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SOL (MSHA) V. CAROLINA STALITE  
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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  
v.  
CAROLINA STALITE COMPANY,  
RESPONDENT

Civil Penalty Proceedings

Docket No. BARB 79-319-P  
A.O. No. 31-00136-05006R

Docket No. SE 79-56-M  
A.O. No. 31-00136-05007

Docket No. SE 79-91-M  
A.O. No. 31-00136-05001

Docket No. SE 79-92-M  
A.O. No. 31-00136-05003

Docket No. SE 79-93-M  
A.O. No. 31-00136-05004

Docket No. SE 79-94-M  
A.O. No. 31-00136-05002

Docket No. SE 79-95-M  
A.O. No. 31-00136-05005

Docket No. SE 79-85-M  
A.O. No. 31-00136-05008

Docket No. SE 79-87-M  
A.O. No. 31-00136-05009

Docket No. SE 79-114-M  
A.O. No. 31-00136-05010H

Docket No. SE 80-35-M  
A.O. No. 31-00136-05012

Docket No. SE 80-37-M  
A.O. No. 31-00136-05013

Docket No. SE 80-44-M  
A.O. No. 31-00136-05014

Stalite Mill

DECISION AND ORDER

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor,  
U.S. Department of Labor, Nashville, Tennessee,  
for the petitioner;  
William C. Kluttz, Jr., Esq., Salisbury, North Carolina,  
for the respondent

Before: Judge Kennedy

These 13 penalty cases involve 133 charges of violations of the Mine Act and the mandatory safety standards for sand, gravel and crushed stone operations set forth in 30 C.F.R. Part 56. In all these cases, the operator filed an answer in which it (1) generally denied liability, (2) specifically denied subject matter jurisdiction, (3) moved to suppress evidence, (4) challenged the standards for vagueness, and (5) claimed the charges were the result of arbitrary and capricious action.

On November 28, 1979, respondent filed a motion for summary decision and to dismiss based on its jurisdictional and constitutional challenges. After briefing and oral argument, the motion was denied by Decision and Order of April 14, 1980, a copy of which is attached hereto and incorporated herein.

Thereafter, in the interest of a just, speedy and inexpensive disposition, the parties stipulated to waive an evidentiary hearing and agreed to submit all of the violations for decision on the record of their written submissions, leaving to the judgment, expertise and discretion of the trial judge the resolution of factual conflicts and the determination of the amount of the penalties warranted. 5 U.S.C. 556(d); 30 U.S.C. 110(i), (k), 113(d). The stipulation originally proposed that in addition to deciding the merits the trial judge would rule on the void for vagueness claim without briefing or argument. When the trial judge declined to accept this provision, respondent withdrew this challenge. The stipulation as filed on August 11, 1980 and amended on October 30, 1980, the trial judge finds is acceptable.

The claim that the charges are arbitrary and capricious is without merit. The evidence shows that most of the violations did, in fact, occur. Furthermore, the undisputed evidence as to the conditions observed by the inspector established probable cause to believe that at the time of issuance of the citations and orders the violations charged existed. There is no evidence that the enforcement action taken was so selective as to establish an abuse of discretion or so grossly erroneous as to imply bad faith. Accordingly, the defense of arbitrary and capricious action is denied.

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The record for decision in these cases consists of the citations and orders, the inspector's statements and contemporaneous notes, the operator's statements in defense or in mitigation of the gravity and negligence (Exhibit "B" to the stipulation as amended), photographs submitted by respondent, sketches submitted by petitioner, and the parties' prehearing submissions.

After a careful review of the record and based on an independent evaluation and de novo review of the circumstances of each violation, I find, that except as noted below, the conditions and practices observed and set forth in the citations and orders were violations of the mandatory safety standards cited. Appendix "A" attached hereto and made a part hereof, supplemented where appropriate with the additional discussion contained in Appendix "B" hereto, contains my determinations with respect to gravity, negligence, and, based on my consideration of the other criteria applicable to the assessment of penalties, findings as to the amount of the penalties warranted for each violation found. For the reasons advanced by the operator, and after careful consideration of the record considered as a whole, including the physical circumstances shown in the photographs and sketches, I find the violations indicated in Appendix "A" as "vacated" are deficient as a matter of fact and law, and that these violations did not, in fact, occur.

The total amount of the penalties found warranted for the 103 violations found is \$14,542.00. Accordingly, it is ORDERED that on or before Monday, December 29, 1980, the operator pay the amount of the penalties assessed, \$14,542.00, and that subject to payment the captioned matters be, and hereby are, DISMISSED.

Joseph B. Kennedy  
Administrative Law Judge

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APPENDIX A

Docket No.	Citation/Order No.	Standard	Gravity
Negligence	\$Penalty		

TOTAL PENALTIES \$14,542

See Appendix B

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APPENDIX B

BARB 79-319-P

Citation No. 104393: The undisputed facts with regard to this violation are set forth in the attached decision and order of April 14, 1980. As discussed therein, section 103(a) of the Act provides a right of entry upon mine property for the purpose of conducting inspections for health and safety hazards. The operator contends, however, that a denial of entry is not a violation of the Act for which a civil penalty may be assessed. I disagree. Section 110(a) of the Act states that any operator who violates "a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty . . ." Since section 103(a) provides the Secretary with a right of entry upon mine property, it also of necessity creates a duty on the part of the operator not to interfere with the exercise of that right. Interference with the right of entry by the operator is, therefore, a violation of section 103(a), and a civil penalty for that violation must be assessed. Accord, Waukesha Lime & Stone Co., 1 FMSHRC 512, 518 (June 5, 1979); Baker Coal Co., 2 FMSHRC 2626 (September 16, 1980).

With regard to the amount of the penalty warranted for the violation found, I note that the operator denied the inspector access to the mine knowing full well that the inspector was authorized to enter by the Act. I further note that the mine property had been inspected on numerous occasions pursuant to the warrantless inspection provisions of the Metal and Nonmetallic Mine Safety Act of 1966, and the operator was therefore familiar with the federal inspection authority. This was a serious violation in that it significantly lengthened the employees' exposure to dangerous conditions. Accordingly, and after considering the other statutory criteria, I conclude that a civil penalty in the amount of \$500 is warranted for this violation.

SE 79-114-M

Imminent Danger Closure Order No. 104453: Thirty minutes after the operator's foreman had been warned against allowing workmen to work in high places without safety belts and lines, he was observed watching an employee standing twenty feet above the ground on a four-inch angle iron brace working on a chute from the silo to the Nordberg crusher. Because of the imminent hazard to life and limb, the inspector issued a section 107(a) imminent danger closure order.

No excuse for the foreman's disregard for safety was offered. Furthermore, there is no evidence that any disciplinary or other corrective action was taken by the operator with respect to either the foreman or the perpetrator of the violation. This indifference to the foreman's reckless participation in the violation reflects a lack of commitment to voluntary compliance by the operator and its supervisory management.

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I find, therefore, that (1) the violation of 30 C.F.R. 56.15-5 charged did, in fact, occur, (2) the violation was extremely serious in that it exposed the miner involved to a potentially fatal fall onto structures below, and (3) the violation was the result of reckless indifference to safe operating practices. Accordingly, and after considering the other statutory criteria, I conclude that a civil penalty in the amount of \$1500 is warranted for this violation.