

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

AUG 14 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),		: Civil Penalty Proceedings
		:
	Petitioner	: Docket No. CENT 80-231-M
		: A/O No. 41-00013-05004
		:
V.		: Docket No. CENT 80-232-M
		: A/O No. 41-00013-05005
CHEMICAL LIME, INC.,		:
	Respondent	: Mine: Clifton Quarry and Plant

DECISION

On January 19, 1981, the Petitioner filed a motion for summary decision based on a record jointly stipulated by the parties. This motion was resubmitted with amendments on May 4, 1981. As grounds for its motion, Petitioner asserted the following:

1. The parties have stipulated to all material facts including jurisdiction, coverage, the existence or occurrence of the alleged violations, and the appropriateness of the penalties proposed.

2. The only remaining issue to be resolved by the Review Commission is whether Defendant, as owner-operator of a mine, can be cited for violations of the Act committed by its independent contractors while employed at Defendant's mine property. This question has been addressed and answered most recently in Secretary of Labor v. Old Ben Coal Company, (FMSHRC Docket No. VINC 79-119), 1 MSHC 2177, and Secretary of Labor and United Mine Workers v. Monterey Coal Company (FMSHRC Docket No. HOPE 78-467), 1 MSHC 2232 where the Commission held that as matter of law, owner-operators can be held responsible for violations of the Act committed by its contractors. As the present case is indistinguishable, at least with respect to the independent contractor issue, from Old Ben, and Monterey Coal, supra, the Secretary is entitled to a Summary Decision affirming the contested citations, as a matter of law.

In the Joint Motion for Submission of Proceedings upon Stipulated Facts, the parties admitted that no genuine issue remained as to any material fact.

The submitted stipulations are as follows:

The following matters are hereby agreed and stipulated to by and between the parties hereto for consideration in connection with any **Motion** to Dismiss, Motion for **Summary** Judgment or Decision filed or to be filed herein, as well as any hearing or trial herein and any appeals resulting from rulings on such motions, hearing or trial. Each of the parties reserves the right to disavow all or any part of this Stipulation in connection with proceedings in any action other than those in connection with any **Motion** to Dismiss, Motion for **Summary** Judgment or Decision, as well as any hearing or trial and any appeals resulting from rulings thereon, and no matters set forth in this Stipulation shall have or be given any collateral estoppel or res judicata effects in any other action or proceeding, except the collateral estoppel or res judicata effect of the judgment or decision of the tribunal or Court rendered herein based upon **such Stipulation**, or parts thereof.

This Stipulation, along with the Complaints and Answers filed herein, and all matters incorporated by reference, constitute the entire record in this proceeding.

I. Definitions

Where used in this Stipulation:

1. MSHA refers to the Mine Safety and Health Administration.
2. Plaintiff refers to Ray **Marshall**, Secretary of Labor, U.S. Department of Labor.
3. Defendant refers to Chemical Lime, Inc.
4. The Act refers to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, et seq.
5. The Commission refers to the Federal Mine Safety and Health Review Commission.
6. Clifton Quarry and Plant refers to a limestone quarry and plant.
7. Souther refers to Gene Souther Equipment.
8. Wales refers to Wales Industrial Service.

II. CENT 80-231-H

9. In September 1979, defendant owned mining rights to, and was conducting and causing others to conduct mining activities subject to the Act at the proposed limestone quarry and plant, designated by MSHA as Clifton Quarry and Plant.
10. On September 24, 1979, an inspection of said Clifton Quarry and Plant was conducted by a duly authorized representative of plaintiff pursuant to Section 103(a) of the Act, and as a result of this inspection, defendant was issued the following citation:

<u>CITATION NUMBER</u>	<u>DATE ISSUED</u>	<u>30 CFR STANDARD</u>
00154761	09/24/79	56.9-45

A copy of this citation is \* \* \* incorporated herein by reference. 1/

11. Souther is a separate, independent contractor retained by defendant to install a new conveyor system for Chemical Lime, Inc.
12. Wales is a separate, independent contractor retained to assist Souther in the installation of a new conveyor system for Chemical Lime, Inc.
13. Souther and Wales worked on the installation of the conveyor system at the Clifton Quarry and Plant during the time in question and were independent contractors within the meaning of 545.4 of the Secretary's Proposed Regulation referred to in paragraph 37

1/ Citation No. 154761 was issued pursuant to section 104(a) of the Act. It alleged a violation of 30 C.F.R. § 56.9-45 and described the pertinent condition or practice as follows:

"Two sections of conveyor frame with walkway had been loaded on a flat bed trailer and were not secured. When additional material was loaded on the overhanging walkway of one of the conveyor sections it tipped over and fatally injured, an employee."

Section 56.9-45 requires the equipment to be hauled shall be loaded and protected so as to prevent sliding or spillage.

The citation was terminated within 10 minutes of its issuance. The action taken to terminate the citation was given as follows:

"Operator was instructed on the need to secure equipment before adding additional material on the load."

below, that time through all times pertinent to this proceeding.

14. Citation No. 154761 refers to activities or omissions of Souther and/or Wales' employees **or** conditions of Souther and/or Wales' equipment **or** facilities relating to the performance of the contracted installment of the conveyor system at the Clifton Quarry and Plant.
15. The Production Supervisor of defendant had discussed safety procedures with the independent contractors prior to the accident on the day the accident occurred.
16. The condition described in Citation No. 154761 was abated by the employees of Souther and Wales.
17. The citation does not allege, and it is a fact that none of the defendant's employees, equipment or activities caused or contributed to the alleged violation.
18. None of the defendant's employees ever perform and work for Souther or Wales at the Clifton Quarry and Plant.
19. Defendant's employees had no authority to control the manner, methods, and details of the performance of contracted work by Souther or Wales and their employees, and this is outlined in the contract between Chemical Lime and the independent contractors.
20. Defendant does and did have employees permanently present at the quarry and plant, however, no company personnel were present when the accident occurred.
21. Defendant's contracts with Souther and Wales require compliance with applicable local, State and Federal laws, including the Federal Mine Safety and Health Act.
22. As a matter of law, Souther, Wales and defendant are now "operators" within the definition of **§3(d)** of the Act [**30 U.S.C. §802(d)**] as amended and pursuant to other relevant provisions.

**III.** CENT 80-232-X

23. In September, 1979, defendant owned mining rights to, and was conducting and causing others to conduct

mining activities subject to the Act of the proposed limestone quarry and plant, designated by MSHA as Clifton Quarry and Plant.

24. On September 24, 1979, an inspection of said Clifton Quarry and Plant was conducted by a duly authorized representative of plaintiff pursuant to section 103(a) of the Act, and as a result of this inspection defendant was issued the following citations:

<u>CITATION NUMBER</u>	<u>DATE ISSUED</u>	<u>30 CFR STANDARD</u>
154762	09/24/79	50.10
154763	09/24/79	50.12

Copies of these citations are \* \* \* incorporated herein by reference. 2/

25. These citations were issued pursuant to Section 104(a) of the Act and comply with the provisions thereof in all particulars.
26. Citation No. 154762 refers to activities or omissions of employees of defendant.

2/ Citation No. 154762 was issued pursuant to section 104(a) of the Act. It alleged a violation of 30 C.F.R. § 50.10 and described the pertinent condition or practice as follows:

"A fatal accident occurred at approximately 11:30 AN on 9/20/79 and the Dallas Subdistrict Office was not notified until 2:30 PM on 9/21/79."

Section 50.10 requires that an operator immediately notify MSHA if an accident occurs.

The citation was terminated 5 minutes after it was issued. The action taken in abatement was given as follows:

"The operator was informed of his need to report a serious accident immediately."

Citation no. 154763 was issued pursuant to section 104(a) of the Act. It alleged a violation of 30 C.F.R. § 50.12 and described the pertinent condition or practice as follows:

"A fatal accident occurred at the mine property on 9/20/79 and the accident site had been altered when the accident was reported to MSHA in as much as the equipment and material had been moved to a different location."

Section 50.12 requires that an accident site be kept unaltered until completion of all investigations pertaining to the accident.

The citation was terminated within 10 minutes of its issuance. The action to terminate was given as follows:

"The operator was instructed on the need to preserve the evidence until investigation is completed."

27. The condition described in Citation No. 154762 was abated by employees of defendant.
28. As a matter of law, defendant was an "operator" within the then definition of §3(d) of the Act [30 U.S.C. §802(d)] and pursuant to other relevant provisions.

IV. General flatters

29. Subject to the qualifications of the preamble paragraph of this Stipulation:

- a) The parties agree to the jurisdiction of the Commission over this proceeding.
- b) The parties agree the mines, operators and miners mentioned herein were subject to all provisions of the Act at the time of the occurrence.
- c) The parties agree the conditions alleged in each citation in fact occurred on the dates described in each citation and that the same constitute violations as follows:

Citation 154761 a violation of 30 CFR §56.9-45  
Citation 154762 a violation of 30 CFR §50.10  
Citation 154763 a violation, of 30 CFR §50.12

- d) For the limited purpose of agreeing to facts on which the Review Commission may rely to assess a penalty in this case, should it deem such an assessment appropriate, the parties agree that the size of respondent, defendant's history of previous violations, the gravity of the violations, respondent's good faith in abating the violations, and the negligence of the respondent with respect to the violations are accurately reflected and set forth in the proposed assessment issued to respondent.

Further, with regard to the negligence of the respondent with regard to the citations the parties agree and stipulate that respondent had instructed the subcontractor thoroughly in safe work procedures the morning prior to the accident and that the accident was therefore not foreseeable.

30. MSHA policy in existence at the time the citations mentioned herein were issued provided for the issuance of citations or orders at the time pursuant to Section 104(a) of the Act for Mine Safety and Health Violations to entities identified to MSHA by a Federal Mine Identification Number.
31. A Federal Mine Identification Number may be issued to any entity registering with the Mine Safety and Health Administration upon a demonstration that that entity controls, or is capable of controlling the activities affecting the health and safety of mine personnel. However, only one mine identification number is issued at any given mine.
32. Federal Mine Identification Numbers have been issued by MSHA to entities other than mine owners at mines subject to the Federal Mine Safety and Health Act.
33. Neither Souther nor Wales possessed a Federal Mine Identification Number for Clifton Quarry and Plant, the Federal Mine Identification Number having been issued to defendant.
34. Not having a Federal Mine Identification Number, neither Souther nor Wales could be issued a citation and therefore the defendant, as opposed to either one of the independent contractors, was proceeded against.
35. This agency wide policy to directly enforce the Act against only owner-operators for contractor violations was an interim policy pending adoption of regulations providing guidance to inspectors in the identification and citation of contractors.
36. On October 31, 1979, MSHA announced the availability of a draft proposal which would allow identification of certain independent contractors as operators under the Act, by publication at 43 Federal Register 50716. Forty-five days were given to comment on the draft rule.
37. On August 14, 1979, a proposed regulation for independent contractors (30 CFR Part 45) by which MSHA could identify certain independent contractors as operators under the Act, was published at 44 Federal Register 47746. The comment period for this proposed regulation closed on October 15, 1979 and the regulation has been enacted.

Documents attached to Petitioner's Motion to Amend Stipulation established that the size of Chemical Lime, Inc., was 94,315 man-hours per year in 1978 and that it received a total of eight prior assessed violations. In the absence of evidence to the contrary, it is found that the penalties assessed herein will not adversely affect the ability of Respondent to continue in business.

Pursuant to 29 C.F.R. § 2700.64(b), a motion for summary decision shall be granted if it is shown (1) that there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

The stipulations entered into by the parties have resolved the issue of whether the violations occurred as alleged. Each of the six statutory criteria were also resolved. No genuine issue as to any material fact remains **undetermined**.

Furthermore, it is clear that Petitioner **is** entitled to summary decision as a matter of law. The parties have agreed that the only remaining issue to be decided is whether Respondent may be held liable for violations committed by its contractors. As noted by Petitioner in its motion, the Commission has found that, as a matter of law, an owner-operator can be held responsible without fault for a violation of the Act committed by its contractor. Secretary of Labor v. Old Ben Coal Company, 1 MSHC 2177 (1979) (Old Ben). In view of the absence on the record of any basis on which to distinguish the instant cases from Old Ben, it is found that Respondent is liable for the three violations at issue herein.

The following findings of fact are made with regard to the remaining statutory criteria:

Citation No. 154761: Although the violation which gave rise to this citation resulted in a fatality, the violation was not caused by any negligence on Respondent's part. The violation was abated within a reasonable period of time.

Citation Nos. 154762 and 154763: These violations were occasioned by a moderate degree of negligence on the part of Respondent. It was improbable, **however**, that these violations would result in an accident or injury. Both violations were abated shortly after issuance of the respective citations.

Based on the information furnished in the stipulated record and supporting documents, and in consideration of the statutory criteria, the appropriate penalties in this case are found to be as follows:

<u>Citation No..</u>	<u>Assessment</u>
154761	\$100
154762	56
154763	56

ORDER

It is ORDERED that Respondent pay MSHA the sum of \$212 within 30 days of the date of this decision.

*Forrest E. Stewart*

Forrest E. Stewart  
Administrative Law Judge

Distribution:

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