL CITATIONS

Respondent is a very small operator, employing two people. There is no evidence that penalties assessed herein will affect its ability to continue in business, but I note and will consider the testimony of Respondent's president that the operation loses money. In the 24 months immediately preceding the citations at issue seven violations were charged and paid. **This** history is not such that penalties otherwise appropriate should be increased because of it. The evidence establishes that each citation was abated in good faith.

FINDINGS OF FACT

The Electrical Violations

1. On July 18, 1979, wires leading to the water pump did not enter an electrical box but were covered with tape.
2. Although the pump was not operating at the time, the line was energized.

3. The area was very wet.
4. The pump was being repaired at the time and the wires were taped by an electrician.
5. Respondent knew or should have known of the hazard created by the conditions described in Findings 1 through 3.
6. The hazard created by the conditions described in Findings 1 through 3 was very serious in that an employee who contacted the wires could have received an electrical shock.
7. On July 18, 1979, a cover was missing from an electrical box in the shop area of the subject mine. Energized wires were leading from the box to the water pump.
8. The pump was not in operation at the time the citation was issued. The pump was being repaired.
9. Respondent knew or should have known of the absence of the cover.
10. The condition described in Finding 8 was moderately serious in that wires inside the box were exposed and an employee contacting them could have received an electrical shock.
11. On July 18, 1979, the audible reverse alarm on the Trojan **front-**end loader was not operating when observed by the inspector.
12. The alarm was present, but because the switch was not pulled out, it did not operate.
13. The condition described in Finding 11 was not serious and not the result of Respondent's negligence.
14. On July 18, 1979, the cab window on the Trojan front-end loader was cracked in several places.
15. The condition described in Finding 14 impaired the visibility of the operator of the loader.
16. The condition described in Finding 14 was moderately serious.
17. The condition described in Finding 14 was known or should have been known by Respondent.
18. On July 18, 1979, a guard was not provided at the head pulley along an elevated walkway at the stone conveyor.
19. A pinch point existed which could have injured an employee who contacted the pulley.

20. The condition described in Finding 18 was moderately serious. It was located in an area where employees seldom went when the machinery was in operation.

21. Respondent knew or should have known of the condition described in Finding 18.

22. On July 18, 1979, Respondent failed to have a copy of the last quarterly report available at the mine site.

23. Respondent did not keep the reports at the mine site because of frequent break-ins at the site.

24. The condition described in Finding 22 was not serious. It did not result from Respondent's negligence.

CONCLUSIONS OF LAW

1. Respondent is subject to the provisions of the Federal Mine Safety and Health Act of 1979 in the operation of the Middlemiss Pit.

2. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of this proceeding.

3. The condition described in Finding 1 constituted a violation of the mandatory safety standard contained in 30 C.F.R. § 56.12-30. The violation was very serious and resulted from Respondent's negligence. I will assess a penalty of \$250 for this violation.

4. The condition described in Finding 7 constituted a violation of 30 C.F.R. § 56.12-32. The violation was moderately serious and resulted from Respondent's negligence. I will assess a penalty of \$200 for this violation.

5. The condition described in Finding 11 constituted a violation of the mandatory safety standard contained in 30 C.F.R. § 56.9-2. The violation was not serious and did not result from Respondent's negligence. I will assess a penalty of \$75 for this violation.

6. The condition described in Finding 14 constituted a violation of 30 C.F.R. § 56.9-11. The violation was moderately serious and resulted from Respondent's negligence. I will assess a penalty of \$125 for this violation.

7. The condition described in Finding 18 constituted a violation of 30 C.F.R. § 56.14-1. The violation was moderately serious and resulted from Respondent's negligence. I will assess a penalty of \$100 for this violation.

8. The condition described in Finding 22 constituted a violation of 30 C.F.R. § 50.30. The violation was not serious and did not result from Respondent's negligence. I will assess a penalty of \$50 for this violation.

ORDER

Respondent is ORDERED to pay within 30 days from the date of this decision the following penalties for violations of mandatory safety standards.

<u>Citation</u>	<u>30 C.F.R. Standard</u>	<u>Penalty</u>
295698	56.12-30	\$ 250
295699	56.12-32	200
295700	56.9-2	75
295701	56.9-11	125
295702	56.14-1	100
295703	50.30	50
		Total: <u>\$ 800</u>

James A. Broderick
James A. Broderick
Chief Administrative **Law** Judge

Distribution:

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