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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

Civil Penalty Proceeding

Docket No. SE 81-8-M
A.O. No. 08-0075-05005F

v.

St. Catherine Quarry

ST. CATHERINE ROCK COMPANY,
RESPONDENT

DECISION

Appearances: Ken W. Welsch, Attorney, U.S. Department of Labor, Atlanta, Georgia, for the petitioner;
David A. Davis, Esq., Bushnell, Florida, for the respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on January 5, 1981, pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing was held on July 7, 1981, in Tampa, Florida and the parties appeared and participated therein. The parties waived the filing of posthearing arguments, but were afforded the opportunity to make arguments on the record and those have been considered by me in the course of this decision.

Issues

The principal issues presented in these proceedings are (1) whether respondent violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed in these proceedings, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act. Additional issues raised by the parties are identified and disposed of 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

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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.
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(i) of the 1977 Act, 30 U.S.C. 820(i).

3. Commission Rules, 20 C.F.R. 2700.1 et seq.

Stipulations

The parties stipulated as to jurisdiction, agreed that the respondent is a small crushed stone operator employing approximately seven employees, that the mine operates one daily 8-hour production shift 5 days a week, and that the respondent has no previous history of paid or assessed violations (Tr. 6-7).

Respondent's counsel raised an objection to proceeding with the hearing on the ground that respondent was not afforded an opportunity for a trial by jury. The objection was denied, and my ruling in this regard is herein reaffirmed. It seems clear to me that civil penalty proceedings pursuant to the Act are civil rather than criminal, and that the respondent has not been deprived of any Sixth Amendment right to a trial by jury in a criminal matter, or of any right conferred by the Seventh Amendment to a jury trial in a civil penalty assessment case. The rights to which respondent is entitled are those specifically provided for in the Act, namely an APA hearing before a Commission Judge, with the opportunity to participate fully therein, including the right to confront and cross-examine the inspectors who issued the citations.

In a case under the Occupational Safety and Health Act (OSHA), the Supreme Court, on March 23, 1977, ruled that the Seventh Amendment guarantee of a jury trial in suits at common law does not apply to hearings before the Occupational Safety and Health Review Commission in contested civil penalty proceedings. *Atlas Roofing Co., and Frank Irely, Jr., Inc. v. Occupational Safety and Health Review Commission et. al.*, 1977-1978 OSHD, 21,615, affirming decisions of the third and Fifth Circuit Appeals Courts, reported at 1975-1976 OSHD 19,878 and 20,002. In *Mohawk Excavating, Inc.*, the Second Circuit Court of Appeals ruled on February 8, 1977, that civil penalties under OSHA are civil rather than criminal because Congress characterized them as such, and the only consequence of a judgement is a money penalty, 1976-1977 OSHD, 21,537. Under the circumstances, I conclude that these precedents are applicable in civil penalty proceedings brought under the Mine Act and respondent is not entitled to a trial by jury.

Discussion

The citations which issued in this case were the result of an investigation conducted by MSHA into the causes of a fatality which occurred at the mine site on July 2, 1980, when a front-end loader operator (Henry Quarterman) was drowned after the loader he was driving jumped a berm and went into a body of water adjacent to a pit loading area. The citations which were issued are as follows:

Citation No. 091484, July 9, 1980, 30 C.F.R. 56.9-2.

A Michigan 175B front end loader serial No. 427B253 owned and operated by St. Catherine Rock Co. was not maintained in a safe condition in that; the transmission forward and reverse shift lever had been bent and would not stay engaged in forward gear, allowing the loader to become free wheeling. This loader was involved in a fatal accident on July 2, 1980.

Citation No. 091485, July 9, 1980, 30 C.F.R. 56.9-3.

A Michigan 175B front end loader serial No. 427B253 owned and operated by St. Catherine Rock Co. was being operated with defective brakes. Following a fatal accident that occurred on July 2, 1980, an inspection of the loader revealed the front master cylinder empty of brake fluid, the left braking caliper frozen, and the emergency air locks system inoperable.

Testimony and Evidence Adduced by Petitioner

Edward Booth, son of the owner of St. Catherine Rock Quarry, described the circumstances surrounding the fatal accident of July 2, 1980. He stated that at 4:00 p.m., the accident victim Henry Quarterman returned to the shop to add brake fluid to the end loader, and that Mr. Quarterman and Mr. J. D. Hadley also bled the brakes. Mr. Booth did not remember telling the inspector that they had also added brake fluid around 3:00 p.m, and he thought it unlikely that the brakes would have needed fluid after only 45 minutes since it was usually needed only every three to four months. He testified that on July 2, fluid was put in both front and back cylinders and he did not recall informing the inspector that brake fluid was put in only the rear cylinder.

Mr. Booth testified that the forward/reverse lever on the loader had been bent for almost a year due to a rock falling on it. He stated that he was not involved with the repair work and was not sure whether the lever had been repaired although he did remember telling the inspector that the machine had not been repaired. He admitted that the machine sometimes slipped into neutral but stated that it could easily be put back into forward without taking one's hands off the steering wheel. He indicated that sometime after 4 o'clock he watched Mr. Quarterman drive the

loader down the pit ramp, stand up in the seat, and then go into the water. He did not know fast the loader was going although he admitted having told the inspector that it was about 25-30 miles per hour. (Tr. 8-22).

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On cross-examination, Mr. Booth testified that both he and Mr. Quarterman tested the machine after adding brake fluid, and that the brakes and the shift lever were working properly. After adding the fluid, Mr. Booth got into his truck and went down to the pit, which the parties stipulated was around 390 feet from the top of the ramp. J. D. Hadley was in his bulldozer, stripping overburden approximately 500 yards away and was unable to see Mr. Quarterman as he headed down the ramp. Mr. Booth saw Mr. Quarterman stand up as he came down the ramp and yelled for him to jump off, but he could not be heard over the noise of the motor. (Tr. 22-31).

In response to bench questioning, Mr. Booth stated that the water in the pit was 30 to 35 feet deep, and that the loader usually stopped near the stack of material located by the water. He believed that Mr. Quarterman could not stop the machine while he was standing up, but thought that he could have dropped the bucket to slow down or driven the loader into the bank. The machine was also equipped with a manually operated emergency brake. He noted that Mr. Quarterman had been employed with the company for over 20 years and was considered an experienced machine operator. (Tr. 33-42).

MSHA Inspector Harry Verdier, confirmed that he investigated the fatal accident on July 3, 1980, and testified that he had more than 20 years of experience operating pit trucks, front end loaders, and dozers, and had performed minor maintenance work on them.

Mr. Verdier stated that he inspected the front end loader after it had been retrieved from the water, and noticed that the forward/reverse lever was in neutral. Through his conversation with Edward Booth, he learned that there had been a problem with the selector lever causing it to slip out of forward gear, and Mr. Booth told him that a rock had fallen on the lever a year earlier and damaged it. The steering wheel, but not the lever, had been replaced. Mr. Booth told Mr. Verdier that when the lever flew out of gear during operation, he could reposition it by using his foot.

Mr. Verdier testified that in checking the brake system, he and George Long, a mechanic, unlocked the back seat, checked the rear master cylinder, and found it to be half full of brake fluid. They stuck their fingers in the front master cylinder and found no fluid. They could find no broken hoses. In speaking with Edward Booth, Mr. Verdier learned that brake fluid had been added at 3 o'clock and at 4 o'clock on the day of the accident. Mr. Booth told him that no fluid was put in the front because they had not had brakes in the front of the loader for some time. Mr. Verdier testified that on July 9, 1980, Edward Booth stated to his father, "come on dad, you knew those brakes were bad, they been bad for some time," and that his father had replied, "you're just young, you don't understand."

Mr. Verdier stated that when he inspected the loader he noticed that the back rear disc near the brake pad was rusty, and

that the right rear one had some rust and some shiny spots. The rust proved that the pads were not rubbing against the disc properly. He also found a frozen left caliper, and observed that the air pressure gauge measured zero. This being the case, he

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believed that the emergency air lock system should have come on automatically because the system activates when pressure goes below 60 pounds. He also noticed that the wheels on the loader were turning freely when it was pulled from the water, demonstrating to him that it had no brakes. (Tr. 42-53).

On cross-examination, Mr. Verdier explained that he checked the air pressure gauge on July 3 after the loader had been pulled from the water. He believed that even though it had been in the water, if it was perfectly air locked, pressure would not have leaked. He believed that the brakes did not lock because of a defective check valve. (Tr. 62-64).

In response to bench questioning, Mr. Verdier stated that if the gear lever switch was in neutral the loader would roll on an incline, but if it was in forward, it would tend to hold still. He thought that since Mr. Edward Booth had seen Mr. Quarterman half standing, trying to steer the machine, that possibly the engine had stalled. If the machine was not running, there would be no power steering thereby making it nearly impossible to steer. With the gear in neutral, the front master cylinder dry of brake fluid, and the left rear caliper frozen, the operator would be less able to control his equipment on an incline. Mr. Verdier conceded that he performed only visual testing and that the machine was not started because the engine was full of water and it would have been ruined. (Tr. 68-79).

On redirect examination, Mr. Verdier stated that the battery was missing when the machine was pulled out of the water, and he believed that the rear brakes were not adequate to stop the machine although he agreed with Mr. Edward Booth that an operator could push the lever from neutral to forward with his foot while in a seated position. (Tr. 82-88).

Testimony and Evidence Adduced by Respondent

J. D. Hadley, an employee at St. Catherine Rock Company for 11 years, testified that he worked with Mr. Quarterman nearly every day and that he was an excellent worker. On the day of the accident, Mr. Hadley was at the shop, where he assisted Mr. Quarterman and Mr. Edward Booth in bleeding the brakes and adding fluid. Mr. Hadley stated that all four brakes were bled and then were tested for their stopping efficiency. He then went down one ramp with his dozer while Mr. Quarterman went down another with the loader. Within 10 minutes, Mr. Edward Booth approached him, yelling that Mr. Quarterman and the loader had gone into the water. (Tr. 92-94).

On cross-examination, Mr. Hadley testified that Mr. Quarterman had complained that his brakes were going out, and to remedy the problem, Mr. Edward Booth bled the plugs and added fluid. Only the back cylinder needed fluid since the front one was half full, and Mr. Hadley could not recall anyone having mentioned that the cylinder had been filled earlier that day. (Tr. 95-97).

In response to bench questioning, Mr. Hadley stated that he had operated Mr. Quarterman's loader the day before the accident and had not had any

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problems with it. He had heard Mr. Quarterman complain about the loader in the past because fluid would empty out and the lines would have to be bled, and he had no idea why the master cylinder emptied out while the loader was immersed in the water since he discovered no leaks in the system (Tr. 97-99).

Mr. George Bowman, a field mechanic for Lender Machinery Company for 23 years, testified that he delivered the loader in question to St. Catherine Rock Company, and had repaired the machine for the past 6 years and inspected it after the accident.

The engine had been removed by the time he arrived to examine the machine, and he believed that the brake fluid could not have leaked out of the machine after leaving the shop unless there had been a massive rupture. He thought the fluid could have escaped through a hole in the reservoir cap while the loader was in the water.

Mr. Bowman testified that after inspecting the machine, he determined that the bent lever and brake calipers did not need to be replaced. Since the lever did not interfere with shifting, he thought the gear problem was probably due to a weak spring or worn grooves. The only possible malfunction he saw was in the compensator valve which operates as a shock, easing the impact of the disc on the brake. He noticed water on the compensator indicating a possible leak, which would cause the fluid to run out onto the ground. He stated that the compensators were repaired after the accident because they could affect the safety of the machine.

Mr. Bowman testified that the reason the air pressure gauge read zero when Inspector Verdier looked at it was because it was electrical and no current was in the system while the battery was out of the machine. He stated that the emergency air system automatically activates when there is a loss of air pressure. In his opinion, even if only one half of the brakes were working, it would have been adequate to stop the machine. (Tr. 101-117).

On cross-examination, Mr. Bowman admitted that he is one of 13 field men who regularly repair this machine. He verified that one of his delivery men, a Mr. Long, had told him that there was no brake fluid in the front cylinder, but he did not know whether Mr. Long had only examined the reservoirs for fluid or had checked the entire brake system. Mr. Bowman explained that the emergency brake system is activated by a valve which releases air pressure when there is a loss of air, and if there was a massive air leak, there would be no air for the emergency system. He could find no holes in the hoses which would have caused such an air leak.

Mr. Bowman conceded that if the rear brake system had been operating properly, the disc would be shiny with no rust on it. Although he believed that the pistons and calipers were not frozen, he agreed that if they were, they would have kept the brakes from functioning, and indicated that this problem could have caused the rust on the rear disc. (Tr. 117-138).

In response to bench questioning, Mr. Bowman stated that the bent lever did not contribute to the gear problems. He also thought that the master cylinder could be dry even when there was brake fluid behind the piston.

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This fluid would be enough to stop the machine, but he conceded that the fluid might not be adequate for a braking distance of 390 feet, the length of the incline from the shop to the water. Mr. Bowman stated further that the emergency brake system could be operated both manually and automatically, and after completing his repairs of the machine, the hand brake was working properly. (Tr. 140-154).

Inspector Verdier was recalled and admitted that he had not been aware that the system was electric and that the absence of power caused the gauge to measure zero. He still believed that the brakes were not functioning since the wheels turned freely when the machine was removed from the water and he disagreed with Mr. Bowman's conclusion that the amount of brake fluid behind the master cylinder would be sufficient to operate the brakes (Tr. 158-162).

Findings and Conclusions

Citation No. 091484

Fact of Violation

This citation alleges a violation of 30 C.F.R. 56.9-2, which states that "equipment defects affecting safety shall be corrected before the equipment is used." The equipment defect discovered by the inspector was a bent lever on the forward and reverse transmission shift lever. The condition affecting safety was the fact that the lever would not stay engaged in forward gear and would slip into neutral causing the machine to become free wheeling.

The evidence presented at the hearing indicates that the respondent knew that the lever was bent and that there was a problem in keeping the lever in gear. The lever had been bent for nearly a year, the result of a rock having fallen on the steering wheel. While the steering wheel had been replaced, nothing had been done to repair the gear lever. Both Mr. Booth and Mr. Bowman testified, however, that the bent lever did not contribute to the gear slippage problem. Mr. Bowman concluded that the lever did not need to be replaced to abate the cited condition because its bent shape did not interfere with shifting. He testified that the gear slippage problem was more likely caused by a bad dent, a weak spring, or some worn parts, which were apparently not visible.

While I agree that the described cited equipment defect (bent lever) is not the defect affecting safety, I do not find that the evidence establishes an unsafe condition. Mr. Booth admitted that the machine slipped into neutral causing it to become free wheeling. Inspector Verdier testified that just a slight tap caused the lever to disengage from its forward position. This indicates that even a small bump in the road would trigger the condition. Although Mr. Bowman felt that the lever could be easily slipped back into gear while the operator remained in a seated position by keeping his hands on the steering wheel and using his foot to move the lever, the

sensitivity

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of the lever demonstrates that the condition could arise suddenly and without the operator's knowledge. As the situation here illustrates, this could pose a danger if the machine was travelling on an incline.

Inspector Verdier testified that when the machine was pulled from the water, the forward/reverse lever was in neutral. If the loader had stalled, as he surmised, and the brakes had not worked properly, the machine would roll freely with the transmission in neutral. While the loader may not have stopped if the lever had been in forward, it may have slowed it sufficiently to have prevented the resulting accident.

In view of the foregoing, I conclude and find that petitioner has established a violation of section 56.9-2. The condition of the lever, which allowed it to slip from forward into neutral was a condition affecting safety. When a lever suddenly slips into neutral, it poses a danger to the unsuspecting operator who should be in full control of the vehicle, and respondent should have been alerted to the fact that this condition was abnormal. Even if the defective condition did not cause the accident, and even if the accident had not occurred, I would still find a violation of the cited safety standard. The question of whether a violation of a cited standard has occurred is not dependent on the occurrence or non-occurrence of an accident. Additionally, although the inspector cited the bent lever as the source of the problem, the unsafe condition was adequately described to apprise the respondent of the specific violation, and the respondent was not prejudiced. The citation states that the gear lever would not stay engaged in forward gear and allowed the loader to become free-wheeling, see *Secretary of Labor v. Jim Walters Resources, Inc.*, 8 FMSHRC 1827, 1 BNA MSHA 2233 (1979). The citation is AFFIRMED.

Citation No. 091485

This citation alleges a violation of 30 C.F.R. 56.9-3, which requires that powered mobile equipment be provided with adequate brakes. The inspector determined that the front end loader involved in the accident had defective brakes because his examination revealed that the front master cylinder was without brake fluid, the left braking caliper was frozen, and the emergency air lock system was inoperable.

The inspector testified that he found no brake fluid in the front master cylinder while the rear cylinder was only half full. Although a field mechanic thought that the amount of fluid in the back would be enough to stop the loader, he admitted that it might not be adequate if the operator continually had his foot on the brake for the entire length of the 390 foot incline. The inspector concluded that the amount of fluid was not sufficient to stop the loader.

Although Mr. Booth stated that some brake fluid was added to both the front and rear brake cylinders on the day of the

accident, he also stated that one cylinder already had some and the inference is that he may not have added fluid to both cylinders on that day. (Tr. 11). This inference is

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bolstered by the inspector's testimony that Mr. Booth told him that fluid was added to only the rear cylinder since the front brakes had been bad for some time, and Mr. Hadley stated that the front cylinder was half full and no brake fluid was added. When the inspector checked the machine after the accident, he found the front cylinder to be completely dry of fluid, and since no holes were found in the brake lines, consideration must be given to other evidence which might explain this dramatic loss of fluid in the front cylinder. According to Mr. Hadley, Mr. Quarterman had complained about the brakes in the past, and had indicated that the fluid would empty out of the system. Further, the inspector testified regarding Mr. Booth's statement to his father, acknowledging that they had known for some time that the brakes were bad. Evaluation of these facts leads me to conclude that the front brakes had not been working properly for some time, and that brake fluid had to be added periodically. Further, even though Mr. Hadley stated that he had operated the loader the day before the accident, the fact remains that he did not add more brake fluid to the front cylinder on the day of the accident and the cylinder was only half full.

Although Mr. Bowman determined that the brake calipers and pistons were not frozen, he agreed that the rusty discs indicated that the rear brake system was not operating properly. The inspector testified that the discs would be shiny if the brake pads were rubbing against the discs. Since they were rusty, he concluded that the calipers were not working properly and were frozen.

Although the inspector found the air pressure gauge measuring zero after the loader had been retrieved from the water, this does not indicate that the emergency air lock system was not operating. Further testimony revealed that the gauge was electrical, and since the battery had been removed from the loader, the inspector's reading was inaccurate. Although the inspector based his finding that the emergency air brake system was inoperable on the gauge reading of zero, and the fact that the wheels spun freely as the machine was lifted from the water, there is no conclusive evidence establishing whether the entire system was working properly on the day of the accident. However, I conclude that the preponderance of the evidence adduced establishes that the brakes were not working properly on the day of the accident and were therefore, not adequate. Accordingly, I find that petitioner has established a violation of section 56.9-3, and the citation is AFFIRMED.

Negligence

With regard to the forward/reverse lever, the evidence establishes that the respondent knew that the lever had a tendency to slip out of forward gear and into neutral. Mitigating the fact that the respondent knew it was using equipment with a defective part, is the respondent's argument that the driver could easily put the lever back in gear with his foot without taking his hands off the steering wheel. Although this technique may have worked adequately on level ground, it did

not provide a viable method when the machine was running on an
incline with poor brakes. The respondent knew where the

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machine was operating and it knew that there were brake problems. I, therefore, find a high degree of negligence on the part of the respondent with regard to Citation No. 091484.

I also find that the respondent knew that there was a problem with the front brakes, and unjustifiably permitted the loader to be operated with reliance on the rear brakes to stop the vehicle. Mr. Hadley had heard Mr. Quarterman previously complain about the brakes in the past, and even so, on the day of the accident, brake fluid was put only in the rear master cylinder. William Booth's undisputed statement to his father shows knowledge of the bad brakes, and even though the senior Mr. Booth was present at the hearing, he did not testify or refute the statement. The testimony and evidence lead me to conclude that the front brakes were not working and this same testimony and evidence leads me to conclude that the respondent was fully aware of the problems with the brakes.

Respondent seems to argue that the rear brakes could have stopped the vehicle if the accident victim had lowered the bucket, pulled the manual emergency brake, or steered into the bank. Respondent apparently attempts to share some of the responsibility for the accident with the deceased, because Mr. Quarterman did not use these alternative methods of braking.

I cannot conclude that the evidence establishes that Mr. Quarterman was contributorily negligent in operating the loader. The loader was regularly operated on the incline between the shop and the pit, and respondent was aware of the defective brakes and knew or should have known that an emergency situation could have arisen. No evidence was offered showing that respondent instructed its loader operators on the use of emergency braking procedures. In addition, Mr. Quarterman was an experienced machine operator, having been employed with the company for over 20 years. This experience leads me to believe that he would have tried every feasible method of stopping the loader when the brakes went out, and the fact that he was seen standing suggests an attempt to steer the machine to safety. I, therefore, find that respondent was extremely negligent in permitting this loader to be operated when it was fully aware of the braking problems.

Gravity

In this case, the defective front-end loader resulted in the death of the operator, and I believe it is reasonable to conclude that both violations may have contributed to the accident. I therefore find that the violations were extremely serious.

Good Faith Compliance

The inspector issued a withdrawal order after making his post accident inspections. Petitioner states that the violations were abated in good faith and the evidence of record supports this conclusion (Tr. p. 176, Exh. G-5). As a matter of fact, the loader was practically overhauled, and I have considered this fact in assessing the penalties.

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

The parties stipulated that respondent is a small crushed stone operator employing approximately seven employees and that the mine operates one daily 8-hour production shift 5 days a week. The parties offered no evidence on the effect of a civil penalty on respondent's ability to remain in business. Accordingly, I cannot conclude that the civil penalties assessed will adversely affect the respondent's ability to remain in business.

History of Prior Violations

Respondent has no previous history of paid or assessed violations, and I have taken this into consideration in assessing the penalties for the citations which have been affirmed.

Penalty Assessment

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalties are reasonable and appropriate in the circumstances and they are imposed by me for each of the citations which have been affirmed.

Citation No.	Date	30 C.F.R. Section	Assessment
091484	07/09/80	56.9-2	\$1,500
091485	07/09/80	56.9-3	2,500

ORDER

The respondent IS ORDERED to pay civil penalties in the amounts shown above, totalling \$4,000 within thirty (30) days of the date of this decision and order, and upon receipt of the same by MSHA, this matter is DISMISSED.

George A. Koutras
Administrative Law Judge