CCASE:
SOL (MSHA) V. AMERICAN MATERIALS
DDATE:
19810612
TTEXT:

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. LAKE 79-9-M A/O No. 33-01395-05002F
v.	
AMERICAN MATERIALS CORPORATION, RESPONDENT	Harrison Pit and Plant

DECISION

Appearances: Linda L. Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
John W. Edwards, Esq., and David William T. Carroll, Esq., Smith & Schnacke, Columbus, Ohio, for Respondent

Before: Judge Cook

I. Procedural Background

On June 26, 1979, the Mine Safety and Health Administration (Petitioner) filed a petition for assessment of civil penalty in the above-captioned proceeding pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979) (1977 Mine Act). The petition alleges two violations of provisions of the Code of Federal Regulations. On July 5, 1979, an answer was filed by American Materials Corporation (Respondent). Thereafter, the parties engaged in extensive discovery.

On May 21, 1980, a notice of hearing was issued scheduling the case for hearing on the merits on August 5, 1980, in Cincinnati, Ohio. The hearing convened as scheduled with representatives of both parties present and participating. At the Respondent's request, the undersigned Administrative Law Judge, accompanied by representatives of both parties, viewed the site of the accident which resulted in the issuance of the subject citations. At the close of the Petitioner's case-in-chief, the Respondent made motions to dismiss the proceeding. The motions were taken under advisement to be ruled upon at the time of the writing of the decision. Additionally, following the presentation of the evidence, a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law. However, difficulties experienced by counsel necessitated a revision thereof.

On October 27, 1980, the Respondent filed a motion to dismiss. On November 10, 1980, the Petitioner filed a memorandum in opposition thereto.

The Respondent filed a posthearing memorandum on December 11, 1980, and the Petitioner filed proposed findings of fact and conclusions of law on December 12, 1980. On January 12, 1981, the Petitioner filed a letter retracting, for the present, references to certain cases cited in its posthearing brief. The Respondent filed a reply memorandum, a supplemental memorandum regarding recent decisions, and a second supplemental memorandum regarding recent decisions on January 21, 1981, March 2, 1981, and March 16, 1981.

II. Violations Charged

Citation No.	Date	30 C.F.R. Standard
358304	4/26/78	56.12-71
360204	4/26/78	56.20-11

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called Federal mine inspectors Verl C. Thomas and William D. Atwood as witnesses. Both the Petitioner and the Respondent called Mr. Charles Ballinger, the Respondent's superintendent of operations, as a witness.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a ground plan of the Respondent's Harrison Pit and Plant.

M-2 is a general ground plan of the Respondent's Harrison No. 712 Plant.

M-3 is a computer printout showing the history of previous violations for which the Respondent had paid assessments at its Harrison Pit and Plant, at its Fairfield Pit and Plant No. 711, at its North Hamilton facility No. 710, and at its Kirby Road Pit and Plant.

M-4 is an aerial photograph of the Respondent's Harrison Pit and Plant.

2. The Respondent introduced the following exhibits in evidence:

0-1 is a photograph.

0-2 is a photograph.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of the subject mandatory safety standards occur, and (2) what amount should be assessed as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. No inspections were made and no citations were issued at the Harrison Pit and Plant prior to the accident of April 25, 1978 (Tr. 8).

2. There is no dispute as to coverage and jurisdiction. The facility constitutes a "mine" within the meaning of the 1977 Mine Act (Tr. 11).

3. The size of the mine during the years 1977 and 1978 was 19,518 man-hours per year (Tr. 26-29).

B. Respondent's Motions to Dismiss at the Close of Petitioner's Case-in-Chief

The Respondent made oral motions to dismiss the proceeding at the close of the Petitioner's case-in-chief. The motions to dismiss encompass both citations. The undersigned Administrative Law Judge took the motions under advisement, and informed the parties that rulings would be made on the motions at the time of the writing of the decision based upon the record as it existed when the motions were made (Tr. 134-142).

The Respondent advanced various arguments in support of its motions to dismiss, and has reasserted those arguments in its posthearing filings. The specific legal issues raised are addressed in subsequent portions of this decision. The evidence contained in the record when the motions were made has been considered fully.

It is found later in this decision that the evidence presented by the Petitioner failed to prove that the circumstances of the accident in this case presented a situation where "equipment must be moved or operated near energized high-voltage powerlines * * * and the clearance is less than 10 feet * * * ." (Emphasis added.) Therefore, a violation of 30 C.F.R. 56.12-71 has not been proved.

However, it is found later in this decision that the

evidence presented by the Petitioner established a prima facie case as to a violation of 30 C.F.R.

56.20-11 in that a warning sign should have been posted as to safety hazard which would not be immediately obvious to an employee, namely, the safety hazard created by the high-voltage powerline.

Accordingly, the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief will be granted as to an allegation of a violation of 30 C.F.R. 56.12-71 and will be denied as to an alleged violation of 30 C.F.R. 56.20-11.

C. Occurrence of Fatal Accident

On April 25, 1978, an individual identified as Mr. Meyer sustained a fatal injury at the Respondent's Harrison Pit and Plant. The two citations which are the subject matter of this proceeding were issued during the Petitioner's April 26, 1978, fatal accident investigation.

Mr. Meyer was not an employee of the Respondent at the time of the accident, and nothing indicates that he was ever the Respondent's employee. Rather, he was either an employee of RBS Trucking Company or an owner-operator working for RBS Trucking Company. RBS Trucking Company was one of the Respondent's customers hauling sand and/or gravel from the Harrison Pit and Plant (Tr. 54, 66, 101, 126).

It appears that before April 25, 1978, the Respondent's geographical market expanded when trucks hauling coal from Kentucky to the Harrison, Ohio, area began coming to the Harrison Pit and Plant to obtain loads of sand for the return trip to Kentucky (Tr. 122-123). Some of these truck drivers cleaned coal residue from their truck beds while on the Respondent's property. This cleaning operation was accomplished by raising the truck bed. This had begun a short time before April 25, 1978 (Tr. 122-124).

It appears that the Respondent was clearly displeased with the fact that some of the truck drivers were cleaning coal residue from their truck beds while on the property, and that the Respondent was particularly upset by the fact that some of these truck drivers were cleaning their truck beds in the stockpile areas. Mr. Charles Ballinger, the Respondent's superintendent of operations, had instructed Mr. Norman Ross, the foreman, to stop the truck drivers from doing this, to get them to clean their truck beds off of the property, because coal residue was contaminating the materials that the Respondent was offering for sale. It appears that Mr. Ross implemented this directive by verbally informing those truck drivers caught in the act to make sure that they cleaned their truck beds before coming onto the property. It appears that no arrangements had been made to so instruct the truck drivers when they first entered the property (Tr. 52-53, 122-125).

RBS Trucking Company delivered coal to the power companies in the Harrison, Ohio, area, and thereafter picked up sand and/or gravel at the Harrison Pit and Plant for the return trip to

Kentucky (Tr. 125-126). On April 25, 1978, Mr. Meyer drove onto the property, presumably to pick up a load of sand and/or gravel for transport into Kentucky. He turned west down

a gravel-surfaced roadway leading to one of the stockpile areas (Tr. 37-38, unnumbered stockpile on M-4). Shortly before reaching the workshop, he pulled his tractor-trailer dump truck completely off the gravel-surfaced roadway in order to dump the coal residue from the truck bed. He pulled off to the left of the gravel-surfaced roadway and parked the truck in an area characterized by unstable ground conditions. The ground was wet and muddy and there was standing water present (Tr. 35-38, 59, 86).

Parked in this position, the truck was parallel to, but not directly under, the overhead high-voltage powerlines. The truck was positioned such that the righthand, or passenger's, side of the truck was approximately 5 feet from the gravel-surfaced roadway, and that the lefthand, or driver's, side was the side nearest the powerline (Tr. 37-38, 58-59, 73, 118-119).

Mr. Meyer, apparently while still inside the tractor cab, raised the 30-foot long truck bed, or "sandbox," to its maximum vertical extension of 28-1/2 feet. Then, it appears that he got out of the cab in order to operate the tailgate release lever (Tr. 58, 61, 65, 80-83, 85, 88, 103, 115). This lever was located on the front of the trailer at the service connection of the tractor-trailer rig (Tr. 115). An individual could operate the lever either while standing on the ground or while standing on the tractor frame (Tr. 115-116). It appears that Mr. Meyer climbed onto the tractor frame in order to release the lever. He was electrocuted at approximately 1:45 p.m. when a gust of wind blew the high-voltage powerline into the raised bed of the truck. This required the gust of wind to blow the powerline a lateral distance of approximately 1 foot. The voltage passing through the powerline was rated at 4,160 volts, (FOOTNOTE 1) and the powerline was approximately 28-1/2 feet above the ground (Tr. 34-37, 61-62, 80-86, 117-118).

The subject citations were issued during the course of the Petitioner's April 26, 1978, fatal accident investigation. Citation No. 358304 was issued by Federal mine inspector William D. Atwood. The allegations contained in the citation, as incorporated into the petition for assessment of civil penalty, charge a violation of mandatory safety standard 30 C.F.R. 56.12-71 in that "ÕtÊhe dump truck was being operated within 10 feet of the energized 4,160 volt powerline." The cited mandatory safety standard provides that "ÕwÊhen equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

Citation No. 360204 was issued by Federal mine inspector Steve Viles. The allegations contained in the citation, as incorporated into the petition for assessment of civil penalty, charge a violation of mandatory safety standard 30 C.F.R. 56.20-11 in that "ÕhÊazardous area ÕwasÊ not adequately posted at the main haulage road along the 4,160 ÕvoltÊ powerline." The cited mandatory safety standard provides that "ÕaÊreas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required."

D. Whether the Respondent is Properly Charged with Violations of Mandatory Safety Standards

The first principal question presented is whether the Respondent is properly charged with violations of mandatory safety standards which caused or contributed to the death of an individual who was either a customer or an employee of a customer, or an independent owner-operator hired by a customer. The resolution of this question turns upon (1) whether the decedent was a "miner" within the meaning of section 3(g) of the 1977 Mine Act; and (2) whether the Respondent is charged with having committed violations of the mandatory safety standards or, alternatively, whether the Petitioner seeks to hold the Respondent responsible for violations committed by either the customer, or the customer's employee, or the independent owner-operator hired by the customer.

The 1977 Mine Act is remedial legislation intended to secure a safe and healthful work environment for "miners," as that term is defined in section 3(g) of the 1977 Mine Act. See section 2 of the 1977 Mine Act. The 1977 Mine Act imposes duties on mine operators with respect to those individuals falling within the statutory definition of a "miner." See Republic Steel Corporation, 1 FMSHRC 5, 11, 1 BNA MSHC 2002, 1979 CCH OSHD par. 23,455 (1979). Therefore, the threshold inquiry is whether the decedent was a "miner," as defined by section 3(g) of the 1977 Mine Act.

Section 3(g) of the 1977 Mine Act defines the term "miner" as "any individual working in a coal or other mine." One's status as a "miner" is not contingent upon an employment relationship with the owner or operator of a mine. El Paso Rock Quarries, Inc., 3 FMSHRC 35, 37 n. 11, 2 BNA MSHC 1132, 1981 CCH OSHD par. 25,154 (1981). The duty imposed on the mine operator to comply with the 1977 Mine Act and the mandatory safety and health standards is one that extends to all miners, irrespective of whether or not the miners affected by a given violative condition are employees of the mine operator. See Republic Steel Corporation, 1 FMSHRC 5, 11, 1 BNA MSHC 2002, 1979 CCH OSHD par. 23,455 (1979).

The evidence presented establishes that Mr. Meyer was either an employee of RBS Trucking Company or an owner-operator working

for RBS Trucking Company; and that RBS Trucking Company was one of the Respondent's customers, transporting sand and/or gravel from the Harrison Pit and Plant to Kentucky. The

evidence also shows that Mr. Meyer visited the Harrison Pit and Plant on April 25, 1978, to obtain a load of sand and/or gravel. I hold that Mr. Meyer's April 25, 1978, activities at the Respondent's Harrison Pit and Plant constituted "working in a coal or other mine" and, accordingly, that Mr. Meyer fell within the definition of "miner" set forth in section 3(g) of the 1977 Mine Act. Therefore, he was entitled to the protections afforded by the 1977 Mine Act.

The second question presented is whether the Petitioner seeks to hold the Respondent responsible for violations committed by Mr. Meyer; or, alternatively, whether the Respondent is charged with having committed the violations cited in the subject citations.

The Respondent is, of course, properly charged if the citations allege that the Respondent committed the violations of the cited mandatory safety standards. It is self-evident that the Respondent is liable for its own violations.

A review of the allegations contained in the citations clearly shows that the Respondent is charged with having committed the violations of mandatory safety standards 30 C.F.R. 56.12-71 and 30 C.F.R. 56.20-11. The Petitioner is not attempting to hold the Respondent liable for violations committed by either RBS Trucking Company or Mr. Meyer. Accordingly, I conclude that the Respondent is properly charged in this proceeding.

These determinations dispose of some of the issues raised in Respondent's motion to dismiss filed on October 27, 1980. Others will be disposed of later in this decision.

E. Citation No. 358304, April 26, 1978, 30 C.F.R. 56.12-71

As noted above, this citation alleges a violation of mandatory safety standard 30 C.F.R. 56.12-71 in that "ÕtÊhe dump truck was operated within 10 feet of the energized 4,160 volt powerline." The cited mandatory safety standard requires that "ÕwÊhen equipment must be moved or operated near energized high-voltage powerlines (other than trolley lines) and the clearance is less than 10 feet, the lines shall be deenergized or other precautionary measures shall be taken."

The evidence shows that Mr. Meyer pulled his tractor-trailer dump truck off of the gravel-surfaced roadway and parked parallel to, and not under, the powerline. He raised the truck bed to a height of 28-1/2 feet, its maximum extension, and a gust of wind blew the powerline into contact with the raised truck bed, electrocuting Mr. Meyer. This required the gust of wind to blow the powerline a lateral distance of approximately 1 foot. The evidence in the record and the inferences drawn thereform shows that Mr. Meyer raised the truck bed in order to clean coal residue from it prior to acquiring a load of sand and/or gravel.

The controversy as to whether a violation of the regulation

occurred centers around the regulation's use of the term "must." The Respondent's

position, as set forth in its motion to dismiss at the close of the Petitioner's case-in-chief, in its December 11, 1980, posthearing memorandum, and in its January 21, 1981, reply memorandum, asserts that no violation occurred because there was no requirement that the truck be moved or operated near the powerlines. According to the Respondent's posthearing memorandum:

> To the contrary, the truck was parked on ground that was wet, muddy and very unstable. The area was not suitable for pulling a truck into. There were no truck tracks in the off-road area other than the tracks made by the decedent's truck. The road did not pass under the powerlines. In order to get under the powerlines, the truck had to drive off the haul road onto the unstable area which was clearly unintended for and unsuitable for driving. No reasonable person would have driven a truck or anticipated someone else would drive a truck onto the area where the accident occurred.

(Respondent's Posthearing Memorandum, pp. 11-12; citations to record omitted.)

The Petitioner counters that the Respondent's policy prohibiting the cleaning of trailer beds in the pit areas, and its attempts to implement and enforce such policy, in effect required the drivers to perform the cleaning activities on or beside the haulage roads leading to the pits and in close proximity to high-voltage powerlines. According to the Petitioner, the fact that the Respondent did not want the truck beds cleaned on its property is not controlling because, given the circumstances, it was foreseeable that the dumping would occur on the property (Tr. 137-142, Petitioner's Posthearing Submissions, p. 8).

The regulation's use of the verb phrase "must be moved or operated" demonstrates that the regulation applies when the mine operator requires the movement or operation of equipment within 10 feet of high-voltage powerlines, or when the operator arranges the layout of its plant in such a way that equipment must be moved or operated within 10 feet of high-voltage powerlines in carrying out operations at the plant.

As stated previously, the evidence presented by the Petitioner failed to prove that the instant case presented a situation where equipment must be moved or operated within 10 feet of high-voltage powerlines.

The location of the wires in this case with respect to the subject part of the plant, including the roads, was such that it cannot be said that the mine operator created a situation where a truck such as the one involved in this case must be operated within 10 feet of the high-voltage lines.

The wires in question were not over the road in the area of

the accident. The wires were well off the road. The facts show that they had to be at least about 13 feet from the road. Further, the wires were 8-1/2 feet above the standard required by the National Electric Safety Code (Tr. 99-100).

The mine operator had made it known to the truck drivers that it did not want them to dump any coal from their trucks on the property of the plant. The problem of such type of dumping of coal had begun to develop just before the day of the subject accident.

Evidence was found in the area after the accident indicating that other truck drivers had cleaned coal residue from their truck beds in the area where the accident occurred. Mr. Ballinger testified that he observed two piles of coal residue in the area immediately following the accident, the one which Mr. Meyer had dumped and one which had been dumped by another driver prior to the accident (Tr. 38-39, 53-54). The latter pile was approximately 5 to 10 feet behind, i.e., to the east of the truck and 3 or 4 feet to the north (Tr. 38-39). He testified that he did not observe piles of coal at any other point along the roadway, either to the west or to the east of the shop (Tr. 39). Federal mine inspector Verl C. Thomas, who examined the area during the April 26, 1978, fatal accident investigation, observed three piles of coal residue located approximately 5 to 8 feet, possibly 10 feet, behind the truck and 4 to 6 feet farther to the north (Tr. 59-60). He observed two additional coal residue piles located approximately 15 to 20 feet behind the truck, and somewhat closer to the gravel-surfaced roadway than the first three piles (Tr. 59-60).

However, there is no proof that any part of the management of the Respondent had any knowledge that the coal piles existed in the areas behind the subject truck off of the road area (Tr. 120-122), although the management had prior knowledge of dumping in the stockpiles. In addition, the truck driver took his truck off the road into a wet, muddy and very unstable area. It was an unsuitable area to park a truck (Tr. 37-38). In addition, the driver had gone the wrong way on a road that had been marked "one-way" the opposite direction (Tr. 49-50, 59, 73).

In addition, the inspector who issued the citation had, in a statement he issued concerning the alleged violation of 30 C.F.R. 56.12-71, checked a box which stated that the condition o practice cited could not have been known or predicted, or occurred due to circumstances beyond the operator's control (Tr. 71). This observation by the issuing inspector bolsters the conclusion that the Respondent did not create a situation where equipment must be moved or operated within 10 feet of high-voltage powerlines.

In view of all of these factors, it is found that the Petitioner has failed to prove that the facts of this case presented a situation where equipment must be moved or operated within 10 feet of high-voltage powerlines.

It should be added that the additional evidence presented by the Respondent after the Petitioner had concluded its case would not change the result herein.

In view of the foregoing, I conclude that a violation of

mandatory safety standard 30 C.F.R. 56.12-71 has not been established.

F. Citation No. 360204, April 26, 1978, 30 C.F.R. 56.20-11

As noted above, this citation alleges a violation of mandatory safety standard 30 C.F.R. 56.20-11 in that a "ÕhÊazardous area ÕwasÊ not adequately posted at the main haulage road along the 4,160 ÕvoltÊ powerline." The cited mandatory safety standard provides that "ÕaÊreas where health or safety hazards exist that are not immediately obvious to employees shall be barricaded, or warning signs shall be posted at all approaches. Warning signs shall be readily visible, legible, display the nature of the hazard, and any protective action required." The evidence presented shows that the area had not been barricaded and that no warning signs had been posted (Tr. 69-70, 72, 88).

The Respondent does not contest the fact that the area where the fatal accident occurred was not barricaded and that no warning signs had been posted. Instead, the Respondent maintains that no violation occurred by interpreting the phrase "not immediately obvious to employees" as (1) limiting the rgulation's protection to its own employees; and (2) requiring that the hazard not be immediately obvious to its own employees. (See Respondent's motion to dismiss at the close of the Petitioner's case-in-chief, Tr. 134-137; Respondent's Posthearing Motion to Dismiss; Respondent's Posthearing Memorandum.) (FOOTNOTE 2) The Petitioner maintains that the protection afforded by mandatory safety standard 30 C.F.R. 56.20-11 extends to all who fall within the definition of "miner" set forth in section 3(g) of the 1977 Mine Act. Additionally, the Petitioner maintains that the hazard may not have been immediately obvious to Mr. Meyer.

I conclude that mandatory safety standard 30 C.F.R. 56.20-11 imposes a duty upon the mine operator with respect to all who fall within the definition of the term "miner." The regulation's protection is not limited to the mine operator's employees.

Mandatory safety standard 30 C.F.R. 56.20-11 was initially promulgated by the Secretary of the Interior pursuant to section 6 of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. 725 (1976) (1966 Metal Act). See 30 C.F.R. 56.1. The 1966 Metal Act was remedial legislation enacted "to reduce the high accident rate and improve health and safety conditions in mining and milling operations carried on in the metal and nonmetallic mineral industries." S. Rep. No. 1296, 89th Cong., 2nd Sess., reprinted in Õ1966Ê U.S. CODE CONG. & AD. NEWS, 2846. The Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 STAT. 1290-1322 (Amendments Act), amongst other things, repealed the 1966 Metal Act, see 306(a) of the Amendments Act, and enlarged the definition of "mine" set forth in section 3(h) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 et seq. (1970) (1969 Coal Act), to include those mines previously covered by the 1966 Metal Act. S. Rep. No. 95-181, 95th Cong., 1st. Sess. (1977), reprinted

in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 647 (1978). The mandatory standards relating to mines, issued by the Secretary of the Interior under the 1966 Metal Act and in effect when the Amendments Act was enacted, remained in effect as mandatory health or safety standards applicable to metal and nonmetallic mines under the 1977 Mine Act, and continue to remain in effect until such time as the Secretary of Labor issues new or revised mandatory standards. Section 301(b)(1) of the Amendments Act. The mandatory standards in effect on the effective date of the Amendments Act "continueÕdÊ in effect according to their terms until modified, terminated, superseded, set aside, revoked or repealed by the Secretary of Labor, the Federal Mine Safety and Health Review Commission or other authorized officials, by any court of competent jurisdiction, or by operation of law." Section 301(c)(2) of the Amendments Act.

It has been held previously in this decision that Mr. Meyer fell within the definition of the term "miner" as set forth in section 3(g) of the 1977 Mine Act. Thus, the question presented is whether 30 C.F.R. 56.20-11, as applied under the 1977 Mine Act, accords protection to miners who are not the mine operator's employees. The problem is essentially one of interpreting the regulation in accordance with the 1977 Mine Act's remedial purpose.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland on Statutory Construction, 31.06, p. 362 (1972). According to 2 Am.Jur.2d, Administrative Law, 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe and healthful work places must be interpreted in light of the express Congressional purpose of providing a safe and healthful work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. Brennen v. Occupational Safety and Health Review Commission, 491 F.2d 1340 (2d Cir. 1974). "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972).

The 1966 Metal Act never used the term "miner" in any of its provisions. Instead, the 1966 Metal Act used the terms "employees of the mine," "employees," "mine workers," and "workers in such mines," where the term "miner" would ordinarily be expected to appear. See sections 7(a), 8(a)(3), 8(b)(3), 10(c), and 15 of the 1966 Metal Act. But the regulation, when interpreted in conjunction with the 1977 Mine Act's remedial purpose, is clearly intended to provide those working in the mine with warning of or protection against health or safety hazards

which are not immediately obvious. I therefore conclude that Congress, in adopting 30 C.F.R. 56.20-11 as a mandatory standard under the 1977 Mine Act, intended that it afford protection to all miners, and that it imposes a duty on the mine operator with respect to all

miners working in its mine. A construction limiting its protection to employees of the mine operator would serve an objective at odds with mine safety, and is therefore not to be preferred.

The remaining question is whether the hazard was immediately obvious. The evidence clearly shows that the powerlines were readily observable (Tr. 72, 104). The evidence further shows that the powerline that achieved contact with the truck bed was approximately 28-1/2 feet above the ground, and that the truck bed, at its maximum extension, reached a height of approximately 28-1/2 feet.

The fact that the powerlines themselves were readily observable under normal conditions is not dispositive of the question presented. The powerlines were sufficiently high above the ground that the hazard posed by raising a truck bed or operating other equipment in the area was not immediately obvious. The truck operator had raised the bed of the trailer from inside the truck cab. It was raining; the winds were gusting; and the operator of the truck, upon getting out of the truck, was engaged in operating the tailgate. There is no way to know whether operators of trucks in the area would know about the high voltage of the wires in question. In view of all of these factors, I conclude that this was an area where a safety hazard existed which was not immediately obvious to a miner such as the subject truck driver and that neither barricades nor warning signs were posted at all the approaches.

Accordingly, I conclude that a violation of mandatory safety standard 30 C.F.R. 56.20-11 has been established by a preponderance of the evidence.

G. Negligence of the Operator

It appears that the problem of dumping coal residue on the property arose only a short time prior to April 25, 1978. The Respondent undertook steps to prevent truck drivers from engaging in such activity, but as of April 25, 1978, had not found an effective means of dealing with the problem. In fact, at some undisclosed point in time after the accident, the Respondent provided a waste area in the pits where the dumping of truck beds could be accomplished (Tr. 131).

However, the fact remains that warning signs should have been posted concerning the hazard of the high-voltage powerlines. In view of all of the surrounding circumstances, including the fact that the Respondent attempted to undertake corrective action by attempting to prevent the dumping of coal residue on the property prior to April 25, 1978, I find that the Respondent demonstrated ordinary negligence in connection with the violation.

H. Gravity of the Violation

The violation contributed to the fatal accident.

Accordingly, it is found that the violation was serious.

I. Good Faith in Attempting Rapid Abatement

The haulageway was immediately barricaded and posted in order to abate the violation (Tr. 72). Accordingly, I conclude that the Respondent demonstrated good faith in attempting rapid abatement of the violation.

J. Size of the Operator's Business

The Respondent is a wholly owned subsidiary of American Aggregates Corporation (Tr. 9; Respondent's Posthearing Memorandum, p. 2). The record contains no evidence as to whether American Aggregates Corporation owns or controls mining operations other than the Respondent, or, if so, the size of those mining operations.

No evidence was presented as to the aggregate size of all mining operations owned or controlled by the Respondent. The only evidence contained in the record relates to the size of the Respondent's Harrison Pit and Plant. The parties stipulated that the size of the Harrison Pit and Plant in 1977 and 1978 was rated at 19,518 man-hours per year (Tr. 26-29). The evidence presented reveals that the Harrison Pit and Plant sold approximately 350,000 to 400,000 tons of material in 1978 (Tr. 52).

K. History of Previous Violations

The parties stipulated that no inspections had been conducted at, or citations issued at, the Harrison Pit and Plant prior to the April 25, 1978, accident (Tr. 8). The record contains no other evidence as relates to the history of previous violations.

Accordingly, it is found that the Respondent has no history of previous violations cognizable in this proceeding.

L. Effect of a Civil Penalty on the Operator's Ability to Continue in Business

No evidence was presented establishing that the assessment of a civil penalty in this case will adversely affect the Respondent's ability to remain in business. In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1971-1973 CCH OSH. par. 15,380 (1972), the Commission's predecessor, the Interior Board of Mine Operations Appeals, held that evidence relating to whether a penalty will affect the ability of the operator to remain in business is within the operator's control, and therefore, there is a presumption that the operator will not be so affected. I find, therefore, that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to continue in business.

VI. Conclusions of Law

1. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

2. American Materials Corporation and its Harrison Pit and Plant have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

3. Federal mine inspectors William D. Atwood and Steve Viles were duly authorized representatives of the Secretary of Labor at all times relevant to this proceeding.

4. The Petitioner has failed to prove the alleged violation with respect to Citation No. 358304, April 26, 1978, 30 C.F.R. 56.12-71.

5. The violation charged with respect to Citation No. 360204, April 26, 1978, 30 C.F.R. 56.20-11 is found to have occurred as alleged.

6. All of the conclusions of law set forth in Part V, supra, are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The parties filed the posthearing submissions identified in Part I, supra. Such submissions, insofar as they can be considered to have contained proposed findings of fact and conclusions of law have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in this case.

VIII. Penalty Assessed

Upon consideration of the entire record in this case and the foregoing findings of fact and conclusions of law, I find that the assessment of a penalty is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
360204	4/26/78	56.20-11	$300

ORDER

IT IS ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief as relates to an alleged violation of 30 C.F.R. 56.12-71 be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief as relates to an alleged violation of 30 C.F.R. 56.20-11 be, and hereby is, DENIED.

IT IS FURTHER ORDERED THAT the Respondent's October 27, 1980, motion to dismiss be, and hereby is, DENIED.

~1538
IT IS FURTHER ORDERED that the Respondent pay a civil penalty in the amount of $300 within the next 30 days.

John F. Cook
Administrative Law Judge

ÄÄ

~FOOTNOTE_ONE

1 One of the definitions contained in 30 C.F.R. 56.2 provides that the term "high potential" means "more than 650 volts." According to Paul W. Thrush (ed.), A Dictionary of Mining, Mineral and Related Terms (Washington, D.C.: U.S. Department of the Interior Bureau of Mines) (1968) at page 543, the term "high voltage" means: "a. A high electrical pressure or electromotive force. Grove. b. That which is greater than 650 volts. Also called high potential. ASA M2.1-1963."

~FOOTNOTE_TWO

2 The Respondent's position that the regulation protects only its own employees is based upon the definition of "employee" set forth in 30 C.F.R. 56.2, which defines the term as "a person who works for wages or salary in the service of an employer."