

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLF AX AVENUE
DENVER, COLORADO 80204

NOV 14 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	CIVIL PENALTY PROCEEDING
)	DOCKET NO. WEST 79-93-M
Petitioner,)	A/O NO. 02-00711-05004
v.)	MINE: MESA PLANT AND PIT
UNION ROCK & MATERIALS CORPORATION,)	
Respondent.)	

Appearances:

Alan Raznick, Esq., Office of Daniel W. Teehan, Regional Solicitor,
United States Department of Labor, Room 11071 Federal Building,
450 Golden Gate Avenue, San Francisco, California 94102
for Petitioner,

Gary Houston, Esq., Union Rock & Materials Corporation, 1000 Kiewit Plaza,
Omaha, Nebraska 68131
for Respondent.

Before: Judge John J. Morris

DECISION

In this civil penalty proceeding, the Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration (MSHA), charges that Union Rock and Materials Corporation violated safety regulations issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq.

Pursuant to notice a hearing on the merits was held in Phoenix, Arizona on April 1, 1980.

The parties filed post trial briefs.

ISSUES

The issues are whether Union Rock violated the safety regulations.

CITATION 379463

This citation alleges a violation of **30** CYR **56.11-12.1**

The facts are uncontroverted.

1. There was a three foot wide opening under a classifier along a walkway (Tr. 10, 28, R 1, R 2).
2. A person could fall through the opening into the screw type flow (Tr. 10).
3. The opening was at the right side of a travelway (Tr. 10-11).

Union Rock argues that it complied with the standard in providing a handrail and that it was not necessary to provide a **midrail**. Further, Union Rock contends this was sufficient protection in view of the infrequent use of the walkway.

Union Rock's arguments are rejected. There existed an unguarded opening beneath the railing and workers should have been further protected. A **midrail** should have been provided.

Mere infrequent use does not constitute a defense since such a defense concedes exposure of Union Rock's employees to the hazard.

The citation should be affirmed.

CITATION 3 79465

This citation alleges a violation of **30** C.F.R. 56.17-1. **2**

The facts are conflicting. I find the following facts to be credible.

1. There were five electric lights in Union Rock's fifty foot long tunnel (Tr. 32, 33, 40, R 3).
2. There was a broken light bulb close to the open end of the tunnel' (Tr. 33, R 3, R 4).
3. The broken bulb did not af **fect** the illumination in the tunnel area (Tr . 33).

1/ 56.11-12 Mandatory. Openings above, below, or near travelways through which men or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

2/ 56.17 Illumination. Mandatory. Illumination sufficient to provide safe **working** conditions shall be provided in and on all surface structures, paths, walkways, stairways, switch panels, loading and dumping sites, and work areas.

MSHA contends it presented sufficient evidence to sustain this citation. I agree. However, the test is whether MSHA's evidence is persuasive. I find that Union Rock's evidence is more credible.

The facts presented an underlying issue of whether the photographs were taken at the tunnel where the citation was issued. Union Rock's personnel should know its own tunnel. The photographs show four functioning Lights in the tunnel (R 3, R 4). MSHA failed to prove there was insufficient illumination in the tunnel **within** the meaning of 30 CFR 56.17-1. Accordingly, this citation should be vacated.

CITATION 379468

This citation alleges a violation of 30 CFR 56.12-20.³

The evidence is essentially uncontroverted.

1. The rubber mat at the motor control electrical panel was holding water (Tr. 19).
2. The electrical equipment switches located at this point carried 480 volts (Tr. 20).
3. If the mat is dry the electrical current will not go to gr'ound (Tr 21).
4. If the **electrical** equipment developed a short the wet rubber mat, with water around it, would serve as a conductor (Tr. 23, 24).

Union Rock asserts that it should prevail. It argues that the uncontroverted evidence shows that its witness examined the mat out of the presence of the inspector and he found the underneath portion to be dry. I disagree. The water lying on, and around the mat, is sufficient to establish the hazard contemplated by the regulation.

This citation should be affirmed.

PROPOSED CIVIL PENALTIES

Considering the statutory **criteria** ⁴ I deem the proposed civil penalties for Citations 379463 and 379468 to be appropriate.

3/ 56.12-20. Mandatory. Dry wooden platforms, insulating mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, noncurrent-carrying parts of the power switches to be operated may be used.

4/ 30 U.S.C. 820 (i).

WITHDRAWAL OF CONTEST AND MOTIONS TO VACATE

At trial Union Rock moved to withdraw its notice of contest and pay the proposed penalties for citations 379461, 379464, and 379469 (Tr. 5). The motion is granted.

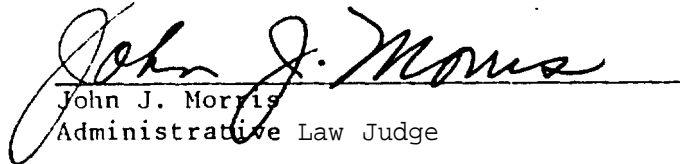
MSHA moved to vacate citation 379462 and 379467 (Tr. 7). The motions are granted.

Based on the foregoing findings of fact, conclusions of law, and motions I hereby enter the following

ORDER

1. Citations 379461, 379463, 379464, 379468, and 379469 and the proposed penalties therefor are affirmed.

2. Citations 379462, 379465, 379467 and all proposed penalties therefor are vacated.


John J. Morris
Administrative Law Judge

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