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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

v.

WASHINGTON CORPORATION,
d/b/a WASHINGTON
CONSTRUCTION COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

DOCKET NO. WEST 80-471-M

ASSESSMENT CONTROL NO.
10-00556-05009

MINE: Dry Valley

BENCH DECISION AND ORDER

Appearances: Robert A. Friel, Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Office Building
Seattle, Washington 98174,
for the Petitioner
Mr. James A. Brouelette
EEO/Safety Officer
Washington Corporations
P. O. Box 8989 - 500 Taylor
Missoula, Montana 59807,
for the Respondent

Before: Judge Jon D. Boltz

This proceeding is brought by the petitioner, Secretary of Labor, on a petition for assessment of civil penalty against the respondent for an alleged violation of 30 C.F.R. 55.3-1.(FOOTNOTE.1) The cited regulation is promulgated by authority of the Federal Mine Safety and Health Act of 1977.

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The petitioner specifically alleges in Citation No. 345076 that the regulation was violated in that the high wall in the respondent's mine was approximately 100 feet high and had an original vertical angle of approximately 3/4 to 1, that this high wall was developing an overhang approximately 20 feet down from the crest, and that there were also fractures visible in the cap rock.

At the conclusion of the hearing the parties waived the filing of post-hearing briefs and agreed that a bench decision could be rendered at this time.

I make the following findings of fact:

1. The respondent had no significant history of previous violations.
2. The respondent is a moderate sized operator.
3. The payment of proposed penalty will not affect the respondent's ability to continue in business.
4. The respondent demonstrated good faith in achieving rapid compliance after notification of the violation.
5. The MSHA inspector who issued and served the citation involved was a duly authorized representative of the Secretary.
6. The respondent's products enter commerce and the mine involved is subject to the jurisdiction of the Act.

It is undisputed that a bulldozer operator had been working near or under the overhang described in the citation. The MSHA inspector testified that he issued the citation because of loose overhanging material on the wall itself. He testified that the overhanging material protruded approximately three feet out from the wall and there must have been something wrong with the mining method or the overhang would not have developed. However, there is no evidence that the slope of the pit wall was not in conformity with prudent engineering design.

Respondent's exhibit R-2 is the mining plan followed by the Respondent and establishes standards for the safe control of the pit walls including the overall slope of the wall. The plan states that the high wall will be excavated at a slope of 60 degrees. It also states that no catch benches are specified in the design, but alterations for their addition, if required, will be made to conform to sound engineering and mining practices. There is no evidence that this was not a proper standard.

The question presented is whether there was a violation of the cited regulation because of the subsequent development of overhanging material which the respondent had not taken down. The MSHA inspector testified that in his opinion the bank was

dangerous, and it has already been shown that miners had been working near or under the bank.

