

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

JUN 24 1981

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner  
v.  
DUCHARME SAND & GRAVEL,  
Respondent

: Civil Penalty Proceeding  
:  
: Docket No. YORK 80-55-M  
: A.O. No. 27-00135-05002  
:  
: Ducharme Pit  
:  
:

DECISION

Appearances: Constance B. Franklin, Esq., U.S. Department of Labor,  
Boston, Massachusetts, for ~~the~~ petitioner;  
Clifford R. Kinghorn, Jr., Esq., Nashua, New Hampshire,  
for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a), of the Federal Mine Safety and Health Act of 1977, seeking civil penalty assessments for 13 alleged violations of certain mandatory safety standards set forth in Part 56, Title 30, Code of Federal Regulations. Respondent filed an answer to the proposal, and pursuant to notice, a hearing was convened on June 2, 1981, in Lowell, Massachusetts, and the parties appeared and participated therein.

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(1) of the 1977 Act, 30 U.S.C. § 820(1).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Issues

The principal issues presented in this proceeding are (1) whether respondent has violated the provisions of the Act and implementing regulations

as alleged in the proposal for assessment of civil penalty filed, and, if so, (2) the appropriate civil penalty that should be assessed against the respondent for **the alleged** violation based upon the criteria set forth in section **110(i)** of the Act. Additional issues raised by the parties are identified and disposed of where appropriate in the course of this decision;

In determining the amount of a civil penalty assessment, 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, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of, the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

### Stipulations

The parties stipulated to the following:

1. Respondent is subject to the provisions of the Act and to the enforcement jurisdiction of the petitioner.
2. The citations in question were issued by an authorized representative of the Secretary of Labor and duly served on the respondent.
3. The respondent is a small family-owned sand and gravel operator employing approximately seven full-time employees.

### Discussion

The respondent in this case is charged with 13 alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The citations and conditions or practices cited are as follows:

1. 208669, 9/13/79, 30 CFR 56.9-87

The Caterpillar 980 B S/N 89P 2580 front-end loader was not provided with an automatic reverse **signal**. The loader was observed operating in close proximity to two **welders** that were prefabricating steel on ground level.

2. 208670, 9/13/79, 30 CFR 56.9-2

The Caterpillar 480-B 89P 2580 front-end loader was not provided with a working secondary braking system able to hold the equipment on the primary crusher hopper ramp.

3. 208671, 9/13/79, 30 CFR 56.12-32

Inspection electrical box covers were not replaced on the following areas after repairs had been made. Primary feeder vibrator, primary crusher motor, primary conduit elbow at crusher motor, and the secondary crusher.

4. 208672, 9/13/79, 30 CFR 56.14-1

The primary crusher counterweight was not provided with a guard. The work platform led an employee right up to the rotating counterweight.

5. 208673, 9/13/79, 30 CFR 56.14-1

The primary crusher flywheel and V-belt drive were not provided with a guard. The crusher work platform was so constructed that an employee could make physical contact.

6. 208674, 9/13/79, 30 CFR 56.11-1

Safe access was not provided to service the following conveyor headpulleys. The mine operator will have to survey the entire plant for other areas.

Citation 208674 was subsequently modified by the inspector on 9/17/79, as follows:

The citation should read as follows. Safe access was not provided to service the following conveyor head-pulleys. No. 1 conveyor, return conveyor, radial stacker feeder, and the radial stacker. The mine operator will have to survey the entire plant for other effected [sic] areas.

7. 208675, 9/13/79, 30 CFR 56.9-7

An automatic emergency stop device or a guard was not provided for both sides of return conveyor troughing idlers.

8. 208676, . 9/13/79, 30 CFR 56.9-7

An automatic emergency stop devite or a guard was not provided for the radial stacker feed conveyor troughing idlers.

9. 208677, 9/13/79, 30 CFR 56.14-1

An adequate tail pulley guard was not provided for the radial stacker feed conveyor. Back and top section missing and side sections were not covering the pinch point and tail pulley blades.

10. 208679, 9/13/79, 30 CFR 56.14-1

The Caterpillar 966-B S/N 75A 4309 front-end loader was not provided with an automatic reverse signal.

11. 208679, 9/13/79, 30 CFR 56.14-1

An adequate tail pulley guard was not provided for the return conveyor. Back and top sections were missing.

12. 208680, 9/13/79, 30 CFR 56.14-6

The front section of V-belt drive-guard was not replaced on the 3 foot telsmith crusher.

13. 308681, 9/13/79, 30 CFR 56.9-22

Berms were not provided on the primary hopper dumping ramp. Both sides were elevated approximately fifteen feet.

Testimony and evidence presented by the petitioner

~~MSHA~~ Inspector Donald C. Fowler confirmed that he issued Citation No. 208669, on September 13, 1979, after conducting an inspection of respondent's mining operation. He also confirmed the fact that he was accompanied on his inspection by a representative of the respondent company and he confirmed that he issued the remaining citations which **are** in issue in these proceedings. Mr. Fowler testified as to the conditions which he found and which prompted him to issue the citation for a lack of a reverse backup alarm on the front-end loader in question, including his opinion concerning the gravity of the conditions cited as **well as** the question of negligence and good faith compliance on the part of the respondent. (Tr. 27-58).

Testimony and evidence presented by the respondent

Mine Operator Walter Ducharme confirmed that he is a co-owner of the respondent mining company, and he testified concerning the circumstances surrounding the issuance of Citation No. 208669. He indicated that the front-end loader in question had a factory-installed backup alarm, but that a wire had become disconnected and rendered it inoperative when the inspector observed it in operation. He also alluded to the fact that he was requested by a local town councilman to disconnect the backup alarms because they were making too much noise and resulted in complaints from persons living in a near-by town. Mr. Ducharme disputed the inspector's contention that two welders working near the loader were placed in a hazardous position by the lack of a backup alarm and he indicated that the workers were some distance away working behind a steel structure which isolated them from any possibility of being **run over** by the loader in question (Tr. 61-78).

### Subsequent settlement disposition of the citations

At the conclusion of the testimony and evidence concerning the first cited citation, and at the request of the parties, I rendered a tentative bench decision wherein I advised the parties that I believed the evidence established the fact of violation, that the violation resulted from ordinary negligence, that it was serious, and that the respondent exhibited rapid good faith compliance in achieving abatement of the conditions cited. I also made tentative findings concerning the size of respondent's operation, the effect of the penalties on respondent's ability to remain in business, and an initial finding that the history of prior **violations** would not warrant any increases in the penalties assessed in this case.

The **parties were** afforded an opportunity to confer with each other out of the presence of the court for the purpose of finalizing a proposed settlement, and pursuant to Commission Rule 29 CFR 2700.30, were afforded an opportunity to present their oral arguments in support of a settlement of all of the citations in issue in this case for my consideration., and these arguments were made on the record (Tr. 79-88). In addition, the parties stipulated as to the authenticity and admissibility of copies of all of the citations and abatements issued in this case, including copies of the inspector's narrative statements pertaining to each citation wherein the inspector comments on the questions of gravity, negligence, and good faith compliance as to each of the citations (exhibits G-1 through G-13).

After careful consideration of the arguments presented by the petitioner in support of the proposed settlement, including a consideration of the pleadings and exhibits, which are **a part of** the record in this case, I have made the following findings and conclusions concerning the statutory civil penalty assessment criteria found in section **110(i)** of the Act.

#### Fact of violations

Respondent has conceded the fact of violation as to each of the citations issued in this case, and they are AFFIRMED.

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

The parties stipulated that the respondent is a small family-owned sand and gravel company employing seven full-time employees. Although respondent indicated that it has a "marginal" operation, no evidence was presented that the assessment of the civil penalties for the citations in question will adversely **affect its** ability to remain in business and I conclude that they will not.

#### Good faith compliance

Petitioner agreed that the conditions and practices kited by the inspector in each of the citations issued in this case were abated in good faith by the respondent prior to the time fixed by the inspector. I conclude that respondent exercised rapid good faith compliance in abating the citations issued and have considered this fact in approving the settlement disposition **of the** citations in question.

<u>Citation No..</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
208672	9/13/79	56.14-i	\$ 36	\$ 10
208673	9/13/79	56.14-1	48	10
208674	9/13/79	56.11-1	56	56
208675	9/13/79	56.9-7	56	40
208676	9/13/79	56.9-7	56	40
208677	9/13/79	56.14-1	48	10
208778	9/13/79	56.9-87	52	35
208679	9/13/79	56.14-1	56	10
208680	9/13/79	56.14-6	56	31
208681	9/13/79	56.9-22	<u>48</u>	<u>40</u>
			\$ 690	\$ 415

Order

Respondent IS ORDERED to pay **civil penalties** in the settlement amounts shown above in satisfaction of the citations in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by MSHA, **this proceeding** is DISMISSED.

  
George A. Koutras  
Administrative Law Judge

Distribution:

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History of Prior Violations

Petitioner stated that the respondent had been served with two prior citations in July, 1978, for alleged violations of 30 CFB 56.9-7 and 56.14-1. However, petitioner could not confirm that civil penalties were assessed or paid for those citations, and respondent asserted that the citations were subsequently dismissed, but could not confirm that fact. Under the circumstances, since there is no evidence of any paid prior citations, I can only conclude that respondent has no prior history of violations for purposes of the penalty assessments levied for the citations in question in this proceeding. Further, assuming that the respondent had paid the two previous assessments, I cannot conclude that two prior citations would warrant any additional increases in the assessments for the citations in question here.

Negligence

I conclude and find that with the exception of Citations 208672, 208673, and 208679, the remaining citations resulted from the respondent's failure to exercise reasonable care to prevent the conditions cited and that this amounts to ordinary negligence. The three-citations listed concern violations of the guarding standards found in 30 CFR 56.14-1, and petitioner asserted that respondent had been led to believe by a prior inspection that the guards which were installed on the equipment cited by the inspector on September 13, 1979, were adequate. Under the circumstances, I cannot conclude that respondent was negligent in those instances and I have considered this fact in approving the settlement dispositions for the citations in question.

Gravity

The information contained in the inspector's narrative statements for each of the cited violations reflects that all of the conditions and practices cited by the inspector were serious, and I adopt these observations by the inspector as my finding with respect to this question.

Conclusion

After careful review and consideration of the pleadings, arguments, and information of record in support of the proposed settlement, I conclude and find that it is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. 2700.30, the settlement is APPROVED, and the citations, initial assessments, and the settlement-amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>30 CFR Standard</u>	<u>Assessment</u>	<u>Settlement</u>
208669	9/13/79	56.9-87	\$ 60	\$ 35
208670	9/13/79	56.9-2	78	68
208671	9/13/79	56.12-32	40	30