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

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATIVE (MSHA)  
PETITIONER

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 79-141-M

v.

ASSESSMENT CONTROL NO.  
02-00150-05003

KENNECOTT COPPER CORPORATION,  
AND  
M. M. SUNDT CONSTRUCTION COMPANY,  
RESPONDENTS

MINE: Kennecott Ray

DECISION

APPEARANCES:

Mildred R. Wheeler Esq.  
Office of the Solicitor  
United States Department of Labor  
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San Francisco, California 94102,  
for the petitioner

Patrick Paterson Esq.  
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100 West Washington Street  
Phoenix, Arizona 85003

Marvin A. Husted  
Vice President  
M. M. Sundt Construction Company  
4101 East Irvington  
Tucson, Arizona 85726,  
for the respondents

Before: Judge John J. Morris

STATEMENT OF THE CASE

In this case the Secretary of Labor on behalf of the Mine Safety and Health Administration (MSHA) seeks an order affirming certain citations and assessing civil penalties. The contest arises under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq. (1977).

Pursuant to notice, a hearing was held in Phoenix, Arizona on April 3, 1980. At that time MSHA and Kennecott were the only parties to this action. At the hearing, Kennecott indicated its desire to withdraw its notice of contest of citation nos. 377273, 377270, 377269, and 377268. They admitted the violations occurred and agreed that the penalties proposed were reasonable.

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MSHA moved to dismiss citation nos. 377272 and 377267. In support thereof, the Secretary stated that there was insufficient evidence to prove these alleged violations.

The Secretary and Kennecott submitted a stipulation of facts as to the remaining citation nos. 377265 and 377266. The occurrence of the alleged violations was not disputed. Respondent contested these citations on the ground that the violations were the responsibility of M. M. Sundt Construction Company (Sundt), an independent contractor. Kennecott also argued that if it were held liable for these violations it should not be found to have been negligent because it had no control over the job site where the violations occurred.

Subsequent to this hearing, MSHA adopted regulations establishing a method for citing independent contractors. As a result of these regulations, the Federal Mine Safety and Health Review Commission in *Secretary v. Pittsburgh and Midway Coal*, BARB 79-307-P et. al. (1980) gave the Secretary the opportunity to decide whether to continue pursuing the existing action against the owner-operator or to proceed against the independent contractor claimed to have violated the standards.

In light of the regulations and the P & M decision, I issued an order directing the parties to state their positions with respect to these recent developments. Kennecott responded by restating its contention that Sundt was solely responsible for the violations. It requested that the citations be vacated. The Secretary chose to continue the proceedings against Kennecott unless Sundt agreed to voluntarily substitute itself as the respondent with respect to the two citations in question.

On November 10, 1980, Kennecott submitted a motion to substitute Sundt for itself with respect to citation nos. 377265 and 377266. Sundt indicated its agreement to this proposal. Sundt stated that it would withdraw the notice of contest as to these citations if the penalties were recomputed to reflect the amount which would have been assessed if the citations had been issued originally to Sundt. Sundt contended that the penalty should be based on its company size and history of violations rather than on Kennecott's.

Sundt was subsequently joined as a party in this case, but only as to citation nos. 377265 and 377266. On May 4, 1981, the Secretary and Sundt filed a motion proposing penalties based on Sundt's size, history of violations and prompt good faith abatement of each violation.

ORDER

Pursuant to 29 C.F.R. 2700.11 Kennecott's notice of contest as to citations nos. 377273, 377270, 377269 and 377268 is withdrawn. These citations are affirmed. After reviewing the criteria for the assessment of a penalty, I also affirm the proposed penalty for each of these citations set forth below.

Citation No.	377273	\$195.00
Citation No.	377270	122.00
Citation No.	377269	150.00
Citation No.	377268	130.00

Kennecott is directed to pay these penalties within 30-days of the date of this order.

Pursuant to 29 C.F.R. 2700.11, MSHA's motion to dismiss citation nos. 377272 and 377267 is granted. These citations and their proposed penalties are vacated.

Further, pursuant to 29 C.F.R. 2700.11, Sundt's notice of contest as to citation nos. 377265 and 377266 is withdrawn. These citations are affirmed. After reviewing the criteria for assessment of a penalty, I also affirm the proposed penalty for each of these citations as set forth below.

Citation No.	377265	\$90.00
Citation No.	377266	65.00

Sundt is to pay these penalties within 30 days of the date of this order.

John J. Morris  
Administrative Law Judge