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SOL (MSHA) v. ERIE BLACKTOP
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. VINC 79-39-PM A.O. No. 33-03313-05001
v.	
ERIE BLACKTOP, INC., RESPONDENT	Quarry Division Quarry & Mill

DECISION

Appearances: Edward H. Fitch IV, Attorney, Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the petitioner
James E. McGookey, Attorney, Sandusky, Ohio, for the respondent

Before: Judge Koutras

Statement of the Case

This proceeding was initiated by the petitioner against the respondent through the filing of a petition for assessment of civil penalties pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), proposing penalties for 12 alleged violations of certain mandatory safety standards promulgated pursuant to the Act. A hearing was held in Sandusky, Ohio, during the term July 29-30, 1980, and the parties appeared and participated therein. Although given an opportunity to file posthearing proposed findings and conclusions, the parties opted to waive such filings and none were filed. However, I have considered the arguments advanced by the parties in support of their respective cases during the course of the hearing in this matter.

Issues

The issues presented in this proceeding are: (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the petition for assessment of civil penalties, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of civil penalty assessments, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator charged, (3) whether the operator was negligent; (4) the effect on the operator's ability to continue in business, (5) the gravity of the violations, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Discussion

Stipulations

The parties stipulated to the following:

1. Respondent has no prior history of violations under the Act.

2. Any penalty assessments made by me in this proceeding will not adversely affect the respondent's ability to remain in business.

3. The parties agreed to the authenticity and admissibility of all hearing exhibits, agreed that the inspector who issued the citations was acting within the scope of his authority as an MSHA inspector, and that he cited the alleged violations upon inspection of the mine.

4. Respondent is a small mine operator.

Preliminary Procedural Matter

The petition for assessment of civil penalties filed in this proceeding states that "a copy of each citation and/or order for which a civil penalty is sought is attached hereto," and it also asserts that MSHA seeks penalty assessments "for each alleged violation set forth in attached Exhibit A." Exhibit A is an MSHA proposed assessment form which contains an itemized listing of 12 citations issued on May 4, 1978, and the citations are identified numerically as Citation Nos. 359236 through 359247. Citation Nos. 359236 through 359240 are listed as section 104(a) citations all of which are shown as issued on May 4, 1978. The remaining listed citations, Nos. 359241 through 359247 are all identified as section 104(b) orders of withdrawal, and they too are shown as being issued on May 4, 1978. However, copies of the 12 citations and seven additional orders numbered 359248 through 359254, dated May 16, 1978, were included as part of MSHA's civil penalty petitions.

The Commission's current rules, 29 C.F.R. 2700.27(c), effective June 29, 1979, as well as the rule in effect at the time of MSHA's petitions were filed, 29 C.F.R. 2700.24(b), require the Secretary to list the cited violations for which civil penalties are sought, and require that they be identified by number and date and the section of the Act or regulation allegedly violated.

In view of the apparent discrepancy and error in the listing and identification of seven of the 104(a) citations as 104(b) orders, and the omission of the orders from the itemized listing, MSHA's counsel was requested to clarify the matter so as to preclude any confusion as to the citations for which penalty assessments were being sought by the Secretary. Counsel stated that the itemized listing included as an exhibit to MSHA's petition resulted from an apparent computer error, that MSHA is seeking civil penalty assessments only for the 12 section 104(a) citations listed and included as attachments to the petition, and that the 104(b) orders included as attachments to the petition are relevant only to the extent that they reflect a lack of good faith compliance with respect to the asserted failure by the respondent to timely abate the seven citations to which they relate, and that the orders are relevant and material to this issue and should be considered in the assessment of any civil penalties for these citations (Tr. 20-21, 188-190).

In view of counsel's explanation and clarification, the parties were informed that I would consider MSHA's petition for assessment of civil penalties as a petition for assessment of penalties for the 12 cited 104(a) citations, and that the 104(b) orders were relevant for purposes of establishing any alleged lack of good faith compliance. Further, I denied respondent's motion to dismiss the seven citations erroneously identified as 104(b) orders on the ground that MSHA is free to amend its pleadings to conform to the evidence, that respondent has not been prejudiced since any civil penalty assessments would be levied by me de novo on the basis of the record adduced at the hearing, and that I considered the asserted computer error to be technical in nature (Tr. 23).

Testimony and Evidence Adduced by the Petitioner

Citation No. 359236 cites a violation of section 109(a) of the Act and states as follows: "An office sign was not posted on the office."

MSHA inspector Edward Cloud confirmed that he issued the citation in question (Exh. P-1) after observing that a trailer on the mine premises used as the mine office had no sign posted identifying it as an office. He had previously inspected the mine under the Metal and Non-Metal Mine Act and believed that it was the same trailer. Mine management accompanied him on the inspection and he always affords a mine representative an opportunity to accompany him, although small operators often choose not to because they would have to close the operation down. The trailer was the only structure which appeared to be an office, although there is a maintenance shop, a mill, and other

structures on the premises. The trailer was parked by the weigh scales, a secretary worked there, and it is the first structure that one encounters after driving on the mine property.

Inspector Cloud stated that the respondent was negligent because he had previously visited the mine in April 1978, to explain MSHA's assessment procedures and to deliver copies of the new Act to mine management. He did not consider the violation to be serious and respondent abated the violation in good faith by purchasing and installing a sign designating the trailer as the mine office (Tr. 37-45).

On cross-examination, Mr. Cloud confirmed that his inspection of May 4, 1978, was the first one at the mine under the new Act and he confirmed his previous "courtesy visit" of April to explain the new law to mine management. He confirmed his belief that the trailer he observed on May 4 was the same one which he previously observed but he could not state whether it had just recently been brought to the mine.

Citation No. 359237 cites a violation of section 109(a) of the Act and states as follows: "A bulletin board was not provided for the office."

Inspector Cloud confirmed that he issued the citation (Exh. P-4) after he found that there was no bulletin board in the mine office. He observed no notices or copies of the regulations posted, and none of the interior trailer walls were designated or indicated to be a bulletin board. Since section 109(a) of the Act required a bulletin board and he observed none, he issued the citation. He believed the respondent was negligent because mine management had a copy of the Act. He considered the violation to be nonserious and abatement was achieved in good faith by the purchase and installation of a bulletin board (Tr. 74-77).

On cross-examination, Mr. Cloud indicated that he recalled making an inquiry about the bulletin board and that Company President Winkel confirmed the lack of a bulletin board. Mr. Cloud also indicated that if any portion of the mine office wall had been specifically designated or segregated as a bulletin board, with the required notices posted, he would not have issued the citation (Tr. 81-88).

Citation No. 359238 cites a violation of 30 C.F.R. 56.11-1 and states: "A safe means of access was not provided from the elevated weigh scales to the elevated doorway at the east end of the office."

Citation No. 359239 cites a violation of 30 C.F.R. 56.11-1 and states: "A safe means of access was not provided from the elevated weigh scales to the elevated doorway at the west end of the office."

Inspector Cloud confirmed that he issued the citation (Exh. P-7) after determining that a safe means of access was not provided from the elevated weigh scales to the elevated entrance door at the east end of the trailer office. The trailer was located adjacent to the weigh scales and both the trailer and scales were both approximately 4 feet off the ground and the distance between the two was approximately 3 feet. The only

means of access from the scales to the door was by jumping or stepping across the 3-foot opening and the secretary working in the office advised him she had to jump across

from the scales to the door opening. He also indicated that he decided not to jump across to enter the office, but instead went to the rear of the trailer and climbed up one of the two door entrances to enter the office. He considered the operator to be negligent and considered the violation to be very serious because someone could be seriously injured if they were to fall through the opening and down the 4-foot elevated area. However, he was not aware that anyone had been injured by falling off. Abatement was achieved timely by the installation of a corrugated metal access way which was 3 feet wide and 4 feet long and he believed the respondent provided a more than adequate safe access (Tr. 54-71, 89-94).

On cross-examination, Inspector Cloud stated that at least three employees were on the premises on the day of his inspection, but he could not state with any certainty how frequently persons traveled the area from the scales to the trailer where no safe access was provided. At my request, he drew a sketch of the area (Exh. ALJ-1), and indicated that the normal route of traffic to the trailer office was from the parking area, across the weigh scales, and directly into the trailer through the doors. The rear doors were located around and behind the trailer down an embankment, and he did not believe that those doors were used as a regular means of access to the trailer (Tr. 99-114).

With respect to Citation No. 359239 (Exh. P-11), Inspector Cloud confirmed that he issued it as a separate citation because a safe means of access was not provided from the weigh scales to the trailer office doorway at the west end of the trailer and the parties stipulated that his testimony regarding this citation would in all respects be the same as that given for Citation No. 359238 (Tr. 114-117).

Citation No. 359240 cites a violation of 30 C.F.R. 56.9-87 and states: "The 988 Caterpillar front-end loader was not equipped with an automatic, audible backup alarm."

Inspector Cloud confirmed that he issued the citation (Exh. P-13) after observing the 988 Caterpillar front-end loader operating in forward and reverse while hauling materials from the muck pile, and when it operated in reverse no alarm sounded. The machine operator advised him that a backup alarm had been installed on the rear wheel but had been knocked off. Upon inspection of the wheel, Mr. Cloud observed no alarm installed and he could not determine whether one had been installed. He was aware that an alarm had been installed on the loader in the past since he had previously cited the loader under the Metal and Non-Metal Mine Act and abatement was achieved by installing a backup alarm. The loader was a piece of heavy-duty mobile equipment, and since he observed no one serving as an observer, a backup alarm was required. The loader was the only piece of equipment operating in the pit area and he determined that the view to the rear was obstructed because of the fact that the machine engine is located behind the operator's cab, and while the operator can see to the rear right and left, the view

directly behind him is obstructed by the engine. He did not sit in the operator's seat, did not look to the rear from the seat, but did

climb up the ladder and looked in the cab to determine whether a fire extinguisher and seat belts were installed.

Mr. Cloud stated that he observed no one in the vicinity of the loader, and he and company president John Wikel were the only ones present in addition to the loader operator. However, mine employees, such as the mill and crusher operator, and state and Federal mine inspectors, would have occasion to be in the area where the loader operated and would be exposed to a hazard of being run over by the loader. He believed the respondent was negligent and he considered the violation to be serious since anyone to the rear of the loader would not be aware that it was backing up without an alarm sounding. The loader is used to load materials from the pit to the crusher and is also used to move limestone materials around the area. Abatement was timely achieved in good faith by the installation of a backup alarm (Tr. 120-132).

On cross-examination, Inspector Cloud confirmed that the loader was in operation when he observed it and he indicated that the operator's seat is located in a cab which is located in front of the machine's engine. He could not recall the precise seat location and indicated that the cab ladder is approximately 6 feet high and that the loader is approximately 15 feet long. Based on his knowledge of such front-end loaders where the engine is mounted behind the operator's seat and cab, it was his belief that they all have obstructed views to the rear and he would cite them all for the lack of backup alarms (Tr. 133-139).

Citation No. 359241 cites a violation of 30 C.F.R. 56.14-1 and states: "The flywheel on the secondary crusher was not guarded."

Inspector Cloud confirmed that he issued the citation in question (Exh. P-17) after observing that the crusher flywheel was unguarded. The rotating flywheel was approximately 4 feet in diameter and some 6 inches wide. It was located some 5 feet off the ground but was near a pathway where persons normally walked by while going to and from plant locations. The violation was serious because one could get their arm or clothing caught in the unguarded moving flywheel and serious injuries could result. Inspector Cloud observed no evidence or indications that maintenance was being performed on the flywheel (Tr. 160-170).

Regarding the abatement, Inspector Cloud stated that a guard was installed over the entire flywheel to abate the citation. However, he indicated that the respondent did not initially abate the condition within the time given and that Mr. Wikel told him that he was too busy to guard the flywheel, and that the plant was down for maintenance and testing. However, he observed a muck pile at the end of the conveyor belt which led him to believe that material was moved on the belt and that the plant was in production. Inspector Cloud stated that he did not believe that the respondent acted in good faith because he had to issue a withdrawal order to gain compliance. He also indicated that when he returned to the mine on May 25, 1978, respondent had shut the

plant down and he could not recall whether the flywheel guard was in

place at that time, and he was not certain as to whether the citation was in fact ever abated (Tr. 174-182).

Inspector Cloud described the secondary crusher as a "portable plant" which is located on a flatbed mounted on wheels, and it can readily be moved around. He stated that his "rule of thumb" in citing guarding violations is that if an unguarded location is within 7 feet of one's reach, he requires a guard to be installed. He could not confirm that the pathway by the secondary crusher is in fact a normal travelway, but he was concerned that a maintenance man or electrician may have come in contact with the unguarded flywheel. He conceded that the crusher was accessible only from one side and also indicated that anyone walking on the platform above the flywheel would not be exposed to a hazard since he would be above it (Tr. 200-206).

Citation No. 359242 cites a violation of 30 C.F.R. 56.11-2 and states: "The handrail on the elevated walkway at the secondary crusher was not in good repair."

Inspector Cloud confirmed that he issued the citation in question on May 4, 1978, after observing that a section of the handrail around the elevated walkway on the secondary crusher was missing and broken. The defective rail was approximately 10 feet long and was constructed out of pipe. The rail was some 15 to 18 feet off the ground and the walkway led to a work platform around the crusher (Tr. 4-9, July 30, 1980).

Inspector Cloud indicated that he gave the respondent a week to abate the citation, and when he returned to the mine on May 16, the condition was not corrected and he was forced to issue a withdrawal order after the respondent advised him that he was "too busy" to correct the condition. The condition was corrected by May 25 after the respondent welded the broken pipe back in place and the citation was terminated at that time (Exh. P-20).

Mr. Cloud identified the defective portion of the handrail as a broken weld and indicated that the plant was in operation on May 4, but was not certain that it was on May 16. The work area in question was a combined walkway and work platform, and while it was improbable that anyone could fall off the area, five employees and a maintenance man would have occasion to be in the area cited (Tr. 14-18, July 30, 1980).

Citation No. 359243 cites a violation of 30 C.F.R. 56.11-1 and states: "The first section of the ladderway to the primary crusher was missing."

Inspector Cloud testified that he issued the citation on May 4 (Exh. P-23) after finding that the first section of the ladderway leading to the primary crusher was missing. In fact, he indicated that the bottom 4-foot section of the ladder had no concrete blocks in place or other means to allow an employee to readily step up and gain access to the working place on the crusher. The top of the ladder is affixed to the crusher platform and the bottom portion from ground level upward was

missing, thereby making it

very difficult for the crusher operator to climb up on the crusher platform to reach his work station (Tr. 61-64, July 30, 1980).

Inspector Cloud stated that when he returned to the mine on May 16, the condition had not been corrected and this prompted the issuance of a withdrawal order. Mr. Cloud again stated that the respondent advised him he did not have time to abate the condition. However, when he returned to the mine on May 25, the missing section of ladder had been welded in place and the citation was accordingly terminated at that time (Tr. 64-66, July 30, 1980).

Citation No. 359244 cites a violation of 30 C.F.R. 56.11-12 and states: "An inside handrail was not provided on the elevated walkway around the primary crusher."

Inspector Cloud confirmed that he issued the citation in question on May 4, 1978, after observing that there was no inside handrail along the elevated walkway around the primary crusher. Such a rail was required so as to prevent an employee from falling into the crusher opening. The walkway, or platform, is at the same level as the entrance to the crusher shanty. Mr. Cloud fixed May 11 as the abatement time but when he returned on May 16, the rail had not been installed and an order of withdrawal was issued. Abatement was finally achieved on August 17, when the respondent installed a 6-foot handrail constructed out of pipe material. Respondent's excuse for not abating the condition within the time initially fixed was that he was "too busy." Inspector Cloud indicated that similar crushers have been guarded by handrails and the probability of the crusher operator falling into the crusher was improbable (Tr. 67-74, July 30, 1980).

Citation No. 359245 cites a violation of 30 C.F.R. 56.11-12 and states: "An inside handrail or barrier was not provided on the inside of the elevated operator's platform on the primary crusher."

Inspector Cloud confirmed that he issued the citation on May 4, 1978, after discovering that one side of the operator's shanty on the primary crusher was open and exposed on the left end looking from inside the shanty out toward the crusher. The open end did not contain a barrier or protection of any kind to prevent the crusher operator from falling through the opening some 15 to 18 feet to the ground. The condition was not abated within the time fixed, and Mr. Cloud had to issue a withdrawal order to gain compliance (Tr. 74-82, July 30, 1980).

Citation No. 359246 cites a violation of 30 C.F.R. 56.14-1 and states: "The V-belts on the drive motor at the primary crusher were not guarded."

Inspector Cloud confirmed that he issued the citation on May 4 after observing that the three-fourths-inch V-belt located on the drive motor of the primary crusher was not guarded. The belt

was approximately 4 feet long and was some 3 feet from the crusher ladder. He believed that anyone on the ground or on the ladder would be exposed to a hazard from the unguarded belt in question and the hazards included the possibility of someone being

struck or grabbed by the whipping action of the belt in the event it broke or being caught in the belt pinch point. He indicated, however, that one would have to deliberately stick his hand into the pinch point in order to be injured. He did not know whether maintenance was being performed on the drive motor on the day of the inspection. The citation was abated on August 17, when the respondent installed a metal guard around the entire V-belt location (Tr. 107-121, July 30, 1980).

Citation No. 359247 cites a violation of 30 C.F.R. 56.14-1 and states: "The head pulley on the No. 2 belt conveyor was not guarded."

Inspector Cloud stated that he issued the guarding citation in question after discovering that the head pulley on the No. 2 conveyor belt was not guarded. The pulley was some 2 feet off the ground and he believed that the plant operator or maintenance man could come in contact with the pulley pinch point by walking near it. There was no barrier or fence to keep people away from the pulley and the wet surface area around it presented a hazard since someone could have slipped and fallen into the exposed pinch point. He believed the operator was negligent. The condition was not abated on May 16, and he issued a withdrawal order, but subsequently terminated it on May 25 when a guard was installed. Mr. Cloud conceded that there was no regularly visible traveled path for employees to walk on near the pulley in question (Tr. 129-146, July 30, 1980).

Respondent's Testimony and Evidence

Dean Wikel, respondent's secretary-treasurer, testified that the mine office was located in a trailer which had been moved to its location about a week or so before the inspection conducted by Inspector Cloud. Regarding the bulletin board citation, Mr. Wikel testified that he had ordered a board 2 weeks after the new law went into effect and that it was stored in the office when the inspector conducted his inspection. Due to the fact that he was in the process of moving into the trailer he had not mounted the board on the office wall was required by the inspector. Notices were posted on the wall of the trailer and he pointed the bulletin board out to Mr. Cloud. With regard to the mine office sign, Mr. Wikel stated that he was not aware of the fact that one was required, although he confirmed the fact that Mr. Cloud did give him a copy of the law during a previous mine visit.

Regarding the safe means of access citations at the weigh scales, Mr. Wikel confirmed that the distances an employee would have to stride from the scales to the office entrances at both of the cited locations were the same, and he believed they were somewhat less than a stride. Abatement was achieved by placing boards across the open gaps, supported by cement blocks. He believed the open gaps were less than 2 feet, and while he did not believe that the cited conditions presented a hazard, he conceded that it was possible that someone attempting to stride from the scales to the entrance of the office could have fallen and injured a leg.

Regarding the backup alarm citation, Mr. Wikel described the dimensions of the loader in question and stated that it was equipped with a rearview mirror, and since the operator's seat was elevated approximately a foot and a half higher than the rear-mounted engine, he believed that the operator could see anyone directly to the rear of the machine through the rearview mirror. He also indicated that no one would be to the rear of the machine during its normal operation and that "no one in his right mind" would approach it from the rear while it was in operation.

Mr. Wikel described the dimensions of the loader in question as 11 feet wide, 12 feet high and some 30 feet long. The backup alarm in question was mounted on the rear wheel of the loader, and he stated that the inspector insisted that it be maintained at that location and that he was not really concerned with rearview visibility. Mr. Wikel conceded that the loader which was cited was in fact equipped with an audible backup alarm prior to the inspection of May 4, and that it was installed on the left rear wheel. However, he also indicated that Inspector Cloud had previously cited a violation for the backup alarm, not because of any visibility problem, but because of his insistence that an alarm was required by law (Tr. 230-233).

Mr. Wikel did not dispute the fact that the flywheel on the secondary crusher was unguarded. However, he indicated that during the periods May 4, 16, and 25, 1978, the plant was not in full production and was in fact closed down. He identified Exhibit R-5 as a photograph of the flywheel in question and confirmed the fact that anyone walking by the flywheel location would have to walk around it to avoid it, and stated that while the crusher was not in full production, it was operated at times for testing and he did not believe that the flywheel had to be guarded while the plant was not in full production because no one would be around it. He indicated that he advised the inspector on May 4 that he was testing the crusher equipment to ascertain whether it was operating properly and also advised the inspector that he was not in full production. Employees were instructed to stay clear of the flywheel.

Mr. Wikel stated that he shut the plant down after receiving the 12 citations in question and that five were abated immediately. Since he was involved in the abatement of the five citations from May 4 to the 16th, and the plant was down, he could not work on abating the remaining seven. He did not intend to use the crusher until all of the citations were abated, and while he denied telling Mr. Cloud that he was "too busy" to abate the seven citations, it was possible that this was in fact the case. He was attempting to reopen the plant, while at the same time operating a blacktop business, and most of his work was directed to that business. He indicated that during May 1978, he was only producing, 25,000 tons of limestone annually, operating some 50 days a year, and that he did not operate on a full 5-day weekly schedule.

Regarding the handrail on the secondary crusher walkway, Mr.

Wikel testified that the walkway was not in use and that a chain was installed across it to prevent anyone from entering it. He abated the citation by removing the

handrail and the walkway. He conceded that someone could crawl under the chain but that they could not step over it.

With respect to the primary crusher ladder citation, Mr. Wikel conceded that the distance from the ground to the first rung of the ladder was some 30 inches. He also indicated that the crusher itself was a foot higher off the ground than its tires and that he abated the condition by adding two additional steps which then measured 16 inches to the ground and he took the tires off the crusher and supported it by blocks. The condition cited resulted from the crusher being initially higher off the ground than its usual and normal elevation.

Regarding the lack of an inside handrail on the walkway around the primary crusher, Mr. Wikel stated that the crusher operator normally stays in the shanty while the crusher is in operation, leaves the shanty only to turn the crusher on or off, and he does not use the platform. Regarding the lack of a barrier or a railing on the operator's platform, he indicated that at one time it was protected by wooden two-by-fours and windows but that the windows were broken out by vandals. Mr. Wikel indicated that after the order of May 25 was issued, the condition was abated by his physically cutting off the walkway, and that since the walkway no longer was in existence, the inspector abated the original citation (Tr. 280).

On cross-examination, Mr. Wikel testified as to the efforts made by him to abate all of the citations issued by Inspector Cloud. He confirmed that he intended to "go down the list" of all citations and to make corrections as materials were received for this purpose. He also alluded to the fact that "we were very busy at the time" and that materials required for abatement were often received before abatement work could begin (Tr. 286). He conceded that he had copies of the regulations available to him but had never read them "cover to cover" (Tr. 288). He identified a photograph of the ladderway with the missing rungs (Exh., R-8), and testified as to his abatement efforts to correct the citation (Tr. 289-295).

Mr. Wikel identified Exhibit R-9 as a photograph of the V-belt pulley citation, and he indicated that the location of the cited belt is some 7 feet from where the man shown on the ladder is located. In the event the belt broke, he did not believe that the belt would reach the man on the ladder because the belt turns at a slow speed (Tr. 300). He conceded that no time was spent on abating this citation during the period May 4 and 16 (Tr. 300).

With regard to the citation concerning the alleged unguarded head pulley on the No. 2 belt conveyor, Mr. Wikel identified Exhibit R-10 as a photograph of the cited pulley location. He testified that a screening plant was located immediately above the pulley location, that no one is required to be under the plant, and that a person would have to crawl under the plant to reach the pulley location which was cited and that no one would do this (Tr. 312-315).

Mr. Wikel conceded that he probably made the statement that he "was too busy" to abate the unguarded pulley citation, but he believed that it was impossible for anyone to slip and fall into the pulley and that a person would have to make a deliberate effort to get caught in the pulley because the screening plant pretty much completely enclosed the pulley area and in effect served as a guard (Tr. 316-317). The area beneath the pulley was exposed for approximately a foot, but someone would have to deliberately reach under the area to get caught in the pulley (Tr. 317, 321).

Findings and Conclusions

Ruling on Order to Show Cause

On April 5, 1979, Chief Judge Broderick issued an order directing the respondent to show cause why it should not be defaulted for failure to file an answer to the petitioner's petition for assessment of civil penalties. By letter filed April 30, 1979, respondent's counsel answered the show-cause order and explained the circumstances surrounding the failure by the respondent to respond to the petition. At the hearing, the parties were afforded an opportunity to comment further on the show-cause order, and petitioner's counsel did not object to my ruling that the answer filed on April 30, 1979, satisfied Judge Broderick's show-cause order and that respondent should not be defaulted (Tr. 5-8).

Jurisdiction

During opening statements, counsel for the parties raised an issue concerning MSHA's enforcement jurisdiction over the respondent's mining operation. Respondent's counsel was unwilling to stipulate as to the jurisdiction, and I reserved my ruling on this question pending the completion of the testimony and the filing of posthearing proposed findings and conclusions. Although given an opportunity to file additional written arguments and briefs, the parties declined to do so. Accordingly, my ruling on the jurisdictional question will be made on the basis of the present record.

The record reflects that MSHA's petition for assessment of civil penalties was filed on November 1, 1978, pursuant to the then-applicable Interim Rules of the Commission, 29 C.F.R. 2700.24. The rules, which became effective March 10, 1978, 43 Fed. Reg. 10320, did not require an allegation of jurisdiction by MSHA as part of its initial pleadings. However, the current rules, which became effective on June 29, 1979, 44 Fed. Reg. 38226, do require a jurisdictional statement as part of the proposal for assessment of civil penalties, and respondent is specifically required to file any denial of jurisdiction, 29 C.F.R. 2700.5(a). Since the petition in this case complied with the applicable rules of the Commission at the time of filing, I conclude that the failure to include a statement concerning jurisdiction did not render the petition procedurally defective.

Inspector Cloud testified that upon the effective date of the Act, he visited several mine operators sometime prior to May 4, 1978, including the

respondent, for the purpose of explaining the assessment program and other provisions of the law. He also indicated that respondent's mining operation had been previously inspected and regulated under the Metal and Nonmetal Mine Act, and that he personally had inspected the facility on four occasions prior to his May 4th inspection (Tr.38-39). He stated that he gave all operators within his area of jurisdiction copies of the new Act during these courtesy visits and explained the law to them (Tr. 67-69).

Mr. Cloud also testified as to the scope of respondent's mining operation, and he stated that approximately four employees were engaged in activities falling within respondent's mining operations over which he had jurisdiction. He indicated that the mine consisted of a quarry, a maintenance shop, an office trailer, and a scale house. He observed limestone being mined at the quarry pit area, and it was transported by a front-end loader to the crusher during the time of his inspection. He also observed other equipment such as a shovel and truck operating around the pit area, observed materials being moved along respondent's plant belt system, and generally described the operations which were taking place. He also alluded to a "blacktop" operation being conducted by the respondent on the premises which did not fall within MSHA's enforcement jurisdiction, however, the quarry pit, plant, and crushing operation did fall within his area of jurisdiction (Tr. 70-73, 81, 123, 133, 147-148, 174-176).

John Wikel, president, Erie Blacktop, Inc., testified that his company is a family-owned corporation, and that the mine consists of some 20 acres employing a total of 20 employees, most of whom are involved in activities connected with his blacktop operations. The limestone mining operation was operational "once in a while in 1978," and since April of 1980, the crusher has not been operational. Most of the mined limestone is sold to the Corps of Engineers for use in shore-erosion projects, and this entails the blasting of large blocks of limestone. The remaining stone is crushed and sold for driveways and roadways. It is also used for blacktop driveway projects as well as a base for roadways and driveways. His company delivers most of the materials, and while he denied that any of the mined material crosses state lines, he conceded that the Corps of Engineers used his products for erosion projects along the coast lines of the State of Ohio, and that he uses the telephone as part of his mining operations (Tr. 44-46, July 30, 1980). He estimated his annual production for the year 1980 to be 100 tons of materials, under 500 tons for the year 1979, and that 25,000 tons of limestone were mined in the year 1977. The limestone is used to maintain the shorelines and waterways of Lake Erie, and for shore-erosion projects (Tr. 47-48, 236-237, July 30, 1980).

Mr. Wikel also testified that his quarry operation employs four people, a secretary who handles the scales and the office chores, a loader operator and a plant operator, including himself and his father. He confirmed that Inspector Cloud had previously inspected his quarry prior to the enactment of the 1977 law. He

also confirmed the fact that he had engaged in assessment conferences in the past with MSHA concerning assessments for citations

(Tr. 174-179, July 30, 1980). Mr. Wikel also confirmed that his mining operation is 5 years old, and that at the time of the inspection he had been operating for 2 years, and that prior to the 1977 Act, he had been cited for two or three violations (Tr. 262, July 30, 1980). He also conceded that he had ongoing mining operations for the years 1976 and 1977 but that the inspector had never "nailed him" for any violations (Tr. 263, July 30, 1980). He also confirmed that he began mining as early as 1975, but that the lack of capital and the expense involved in the purchase of a primary and secondary crusher prevented them from engaging in a fullscale operation at that time. He also admitted that "we cut a few corners and it caught up with us" (Tr. 264, July 30, 1980).

Petitioner's Exhibit P-37 is a mine profile indicating that the mine operated on a one-shift, 8-hour a day basis, employing four people, and that the operation was an open-pit, single-bench, crushed limestone operation, and this information remains unrebutted, except for Mr. Wikel's contention that he was operating at less than full production at the time the citations issued.

On the basis of all of the aforementioned evidence and testimony adduced in this proceeding, I am convinced that at the time of the inspection and issuance of the citations in question, respondent was operating a mine within the meaning of the Act, that limestone was in fact mined, crushed, processed, and sold commercially, and that it was used by the Corps of Engineers for certain erosion projects on Lake Erie, as well as for road and paving projects. Although the inspector conceded that respondent's blacktop business was not subject to MSHA's enforcement jurisdiction, I conclude and find that the open-pit and quarry-limestone mining operations were in fact mining within the meaning of the Act, and that these mining operations "affected commerce." I also take note of the fact that respondent's mining operations were regulated by MSHA under the Metal and Nonmetal Mine Act, and that respondent had never denied that it was subject to MSHA's enforcement jurisdiction. Under these circumstances, I conclude that petitioner has established by a preponderance of the evidence that respondent's mining operations are subject to MSHA's enforcement jurisdiction, and any suggestions to the contrary are rejected.

Findings and Conclusions

Fact of Violations

Citation No. 359236

Section 109(a) of the Act requires that a conspicuous sign be posted designating the official mine office. The evidence adduced in this case establishes that such a sign was not posted, and Respondent has not rebutted this fact. The citation is AFFIRMED.

Citation No. 359237

Section 109(a) of the Act requires that a bulletin board be at the mine office or located:

> [A]t a conspicuous place near an entrance to a mine, and that it be placed in such a manner that orders, citations, notices and decisions required by law or regulations to be posted, may be posted thereon, and be easily visible to all persons desiring to read them, and be protected against damage by weather and against unauthorized removal.

The testimony and evidence establishes that the required bulletin board was not in fact installed in the mine office at a conspicuous place. Although the respondent had purchased a bulletin board in order to comply with the Act, it was apparently located on the floor against a desk and had not been permanently installed on the mine office wall so as to readily facilitate the posting of the required material. In the circumstances, I find that a technical violation occurred and the citation is AFFIRMED.

Citation Nos. 359238 and 359239

These citations allege violations of section 56.11-1 for the failure by the respondent to provide a safe means of access from both ends of the weighing scales to the trailer which served as the mine office. Access could only be gained by someone either jumping or taking a broad step from the edge of the scales for a distance of approximately 3 feet to the entrance doors of the trailer. The elevated area beneath the opening between the scale and the door entrances was approximately 4 feet to the ground below and the inspector was concerned that someone could fall beneath the opening while attempting to step or jump over the areas in question. Although the trailer had doors to the rear, the inspector did not believe they were used as the regular means of access to the trailer, and he believed the front doors were used for this purpose.

Respondent does not dispute the fact that an employee attempting to enter the trailer from the scales area would have to stride over the open space between the scales and the trailer door, and Mr. Wikel candidly conceded that someone attempting to do this could possibly fall into the exposed area and be injured. The standard requires that a safe means of access be provided to all working places. Respondent has not rebutted the fact that the mine office is such a working place, and that the normal means of access was from the scales, and I conclude and find that the trailer office falls within the broad definition of "working place" found in definitions section 56.2, and I further find that petitioner has established the violations by a preponderance of the evidence presented in this case. Accordingly, both citations are AFFIRMED.

Citation No. 359240

The citation here charges the respondent with failing to equip a front-end loader with an automatic audible backup alarm. The cited mandatory standard, section 56.9-87, states as follows:

> 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 an observer to signal when it is safe to back up.

Inspector Cloud conceded that he did not sit in the operator's seat or look to the rear of the cab to determine that the view to the rear was obstructed (Tr. 137-138). He also believed that all Model 988 Caterpillar front-end loaders, such as the one cited, as a class, have obstructed views to the rear and that his practice is to always cite section 56.9-87 when he encounters such equipment without a backup alarm. He conceded that he does not, as a matter of practice, or on a case-by-case basis, make any independent finding that the view to the rear is in fact obstructed (Tr. 138, 159). He also alluded to an MSHA directive dealing with the requirements for backup alarms on front-end loaders, but it was not produced during the hearing (Tr. 160). Respondent testified that since the operator's seat on the end-loader in question was elevated above the rear-mounted engine, the operator could observe anyone directly to the rear of the machine through the rearview mirror. Conceding that the loader had previously been cited by the inspector, and that one was installed to abate that citation, respondent maintained that the previous citation was not based on visibility problems, but was based on the inspector's belief that the law required it anyway (Tr. 230-233).

As I interpret the standard, the first sentence requires audible warning devices on heavy-duty mobile equipment. The second sentence requires the installation of an automatic reverse signal alarm which is audible above the surrounding noise level except that none is required when there is an observer present to signal when it is safe to back up. In this case, there is no evidence that an observer was present, and the exception does not apply. Therefore, the question presented is whether petitioner has established a violation even though the inspector did not ascertain whether the rear view from the end-loader in question was in fact obstructed. I think not. I conclude that as a condition precedent to proving a violation, petitioner must establish that the view to the rear was in fact obstructed; if it was not, no automatic reverse alarm was required.

In this case, it is clear that the citation issued because the inspector found no operative backup alarm installed on the piece of equipment in question. It is obvious that he was concerned about the lack of a backup alarm which is normally affixed to one of the rear wheels of the end-loader and which is

activated automatically when the machine is placed in reverse (Tr. 131), and he conceded that had he observed someone acting as a flagman he

would not have issued the citation (Tr. 123). Since there is no evidence that the inspector established that the view to the rear was obstructed, I conclude that the petitioner has failed to establish a violation of the cited standard and the citation is VACATED.

Citation No. 359241

With regard to the lack of a guard on the flywheel of the secondary crusher, Inspector Cloud initially testified that the flywheel was some 5 feet off the ground and projected out some 4 to 6 inches from the crusher. He also testified that someone walking around the mill building would pass by and under the unprotected flywheel location and contact the exposed flywheel (Tr. 164-165). In describing the physical layout of the secondary crusher, he testified that the crusher and flywheel were mounted on a flatbed with wheels attached to it and that it is a portable piece of equipment which can be moved to different locations. However, he could not remember the width of the crusher or how far the flatbed or wheels extended out from the sides of the flywheel location (Tr. 200-201). When shown a sketch of the crusher prepared by respondent's witness (Exh. R-1), Mr. Cloud stated that he could not remember what it looked like (Tr. 201-202).

In response to questions from petitioner's counsel regarding the physical characteristics of the secondary crusher in question, Mr. Cloud could not remember whether the flatbed itself was wider than the crusher which was mounted on top of it, and he could not remember whether the flywheel itself or any other parts near it required to be serviced or lubricated (Tr. 216-217). He did state, however, that the crusher was only accessible from one side of the flatbed, and while someone could walk on the elevated platform on the same side of the crusher, they would not be exposed to the flywheel because they would be walking above it (Tr. 217).

In response to a question from me as to the theory of citing the respondent for the alleged unguarded flywheel location, Inspector Cloud responded that he uses a "rule of thumb" rule followed by some of his fellow inspectors which requires any unguarded piece of equipment within a 7-foot reach of anyone to be guarded (Tr. 212). Petitioner's counsel conceded that "if the evidence shows that this flywheel recessed 5 feet away from the edge of that flatbed truck, I submit nobody could fall into it" and "then it wouldn't need to be guarded" (Tr. 228).

In defense of the citation, respondent produced a photograph of the secondary crusher and flywheel location in question (Exh. R-5). Respondent does not dispute the fact that the flywheel was not guarded. Its defense to the citation is based on the fact that someone approaching the exposed flywheel would necessarily have to walk around it to avoid it because of the extension of the flatbed wheels. Respondent also defends on the basis of its assertion that the plant was not in full production when the citation issued and respondent did not believe he was required to

guard the flywheel because no one was around it. These defenses are REJECTED.

The critical question in this case is whether or not the exposed flywheel was located in such a position or location as to expose someone approaching it to injury if he came into contact with it. Although the inspector could not remember any of the essential details necessary to enable him to make an informed judgment and apparently applied his "7-foot rule of thumb" in this case, the fact is that Photographic Exhibit R-5 clearly shows the exposed flywheel protruding from the edge of the crusher. Further, while it would appear that one passing by that location would have to walk around the flatbed wheels, the fact is that the flywheel was exposed to anyone passing by its unguarded location and respondent's witness Wikel candidly admitted that employees were warned to stay clear of it. In these circumstances, I am constrained to find that petitioner has established a violation in this case and the citation is AFFIRMED. However, I would urge petitioner to reexamine the practice of inspectors using their own written "rules of thumb" and to insure that they fully document all of the circumstances presented in a given case before automatically concluding that a particular piece of equipment needs to be guarded.

Citation No. 359242

This citation was issued after the inspector found a portion of the handrail on an elevated walkway at the secondary crusher to be broken and in disrepair. Section 56.11-2 requires that such areas be maintained in good condition, and, while a handrail was in fact provided, it was not maintained in good condition, and respondent does not dispute this fact. Respondent's defense is that the walkway was not in use and was protected by a chain across it. However, respondent conceded that someone could crawl under the chain and that it did not prevent anyone from using the walkway. I find that petitioner has established a violation and the citation is AFFIRMED.

Citation No. 359243

The testimony of the inspector regarding the missing bottom portions of the ladderway to the secondary crusher supports a violation of section 56.11-1. The missing portion prevented a person from readily and easily climbing the ladder and the missing portion was such as to present a possible mishap while one was attempting to climb the ladder. Respondent does not dispute the fact that at least 30 inches of the ladder were missing, and its defense is based on its abatement efforts. The citation is AFFIRMED.

Citation Nos. 359244 and 359245

These citations were issued after the inspector found that there were no handrails around the elevated primary crusher walkway or a barrier inside the open end of a shanty where the crusher operator was apparently stationed while operating the crusher. The respondent does not dispute the fact that handrails were not installed at the locations where the inspector believed they should have been, and its defense is based on the assertion

that the operator usually remains in the shanty and only comes out to turn the crusher on and off. As for the lack of inside barriers, respondent asserts that windows and wooden framing were previously installed but were destroyed by vandals.

Section 56.11-12 requires that travelways through which men or materials may fall shall be protected by railings, barriers, or covers. It is clear from the testimony and evidence adduced in this case that the required protective barriers or railings were not installed so as to protect the crusher operator or others in the area from falling through the open end of the shanty or the walkway around the crusher. Although the area inside the shanty itself is technically not a travelway, the definition of that term as found in section 56.2 is broad enough to cover the area inside the shanty. The inspector testified that he considered the area a "travelway" even though he described it as a "platform" because the crusher operator and others walk back and forth along the area (Tr. 90). While I consider this to be a rather strained interpretation of the standard, I still believe that the intent of the protective barrier requirement is to prevent someone from walking or falling through and over the edge of the shanty opening, which in fact was a rather small and confined area of approximately 6 feet by 6 feet (Tr. 93). The citations are AFFIRMED.

Citation No. 359246

The inspector issued this citation after he determined that an unguarded V-belt on the drive motor at the primary crusher was not guarded. He described the location of the belt as some 3 feet from the crusher ladder, and stated that the belt was some 4 feet long. His concern was that someone could become entangled in the belt pinch point and that someone could have been struck by the belt if it broke.

The cited standard, section 56.14-1, requires that certain exposed moving machine parts which may be contacted by persons be guarded. The inspector's rationale in issuing the citation was to protect an employee from reaching into the exposed pinch point. In this regard, there was much confusion during the hearing as to the precise location of the cited belt in question. Respondent's witness Wikel produced a photograph of the location of the belt (Exh. R-9) and he was absolutely sure of its location. On the other hand, Inspector Cloud was unsure as to the location of the belt and could not state that the location shown in the exhibit was the belt which he cited (Tr. 306-311). Having viewed both witnesses on the stand during the course of the hearing, I find respondent's witness Wikel to be a credible and straightforward witness and find his testimony credible and I accept it in support of the location of the belt in question. Further, after viewing the photograph and reviewing the testimony of the witnesses, I fail to understand how anyone could come to the conclusion that someone climbing the ladder depicted in the photograph could come in contact with the exposed V-belt in question. Accordingly, Inspector Cloud's reliance on section 56.14-1 is simply not supportable and the citation is VACATED.

With regard to the inspector's assertion that someone could be struck by the whipping action of the belt in the event it broke, aside from the fact that I find his testimony in this regard to be less than credible and sheer speculation, if this

was his concern he should have cited the proper standard, namely, section 56.14-2.

The inspector cited a violation of section 56.14-1 after observing an unguarded head pulley on the No. 2 belt conveyor. The cited standard requires that such pulleys which may be contacted by persons and which may cause injuries to persons be guarded. In support of the citation, Inspector Cloud first testified that anyone could walk right up to the exposed pulley and that with loose clothing on could be pulled into the pinch point. He also testified that there were no obstructions to prevent anyone from reaching the pulley and that maintenance men, salesmen, and electricians would be in the area and would be exposed to the obvious hazard (Tr. 130-132). However, he could not recall the specific location of the pulley, the type of material moved on the belt, and could not recall the particular crusher where the pulley was located (Tr. 137-138), nor could he remember whether the conveyor had a lock-out device (Tr. 145).

Respondent's witness Wikel identified a photograph (Exh. R-10) as the conveyor belt cited by the inspector and he stated that Inspector Cloud was in error when he identified it as a head pulley. Mr. Wikel stated that the pulley was in fact the tail pulley and he conceded that it was the location which concerned the inspector (Tr. 312-313). Mr. Wikel described the pulley location and indicated that a screening plant extended beyond the unguarded pulley, and stated that someone would have to crawl under the screening apparatus to reach the pulley (Tr. 314). He also testified that the pulley was practically totally enclosed by the screening plant and he believed that it served the function of a guard since anyone crawling under the screening plant would have to reach in and under a 1-foot opening to contact the pulley (Tr. 316-317).

When called in rebuttal, Inspector Cloud stated that he could not recall whether a screening plant was installed at the pulley location in question, but he has observed similar screening plants attached to pulleys such as the one in question (Tr. 318). After viewing Photographic Exhibit R-10, Inspector Cloud conceded that one would have to reach under and upward over the screening plant to contact the pulley, expressed serious doubt that anyone stumbling or falling near the pulley location would come in contact with it, and indicated that no one would have any reason to be near the pulley location (Tr. 323).

Upon careful review and examination of the inspector's testimony in support of the citation, I cannot conclude that petitioner has proved a case. This is a classic example of the failure by an inspector to completely document his observations made at the time of the issuance of the citation so as to clearly and concisely support it if challenged later during a contest. Here, the inspector first testified that anyone casually walking by the exposed pulley could contact it and be pulled in by the action of the pulley catching on loose clothing. When confronted with the respondent's testimony and photograph of the pulley location in question, which I find credible, the inspector changed his position and testified that no one would have any

reason to be near the pulley and even if he were it was highly unlikely that he would contact the pulley which was apparently

obstructed by a screening plant installed over most of it. The citation is VACATED.

Gravity

Citation Nos. 359236 and 359237 concerning the bulletin board and mine sign are nonserious violations and the inspector conceded this was the case. With regard to the safe access citations, Nos. 359238 and 359239, I conclude and find that these were serious. Failure to provide an easy and safe ramp for one to cross from the scales to the trailer which served as the mine office presented a hazard to anyone attempting to negotiate the open space between the two, particularly to the secretary whose day-to-day duties were in the office. Further, respondent conceded that it was possible for someone to slip and fall and be injured while attempting to stride or cross over the area in question.

With regard to the unguarded flywheel, Citation No. 359241, while it is true that one would have to walk around the flatbed to come into close proximity of the exposed unprotected and rather large flywheel, the fact is that respondent seemingly recognized the potential hazard involved since respondent had warned its employees to stay clear of the flywheel. While it may also be true that at certain periods when the crusher was down for lack of production, the exposed flywheel posed no hazard, it nonetheless remained unguarded during periods when production was going on. In these circumstances, I find that this violation was serious.

With regard to the handrail and ladder citations, Nos. 359242, 359243, 359244, and 359245, I find that all of these were serious violations. The defective railing which was corrected by being rewelded was in disrepair and not securely in place. Anyone walking by and grabbing the rail would have nothing secure to hold onto, and any chain which may have been in place would not have prevented one from entering the area. As for the lack of a barrier or railing at the exposed end of the crusher shanty, the inspector testified that the crusher was operating when he observed the condition and that the crusher operator was in the shanty. Although it may have been improbable that he would have walked off the exposed edge and fallen to the ground below, the area in question was rather confined and did present a hazard. The same could be said for the lack of a railing outside the shanty and along the travelway by the crusher. Failure to provide a railing at that location presented a hazard to the crusher operator. The missing bottom portion of the ladder which was cited made it difficult for one to step up and grab the ladder handrail and presented a possible slip and fall hazard. Further, while the testimony presented reflects that respondent's plant may have been out of production during certain periods of time, the fact is that when the conditions were cited by the inspector the crusher and plant were in production and respondent has not rebutted this fact.

Good Faith Compliance

Inspector Cloud agreed that the citations concerning the bulletin board, office sign and the lack of safe access to the mine office were all abated in good faith. Although the citations show May 11, 1978, as the time fixed for abatement, the inspector's next opportunity to return to the mine site was May 16, 1978, and that is when he terminated the citations after finding that the conditions cited had been abated (Tr. 118). Accordingly, as to Citation Nos. 359236, 359237, and 359238, I conclude and find that respondent exercised good faith in achieving compliance with the requirements of the law and regulations cited.

With regard to Citation Nos. 359241, 359242, 359243, 359244, and 359245, the record reflects that they were all initially issued on May 4, 1978, and that Inspector Cloud fixed May 11, 1978, as the date for the abatement of the conditions cited. The subsequent withdrawal orders were all issued on May 16, 1978, when Inspector Cloud returned to the mine and found that the conditions cited had not been corrected. In view of the fact that none of these citations were corrected, Mr. Cloud did not believe that the respondent acted in good faith to achieve compliance.

Mr. Cloud testified that when he returned to the mine on May 16, 1978, Mr. John Wikel advised him that he had been "real busy" and had not started on any repair work in connection with the outstanding citations, and after conducting a spot inspection he issued seven noncompliance orders. Mr. Wikel advised him at that time that the plant had been shut down for maintenance and that it was being tested rather than in full production. However, Mr. Cloud stated that he observed some muck and materials at the end of a conveyor belt and he determined that the plant was in operation and in production and that is why he issued the withdrawal orders (Tr. 175-176, July 29, 1980). Mr. Cloud also stated that Mr. Wikel did not produce any purchase orders indicating that any materials required for abatement had been purchased or ordered and simply told him that "they had been too busy" and his notes confirmed this statement (Tr. 178).

Mr. Cloud testified further that he returned to the mine subsequent to May 16, 1978, and believed that it was within the "next 60 days." At that time, he was advised that the plant was not in operation, conducted no further inspection and left the property (Tr. 182). He returned again several times during the next 30 days and was again told that the plant was still not in operation and each time he left without conducting additional inspections (Tr. 183). However, he later testified that when he returned to the mine on May 25, 1978, he inspected the mine and abated five of the outstanding orders after determining that the conditions had been abated, but he could not recall which two remained outstanding (Tr. 193).

The broken handrail on the secondary crusher was corrected by welding it back in place and the inspector terminated the

order on May 25, 1978 (Tr. 15, July 30, 1980). The missing bottom rungs of the access to the crusher were corrected and that order was also terminated on May 25 (Tr. 65).

Regarding the handrail on the walkway and platform on the crusher, the inspector testified that it was not corrected on May 25, and that he subsequently abated the order on August 17, after repairs were made (Tr. 71). He also indicated that a piece of pipe and several posts were all that were required to make repairs, and assuming the materials were available, he believed the condition could have been corrected in a matter of hours (Tr. 70), but he had no way of knowing whether the condition may have been corrected prior to August 24 (Tr. 71). He also confirmed that Mr. Wikel advised him that the crusher had not been in operation from May 16 to May 25 (Tr. 73). As for the exposed end of the shanty which was not guarded by a handrail or barrier, that condition was not abated on May 25, but Mr. Cloud subsequently terminated the order on August 17 when he found that repairs had been made (Tr. 80).

Mr. Cloud testified that his next visit to the mine was on September 11, 1978, but he could not state whether the two outstanding orders had been abated. Moreover, he did find that a guard for the flywheel for the secondary crusher was not in place but was lying in a muck pile (Tr. 196). Petitioner's counsel conceded that he considered this incident as evidence that a guard had been constructed and does not establish noncompliance with the original citation (Tr. 197). As a matter of fact, respondent produced an original copy of the termination of the flywheel citation and order and it shows that the order was terminated by Inspector Cloud on May 25, 1978 (Exh. R-2).

Mr. Wikel stated that the reason the broken handrail on the secondary crusher was not repaired on May 16 was that the crusher was inoperative and the fuses were out and the motor was off. Under the circumstances, he did not believe he had to make the repairs since the crusher was inoperative. He advised the inspector that the crusher was down and the inspector advised him that it made no difference (Tr. 48-49, July 30, 1980). As for the purported statement made to the inspector that respondent was "too busy" to make the repairs, Mr. Wikel denied making them and stated that if they were made they were probably attributable to his father (Tr. 259). However, he also stated that during the time period in question, "it was very possible that we were too busy" (Tr. 261), and he went on to explain that all of his efforts were directed to his blacktop business and that the stone quarry end of the business was still in its infancy and new equipment was being purchased and installed (Tr. 262-265).

Respondent's witness Wikel testified that very little mining of materials took place in the years 1977 and 1978, and conceding that abatement may have taken as long as 60 days, Mr. Wikel attributed the delays to the fact that the crusher and plant were idle and out of production, and he did not believe that any violations could have occurred during these periods because of his belief that inspectors have no authority to inspect his operation when he is not in production (Tr. 235-239, July 30, 1980). He candidly conceded that some of the citations were not corrected until after May 25, and stated "to be honest with you, I guess I must have been out in left field some place, I felt we

didn't operate, and I didn't see the safety factor" (Tr. 249). He also

stated that he decided to shut the operation down because he was unable to abate all of the citations on time and stated that the inspector did not discuss any abatement times with him and simply advised him that he "wasn't the Judge" (Tr. 251-252).

While it is true that the respondent failed to abate five of the citations within the time fixed by the inspector, the fact is that all of the cited conditions were ultimately corrected and the citations terminated. While failure to abate within the time fixed by the inspector would normally support a finding of lack of good faith on the part of the respondent, I conclude and find that the circumstances surrounding the citations in question as discussed above do not warrant any substantial increases in the penalties assessed by me simply because respondent failed to abate within the time initially fixed by Inspector Cloud. I cannot conclude that respondent is a reckless or irresponsible mine operator who deliberately sought to avoid compliance. While it is true that respondent was dilatory in achieving compliance precisely within the timeframe initially fixed by the inspector, the fact is that for the most part the inspector did not discuss abatement with the mine operator, made his own judgments in this regard, and even though he admitted that mine management had advised him that the plant was out of operation and nonproductive on several occasions when he returned to the mine, the inspector nonetheless sought to rely on the standard "too busy" excuse as the basis for his opinion that the respondent exhibited a total lack of good faith in achieving compliance.

In addition to the foregoing, I cannot ignore the fact that the record in this case supports a conclusion that there was a strained relationship between the inspector and mine management during the time periods in question, and this continued during the course of the hearing and was personally observed by me through the observations of the demeanor of the inspector as well as mine management during their testimony. It seems to me that voluntary compliance with the law can best be achieved through an atmosphere of mutual cooperation between an MSHA inspector and mine management rather than through continued adversary confrontations between the parties and I would hope that MSHA as well as mine management will consider this in any future encounters.

Negligence

During the course of the hearing, petitioner's counsel conceded that the circumstances concerning the citations in this case do not suggest flagrant, deliberate, or reckless disregard for safety, and counsel candidly admitted that it was altogether possible that the plant was in fact closed down and the equipment was not used after the withdrawal orders were issued (Tr. 59, 81). Further, after careful review and consideration of all of the testimony concerning the abatement of the citations in this case, I cannot conclude that the respondent was grossly negligent in failing to correct the conditions cited. To the contrary, I conclude and find that the citations which have been affirmed resulted from the failure by the respondent to prevent or correct

the conditions which he should have been aware of, and its failure in this regard constituted ordinary negligence as to each of the citations in question.

Size of Business and Effect of Civil Penalties on Respondent's Ability to Remain in Business

The testimony and evidence adduced in this case supports a finding that respondent is a very small family-owned mine operator. The parties stipulated that any penalties assessed in this case will not adversely affect respondent's ability to remain in business and I adopt this as my finding on this issue.

History of Prior Violations

The parties stipulated that the respondent has no prior history of violations and I adopt this as my finding on this question and I have considered this in the assessments levied for the citations in question.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate in the circumstances and they are imposed by me for each of the citations which have been affirmed:

Citation No.	Date	30 C.F.R. Section	Assessment
359236	5/4/78	109(a)--Act	$ 5
359237	5/4/78	109(a)--Act	5
359238	5/4/78	56.11-1	40
359239	5/4/78	56.11-1	40
359241	5/4/78	56.14-1	125
359242	5/4/78	56.11-2	50
359243	5/4/78	56.11-1	25
359244	5/4/78	56.11-12	125
359245	5/4/78	56.11-12	125
			$540

On the basis of the foregoing findings and conclusions, the following citations are VACATED:

Citation No.	Date	30 C.F.R. Section
359240	5/4/78	56.9-87
359246	5/4/78	56.14-1
359247	5/4/78	56.14-1

ORDER

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totaling $540 within thirty (30) days of the date of this decision and order, and upon receipt of the same by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge