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SOL (MSHA) V. BASIC REFRACTORIES
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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. LAKE 79-32-M A/O No. 33-00013-05004
v.	
BASIC REFRACTORIES, RESPONDENT	Basic Refractories Quarry and Plant

DECISION

Appearances: Linda Leasure, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Jack A. Klein, Esq., Doehrel & Klein, Columbus, Ohio, for the Respondent

Before: Judge Cook

I. Procedural Background

On June 26, 1979, the Secretary of Labor (Petitioner) filed a petition for assessment of civil penalty in the above-captioned case 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 charged Basic Refractories (Respondent) with 13 violations of various provisions of the Code of Federal Regulations, as set forth in citations issued pursuant to section 104(a) of the 1977 Mine Act. The Respondent, acting through its safety director, filed an answer on July 12, 1979.

On November 5, 1979, the Respondent, through counsel, moved to amend its answer. The motion was granted on November 27, 1979, and the amended answer was filed on December 14, 1979.

Also, on November 5, 1979, the Respondent moved to extend the time period for discovery by interrogatory. The motion was granted on November 27, 1979.

On or about January 14, 1980, the Petitioner requested advice from its Arlington, Virginia, office as to whether the Interagency Agreement between

the Mine Safety and Health Administration (MSHA) and the Occupational Safety and Health Administration (OSHA), see 44 Fed. Reg. 22827 (April 17, 1979), and an August 3, 1979, interpretive memorandum issued by the Administrator for Metal and Nonmetal Mine Safety and Health, transferred jurisdiction over all aspects of the Respondent's operation, other than the quarry, to OSHA. As a result of this inquiry, the Petitioner filed a motion and supporting memorandum on March 20, 1980, requesting the vacation and dismissal of Citation Nos. 368863, 368877, 368885, 368886, 368888, and 368889. A determination granting the motion is contained herein.

On May 19, 1980, the Petitioner filed a motion and supporting memorandum requesting approval of settlement which encompasses Citation Nos. 368848, 368851, and 368854. A determination approving the settlement is contained herein.

On May 21, 1980, a notice of hearing was issued scheduling the remaining matters for hearing on the merits on August 7, 1980, in Bowling Green, Ohio. Subsequent thereto, counsel for the Respondent contacted the undersigned Administrative Law Judge to request a telephone conference for the purpose of requesting a continuance. The requested conference was held on July 29, 1980, with the undersigned Administrative Law Judge and representatives of both parties participating. Counsel for the Petitioner raised no objection to the continuance. Accordingly, an oral determination was made granting the requested continuance subject to the condition that the Respondent file a written motion formally setting forth the reasons for the request. The motion was filed on August 11, 1980, and an order was issued on August 20, 1980, continuing the hearing to November 14, 1980, in Bowling Green, Ohio.

The hearing was held as scheduled with representatives of both parties present and participating. The Respondent filed a trial brief, and made a motion to dismiss the proceeding at the close of the Petitioner's case-in-chief. A ruling on the motion is set forth herein.

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, the schedule was later revised due to difficulties experienced by counsel. The Respondent filed a posthearing brief and proposed findings of fact and conclusions of law on April 27, 1981. The Petitioner filed a posthearing memorandum on May 4, 1981. Neither party filed a reply brief.

II. Violations Charged

Citation No.	Date	30 C.F.R. Standard
368841	11/28/78	56.14-1
368846	11/29/79	56.11-1
368847	11/29/78	56.14-1
368848	11/29/78	56.14-1

368851	11/29/78	56.14-1
368854	11/29/78	56.14-1
368863	11/30/78	56.14-1
368877	11/30/78	56.11-2
368885	12/06/78	56.14-1
368886	12/06/78	56.14-1
368888	12/06/78	56.14-1
368889	12/06/78	56.14-1

III. Witnesses and Exhibits

A. Witnesses

The Petitioner called Federal mine inspector Michael Pappas as a witness.

The Respondent called Mr. Antony Dantuono, the mill foreman; and Mr. Raymond Ouellette, a mechanical engineer employed by the Respondent, as witnesses.

Both the Petitioner and the Respondent called Mr. Arthur Jibilian, the Respondent's safety director, as a witness.

B. Exhibits

1. The Petitioner introduced the following exhibits in evidence:

M-1 is a three-page document containing copies of Citation No. 368841, November 28, 1978, 30 C.F.R. 56.14-1, the termination thereof, and the inspector's statement pertaining thereto.

M-2 is a three-page document containing copies of Citation No. 368846, November 29, 1978, 30 C.F.R. 56.11-1; the termination thereof; and the inspector's statement pertaining thereto.

M-3 is a three-page document containing copies of Citation No. 368847, November 29, 1978, 30 C.F.R. 56.14-1, the termination thereof; and the inspector's statement pertaining thereto.

M-4 is a three-page document containing copies of Citation No. 368849, November 29, 1978, 30 C.F.R. 56.14-1; the termination thereof; and the inspector's statement pertaining thereto.

2. The Respondent introduced the following exhibits in evidence:

0-1, 0-2, and 0-3 are photographs pertaining to Citation No. 368841, November 28, 1978, 30 C.F.R. 56.14-1.

0-4, 0-5, and 0-6 are photographs pertaining to

Citation No. 368847, November 29, 1978, 30 C.F.R. 56.14-1.

O-7, O-8, and O-9 are photographs pertaining to Citation No. 368849, November 29, 1978, 30 C.F.R. 56.14-1.

O-10 contains three schematic drawings pertaining to Citation No. 368841, November 28, 1978, 30 C.F.R. 56.14-1.

O-11 contains three schematic drawings pertaining to Citation No. 368847, November 29, 1978, 30 C.F.R. 56.14-1.

O-12 contains three schematic drawings pertaining to Citation No. 368849, November 29, 1978, 30 C.F.R. 56.14-1.

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. The Basic Refractories Quarry is a "mine" within the meaning of the 1977 Mine Act (Tr. 4-5).

2. Jurisdiction rests in the Federal Mine Safety and Health Review Commission with respect to Citation Nos. 368841, 368846, 368847, and 368849 (Tr. 4-5).

3. Jurisdiction rests in the Federal Mine Safety and Health Review Commission with respect to the citations encompassed by the May 19, 1980, settlement motion (Tr. 4-5).

4. The citations encompassed by the March 20, 1980, motion to dismiss are within the jurisdiction of the Occupational Safety and Health Administration (Tr. 4-5).

5. The size of the Basic Refractories Quarry was rated at approximately 358,329 production man-hours in 1978 (Tr. 4-5).

6. As of November 28 and 29, 1978, the Basic Refractories Quarry had no history of previous violations under the 1977 Mine Act. This was the first inspection of the facility conducted pursuant to the 1977 Mine Act (Tr. 5).

B. Respondent's Motion to Dismiss

The Respondent moved to dismiss the proceeding (FOOTNOTE 1) as relates to Citation Nos. 368841, 368846, 368847, and 368849 at the close of the Petitioner's case-in-chief on the grounds that the Petitioner had failed to establish a prima facie case as relates to the four violations charged. The motion was taken under advisement to be ruled upon at the time of the writing of the decision based solely upon the evidence contained in the record when the motion was made (Tr. 87-90).

Neither the Rules of Procedure of the Federal Mine Safety and Health Review Commission, nor the Administrative Procedure Act, nor the 1977 Mine Act set forth express standards governing the disposition of motions to dismiss at the close of an opposing party's case-in-chief. It is therefore appropriate to consult the Federal Rules of Civil Procedure for guidance. 29 C.F.R. 2700.1(b) (1980).

Rule 41(b) of the Federal Rules of Civil Procedure provides, in part, as follows:

> After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

In ruling upon a Rule 41(b) motion to dismiss, the trial court is empowered to weigh the evidence, consider the law, and find for the defendant at the close of the plaintiff's case-in-chief. 5 J. MOORE, FEDERAL PRACTICE, 41.13[4] at pp. 41-189 - 41-192 (1980). The trial court may grant the defendant's motion when the plaintiff fails to present sufficient evidence during its case-in-chief to satisfy its burden of proof. See Brennan v. Sine, 495 F.2d 875 (10th Cir. 1974), Woods v. North American Rockwell Corporation, 480 F.2d 644 (10th Cir. 1973); Pittston-Luzerne Corporation v. United States, 176 F. Supp. 641 (M.D. Pa. 1959).

Citation No. 368846 charges the Respondent with a violation of mandatory safety standard 30 C.F.R. 56.11-1 in that it failed to provide and maintain a safe means of access to a designated working place at the Basic Refractories Quarry and Plant. The evidence contained in the record when the motion to dismiss was made, insofar as material to the determination as to whether a violation occurred, consisted of a copy of the citation, testimony provided by Federal mine inspector Michael Pappas, and testimony provided by Mr. Arthur Jibilian, the Respondent's safety director. Such evidence, particularly Mr. Jibilian's testimony, is considered sufficient to support the conclusion that the Petitioner satisified its burden of proof during its case-in-chief. Accordingly, the motion to dismiss will be denied as relates to Citation No. 368846.

Citation Nos. 368841, 368847, and 368849 charge the Respondent with three violations of mandatory safety standard 30 C.F.R. 56.14-1 in that three specified tail pulleys were unguarded. The cited mandatory safety standard provides, in part, that tail pulleys which may be contacted by persons, and which may cause injury to persons, shall be guarded. (FOOTNOTE 2)

The evidence contained in the record when the motion to dismiss was made, insofar as material to the determination as to whether the violations occurred, consisted of copies of the three citations, testimony provided by Inspector Pappas, and testimony provided by Mr. Jibilian. In each instance, both the inspector's testimony and the statements appearing on the face of the citation maintained that no guards whatsoever were provided on the three tail pulleys (Exhs. M-1, M-2, M-3; Tr. 11, 14-16, 49, 52, 55). The inspector's testimony indicates that the three citations were issued because of the exposure to pinch points presented by the unguarded tail pulleys (Tr. 12, 15, 16, 52).

As relates to Citation No. 368841, (FOOTNOTE 3) Mr. Jibilian testified that the cited tail pulley was located in the No. 37 plant. He further testified that the tail pulley was guarded and that, as a result of the guard, no one could be harmed (Tr. 64-65, 73-74).

As relates to Citation No. 368847, (FOOTNOTE 4) Mr. Jibilian testified that the cited tail pulley was located in a tunnel in Building 36. Walls abutted both the end and the west side of the tail pulley preventing access from those directions (Tr. 70). A walkway along the east side of the conveyor belt was the sole means of access to the tail pulley (Tr. 70). According to Mr. Jibilian, a guard measuring approximately 3 feet in length and 1 foot in width was present on the east side of the tail pulley. The pinch point was located at the bottom of the belt and was "fairly" inaccessible (Tr. 75).

As relates to Citation No. 368849, (FOOTNOTE 5) Mr. Jibilian testified that the cited tail pulley was located in the mill (Tr. 71-72). A walkway was located along the north side of the conveyor (Tr. 72). According to Mr. Jibilian, the tail pulley was guarded. One side of the tail pulley was against the wall and a guard was present on the other side. The pinch point was located at the bottom of the tail pulley and was covered by the guard (Tr. 76).

In view of the foregoing, it must be concluded that the evidence adduced during the Petitioner's case-in-chief contains patent contradictions as to whether guards were present on the three cited tail pulleys. It must be further concluded that such contradictions preclude a finding that the Petitioner sustained its burden of proof during its case-in-chief. The inspector's testimony throughout the Petitioner's case-in-chief clearly indicated that his present recollection on this point had dimmed with the passage of time, whereas Mr. Jibilian's recollection was intact. Mr. Jibilian is considered the more credible witness on the issue as to whether guards were present.

It should be noted, however, that at one point the inspector gave testimony to the effect that in November of 1978 it was his practice to cite all guarding violations, including those for inadequate guarding as opposed to a total absence of guards, by using the descriptive term "no guards" (Tr. 79-80). This testimony, in view of the other evidence adduced during the Petitioner's case-in-chief, is considered insufficient to support a determination that any guards present may have been inadequate. The comment was not made until after Mr. Jibilian testified that guards were present. Additionally, Inspector Pappas was initially quite evasive when cross-examined as to the implications of this statement as relates to the three subject guarding citations. But he ultimately reasserted his position that no guards were present (Tr. 80-81).

In view of the foregoing, the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief will be granted as relates to Citation Nos. 368841, 368847, and 368849.

Even assuming for purposes of argument that the Petitioner successfully established inadequate guarding during its case-in-chief, the evidence adduced by the Respondent during its case-in-chief was more than adequate to successfully rebut it. The evidence on the record taken as a whole will not support findings that the guards present on the three cited tail pulleys were insufficient to prevent contact with the pinch points.

The pinch point was located at the bottom of the tail pulley in each of the three instances cited by Inspector Pappas (Tr. 143-144). None of the three conveyors can operate in such a fashion that the pinch points would be located at the top of the pulley (Tr. 143-144, 147). All modifications made to abate the citations were requested by Inspector Pappas (Tr. 144-145).

As relates to Citation No. 368841, adjusting the belt was the only work that could be performed at the tail pulley with the belt in operation. No maintenance would have been performed near the pinch point unless the machine was turned off and the guards were removed (Tr. 158-159, 165). In order to achieve contact with the pinch point with the existing guards in place, an individual would have been required to lie on the floor and reach up under the guard through a point where the height between the floor and the bottom of the guard ranged from 4-7/8 inches to 7-1/4 inches (Exh. o-2, Tr. 113, 179; Exh. o-10). He would have been required to reach beyond his elbow in order to achieve contact with the pinch point (Tr. 113; Exh. o-2). An individual in the normal course of his work would never assume such a position and reach up into the pinch point (Tr. 158-159).

The tail pulley was guarded on November 29, 1978, by the conveyor frame, expanded metal mesh guards, and sheet metal (Exh. o-1, Tr. 93-94, 112, Nos. 1 2, and 3 on Exh. o-10, Tr. 202-205; see also Tr. 207-209). In order to abate the citation, the Respondent supplemented the existing guards by installing a guard across the end of the tail pulley, by installing a guard across the top of the tail pulley, and by installing guarding which covered only rollers along the conveyor belt (compare Exh. o-1 with Exhs. o-2 and o-3, Tr. 103, 106-107, 119, 147-148; Nos. 4, 5, and 6 on Exh. o-10, Tr. 202-205). However, none of the actions taken to abate the citation diminished any hazard of contact with the tail pulley pinch point (Tr. 118-119).

As relates to Citation No. 368847, the cited tail pulley was in a relatively isolated area where people did not travel during the course of a day's work (Tr. 145). In fact, employees would not pass the tail pulley because the end practically abutted the wall (Tr. 71). It appears that employees visited the area once a week to perform cleanup activities, and that such activities were usually performed with a hose. An oiler was scheduled to visit the area once every 1 or 2 weeks to administer lubrication. He used an extension fitting to perform this task. It appears that

the lubrication

point was approximately 2 feet from the tail pulley (Tr. 70-71). Additionally, it appears that belt tension adjustments were made at the tail pulley (Tr. 181).

The best available evidence in the record indicates that an individual would have been required to either lie prone on the floor or assume an extremely low kneeling position with his trunk virtually parallel to the floor in order to reach up underneath the guard and above the belt in an attempt to achieve contact with the pinch point. It should be noted that such action would have been necessary to obtain exposure to the pinch point even after the citation was abated (see Exhs. o-4, o-5, Tr. 121-122, 124, 131, 229). There would have been no reason for a person to attempt such a feat during the normal course of his work. A man working around the tail pulley would not fall or kneel and subsequently stretch his arm up underneath the frame and into the pinch point.

The pinch point was guarded on November 29, 1978, by a guard installed on the east side of the tail pulley. Elements of the conveyor framework provided additional guarding (Tr. 122, 126, 131-132, 183-184, 187, 209-210, 217-219, Exhs. o-4, o-5, o-11). To abate the citation, the Respondent installed guards across the top and the end of the tail pulley. The existing guard along the east side of the tail pulley was replaced with a somewhat larger one (Exhs. o-4, o-5, o-6, o-11; Tr. 209-210). The new guard installed on the east side of the tail pulley extended approximately as far downward as the old one. The best available evidence in the record indicates that the guarding installed to abate the citation allowed the same access to the pinch point as existed prior to November 29, 1978 (Tr. 124, 126, 131, 209-210).

As relates to Citation No. 368849, the crusher operator would, on occasion, use the walkway on the north side to merely walk past the tail pulley (Tr. 72-73, 146). No maintenance would have been performed near the pinch point while the belt was in operation (Tr. 165). A large nut passed through the frame at the end of the tail pulley and was used to adjust belt tension (Tr. 165-166, 192, 195, 196, 199). It was not possible for a maintenance man adjusting the belt tension to achieve contact with the pinch point (Tr. 165-166). In order to achieve contact with the pinch point, an employee would have been required to lie on the floor and place his hand through an extremely small opening at the bottom of the frame and reach upward (compare Exh. o-7 with Exh. o-9). An employee, in the normal course of his duties around the tail pulley, would never have performed such a feat (Tr. 157). Nor does it appear that an individual would have fallen down, placed his arm under the frame and reached upward (Tr. 157).

In order to abate the citation, the Respondent installed a guard across the top of the tail pulley and across the end of the tail pulley. The latter guard did not cover all of the tail pulley. Rather, it extended only approximately one-fifth of the distance from the top of the conveyor frame to the floor (Exh. o-12, Tr. 222-224, compare Exh. o-7 with Exh. o-8). The guard

along the north side of the tail pulley was replaced with a smaller guard.

It should be noted that the replacement did not extend as far downward as did the previous guard (compare Exh. O-7 with Exh. O-8). The guarding installed to abate the citation did not afford better protection as relates to the pinch point than the guard present when the citation was issued.

The foregoing evidence rebuts any suggestion that the guarding present when the citations were issued was inadequate to afford protection from the pinch points. It must be presumed that the Mine Safety and Health Administration, acting through Inspector Pappas, considered the guards present when the citations were terminated adequate to afford the requisite protection from the tail pulley pinch points (Exhs. M-1, p. 2, M-3, p. 2, M-4, p. 2, Tr. 52). However, it is clear that the guards installed to abate the citations afforded no better protection as relates to the pinch points than did those present when the citations were issued.

It appears that Inspector Pappas, in issuing the citations, was motivated in part by his apparent belief that pinch points were present at the top of the tail pulleys (see Tr. 50). Such belief would account for his recommendation that guards be installed across the tops and ends of the tail pulleys. This belief was clearly erroneous because none of the three conveyors can operate in such a fashion that pinch points would be formed at the top of the pulleys (Tr. 143-144, 147).

The inspector also gave testimony which indicated that guards were required across the ends and tops of the tail pulleys because it was "possible" that an individual could fall onto the top of the moving belt at a tail pulley and be transported to either a discharge chute or a crusher (Tr. 53). The inspector further indicated that the height of the tail pulleys prompted this concern (Tr. 78). It is significant to note, however, that the Petitioner has not argued this theory in its posthearing memorandum. Rather, the Petitioner styles the inspector's testimony as standing for the proposition that an employee falling on the moving belt could sustain bruises and lacerations. The Petitioner's characterization is erroneous because the inspector never testified to that effect. In fact, a person falling on a stationary object could sustain bruises or lacerations. There is no indication that falling atop the moving belt could have produced such injuries as a result of contacting moving machine parts. The inspector's testimony, when viewed as a whole, indicates that the three citations were issued solely because of the perceived exposure to pinch points.

Additionally, as noted above, one of the guards installed to abate Citation No. 368841, i.e., one of the guards recommended by Inspector Pappas, covered only some rollers along the conveyor belt. It is clear, however, that the Respondent was not charged with a violation of mandatory safety standard 30 C.F.R. 56.11-1 insofar as belt rollers were concerned. The citation does not mention belt rollers, and the inspector never mentioned exposed rollers during his testimony. Furthermore, the testimony of Mr. Jibilian reinforces the conclusion that the Respondent was not

cited for exposed rollers (Tr. 151-152). It is also significant to note that the Petitioner does not argue in

its posthearing memorandum that the exposed belt rollers form a basis for the charge of violation. In fact, exposed belt rollers are never mentioned in the posthearing memorandum.

In view of the foregoing, it would have to be concluded that the evidence on the record as a whole is insufficient to prove the occurrence of the violations charged in Citation Nos. 368841, 368847, and 368849.

C. Citation No. 368846, November 29, 1978, 30 C.F.R. 57.11-1

1. Occurrence of Violation

Citation No. 368846 was issued by Federal mine inspector Michael Pappas during the course of his November 29, 1978, inspection at the Respondent's Basic Refractories Quarry and Plant (Tr. 10, 13). The citation alleges a violation of mandatory safety standard 30 C.F.R. 56.11-1 in that "[a] safe means of access was not provided to the east walkway at the Symons screens" (Exh. M-2). The cited mandatory safety standard requires that "[s]afe means of access shall be provided and maintained to all working places." The term "working place," as used in Part 56 of Title 30 of the Code of Federal Regulations, means "any place in or about a mine where work is being performed." 30 C.F.R. 56.2.

The cited area was apparently located at the east end of the fourth floor in Building 36, also known as the mill or stone plant (Tr. 57). The building was undergoing renovation by an independent contractor when the citation was issued (Tr. 67). In fact, the independent contractor's employees were performing renovation work in the cited area when the citation was issued (Tr. 13, 67).

The nature of the construction being performed on the east walkway was the replacement of the beams and the floor plates (Tr. 155). It appears that a substantial amount of material was located on the east walkway when the citation was issued. This material consisted of old pieces of beams, oxygen-acetylene tanks, hoses, and other tools needed by the independent contractor's employees in the course of removing the old, deteriorated beams and in the course of installing the new beams (Tr. 67).

The citation alleges that safe means of access was not provided and maintained for the Respondent's employees who would perform work on the Symons screens. For the reasons set forth below, I find that the violation has been established by a preponderance of the evidence.

Mr. Arthur Jibilian, the Respondent's safety director, maintained at one point in his testimony that no employee requiring access to the screens would use the east walkway because any adjustments or other work would have been performed from the floor below (Tr. 69). However, he maintained at a later point in his testimony that employees occasionally work on the

east end of the Symons screen, and that the east walkway is the sole means of access to the east end of the Symons screen (Tr. 74).

Mr. Antony Dantuono, the Respondent's mill foreman, testified that he considered the east walkway unnecessary for access to any work area because the adjustments to the Symons screen can be made from the floor below (Tr. 156, 160-161). In this regard, he testified, in effect, that he and the group leader were the only ones who performed the adjustments, that the two men usually performed the task together as a team, and that he always made the adjustments from the floor below (Tr. 160-161). However, he could not affirmatively testify that the group leader does not make the adjustments from the east walkway (Tr. 161).

Mr. Dantuono's testimony is not considered persuasive insofar as it maintains that no violation of mandatory safety standard 30 C.F.R. 56.11-1 occurred. Mr. Dantuono affirmatively testified that the east walkway is used to adjust the different machines in the Symons screen (Tr. 156), and that "we go back on this walkway * * * to adjust a 54 sand cone" (Tr. 160).

In view of the foregoing, I find that the east walkway, at the time of the inspection, was maintained and used as a means of access for the Respondent's employees who periodically performed work on the Symons screens, or made periodic adjustments to the Symons screens. The fact that no work was being performed at the time of the inspection (Tr. 74-75), or that the east walkway was not a general traffic area (Tr. 68), do not constitute affirmative defenses.

The fact that all work or adjustments could have been performed from the floor below is not an affirmative defense to the charge of violation on the facts presented herein. The Commission has expressly rejected the view that the standard's mandate is met when one safe means of access to a working place exists. The standard imposes an affirmative obligation on the operator to make each means of access to a working place safe unless, for example, there is no reasonable possibility that a miner would use the route as a means of reaching or leaving a workplace. The Hanna Mining Company, 3 FMSHRC 2045, 2 BNA MSHC 1433, 1981 CCH OSHD par. 25,672 (1981).

As noted previously, the cited east walkway was part of an active construction site on November 29, 1978, and a substantial amount of material was present in the form of debris and tools. In fact, Mr. Dantuono testified that it was customary for the independent contractor's employees to allow the debris to remain until the job was completed (Tr. 155-156). It can therefore be inferred that the Respondent's employees who used the east walkway for access to the Symons screens were exposed to a tripping or stumbling hazard. Accordingly, it is found that the Respondent failed to provide and maintain safe means of access to the Symons screens for its employees.

The fact that the violative condition may have been caused by the activities of an independent contractor is not an affirmative defense. The Commission has held that a mine operator can be held responsible without fault for violations of

the 1977 Mine Act or the mandatory health and safety

standards committed by independent contractors performing work on mine property. When the subject citation was issued, the Petitioner was pursuing a valid interim policy of citing mine operators for violations committed by independent contractors. Old Ben Coal Company, 1 FMSHRC 140, 1 BNA MSHC 2177, 1979 CCH OSHD par. 23,969 (1979), aff'd., No. 79-2367 (D.C. Cir., filed December 9, 1980).

In view of the foregoing, I conclude that a violation of mandatory safety standard 30 C.F.R. 56.11-1 has been established by a preponderance of the evidence.

2. Gravity of the Violation

The record does not establish that individuals exposed to the tripping or stumbling hazard faced potentially serious injuries.

The record contains no reliable, probative, and substantial evidence as to the probability of the occurrence of the event against which the cited standard is directed, nor as to how severe the injury resulting from or contemplated by the occurrence of the event could reasonably be expected to be. In this regard, it is significant to note that the statements recorded under the "gravity" heading on the inspector's statement (Exh. M-2, p. 3), are those of Mr. William Acuna, a Federal mine inspector-trainee who accompanied Inspector Pappas during the inspection (Tr. 18, 41), and are not the recorded observations of Inspector Pappas. Additionally, Mr. Acuna's observations were not recorded contemporaneously with the transaction or occurrence observed by him. Rather, he recorded his observations on the inspector's statement in December of 1978 or January of 1979 (Tr. 60).

Either Mr. Dantuono or the group leader would have been affected if the event against which the cited standard is directed had occurred.

In view of the foregoing, I find that the violation was nonserious.

3. Negligence of the Operator

The evidence presented clearly shows that the Respondent demonstrated negligence in connection with its failure to provide and maintain a safe means of access to the Symons screens.

As noted previously, Building 36 was undergoing renovation by an independent contractor when the citation was issued. In fact, the independent contractor's employees were performing renovation work in the cited area when the citation was issued. A substantial amount of material was present on the walkway, consisting of old pieces of beams, oxygen-acetylene tanks, hoses, and other tools needed by the independent contractor's employees in the course of their work. It can be inferred from the testimony of Mr. Dantuono, the mill foreman, that the condition

had existed for a substantial period of time (see Tr. 155-156). The condition was sufficiently extensive and had existed for such a substantial period of time that the Respondent knew or

should have known that the east walkway was not a safe means of access to the Symons screens.

Yet the Respondent maintained and used the east walkway as a means of access to the Symons screens, in spite of its actual or constructive knowledge as to the unsafe condition. The mere fact that adjustments or other work could be performed on the screens from the floor below does not absolve the Respondent from negligence. It should be noted that Mr. Jibilian maintained at one point in his testimony that employees occasionally work on the east end of the Symons screens and that the east walkway is the sole means of access to such area (Tr. 74). (FOOTNOTE 6)

Under the circumstances, the Respondent was under an affirmative obligation to undertake effective measures designed to prevent its employees from using the east walkway as a means of access to the Symons screens while the unsafe condition existed. Clearly, this obligation was not met.

In view of the foregoing, it is found that the Respondent demonstrated a high degree of ordinary negligence in connection with the violation.

4. Good Faith in Attempting to Achieve Rapid Compliance

The violation was abated within the time specified for abatement (Exh. M-2, p. 3; Tr. 41). Accordingly, it is found that the Respondent demonstrated good faith in attempting to achieve rapid compliance.

D. Size of the Operator's Business

The parties stipulated that the size of the Basic Refractories Quarry was rated at 358,329 production man-hours in 1978 (Tr. 4-5).

E. History of Previous Violations

The parties stipulated that as of November 28 and 29, 1978, the Basic Refractories Quarry had no history of previous violations under the 1977 Mine Act (Tr. 5).

F. 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 OSHD 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. Petitioner's March 20, 1980, Motion to Dismiss

On or around January 14, 1980, the Petitioner requested advice from its Arlington, Virginia, office as to whether the MSHA/OSHA Interagency Agreement, see 44 Fed. Reg. 22827 (April 17, 1979), and an August 3, 1979, interpretive memorandum issued by the Administrator for Metal and Nonmetal Mine Safety and Health, transferred all aspects of the Respondent's operation, other than the quarry, to OSHA. As a result of this inquiry, the Petitioner filed a motion and supporting memorandum on March 20, 1980, praying for the vacation and dismissal of the following citations:

Citation No.	Date	30 C.F.R. Standard
368863	11/30/78	56.14-1
368877	11/30/78	56.11-2
368885	12/06/78	56.14-1
368886	12/06/78	56.14-1
368888	12/06/78	56.14-1
368889	12/06/78	56.14-1

The memorandum in support of the motion to dismiss states, in part, as follows:

> Petitioner has filed proposals for assessment of penalty alleging violation of regulations promulgated pursuant to the Federal Mine Safety and Health Act of 1977. In the course of its enforcement activities, the Mine Safety and Health Administration entered into an interagency jurisdictional agreement with the Occupational Safety and Health Administration. Interpretation and application of this agreement has proved difficult especially with respect to refractories located on mine property. A reinterpretation of the application of the agreement to the Respondent's Quarry and Plant necessitates dismissal and vacation of the following citations: 368863, 368877, 368885, 368886, 368888, 368889. Dismissal is consistent with the attached memorandum.

Attached thereto is a copy of a February 28, 1980, memorandum from Donald R. Tindal, Counsel for General Legal Advice, Mine Safety and Health, to Associate Regional Solicitor William S. Kloepfer, concerning the proceedings in Secretary of Labor v. Basic Refractories, Docket Nos. VINC 79-199-PM,

LAKE 79-32-M, LAKE 79-40-M, LAKE 79-140-M, and LAKE 79-203-M. This memorandum states, in part, as follows:

> Your memorandum of January 14, 1980, addressed to Roy Bernard, Deputy Administrator, Metal and Nonmetal Mine Safety and Health, concerning the above-captioned matter was referred to this office for reply. You request advice as to whether the MSHA/OSHA Interagency Agreement (33 FR 22827, April 17, 1979) and an interpretative memorandum of August 3, 1979, issued by the Administrator, Metal and Nonmetal Mine Safety and Health, (FOOTNOTE 7) transfer jurisdiction over all aspects of Basic Refractories, other than the quarry, to OSHA.
>
> The MSHA/OSHA agreement provides that OSHA will have jurisdiction over "refractory plants." Agreement, B. 6. b. In the appendix to the agreement, it is accordingly stated that MSHA authority ends and OSHA authority begins with respect to refractory plants "after arrival of raw materials at the plant stockpile." The August 3, 1979, memorandum to the District Managers from Thomas J. Shepich, Administrator for Metal and Nonmetal Mine Safety and Health, elaborating on the agreement, states that an operation which is a free-standing mill engaging in milling and milling-related operations only, and which in the past has been inspected solely by MESA or MSHA remains subject to MSHA jurisdiction. On the other hand, refractory plants, i.e., operations involving milling and the manufacturing of bricks, clay pipe or other forms of finished refractories where there is a joint MSHA/OSHA presence, are now subject to OSHA jurisdiction.

As is reflected in the MSHA/OSHA agreement and Mr. Shepich's memorandum, the purpose of making the jurisdictional determination concerning refractory plants (and other types of operations covered by the agreement) is to eliminate dual jurisdiction "at one physical establishment," by making a "convenience of administration" determination as provided at section 3(h)(1) of the Mine Act (30 U.S.C. 802(h)(1)). Hence, where both milling and manufacturing take place at one identifiable establishment, OSHA is to assume jurisdiction. However, where a reasonable physical or practical separation can be made between associated establishments, for example, between a mine and a mill which has traditionally been inspected by MSHA, and an associated facility such as a refractory manufacturing plant, which has been inspected, or subject to inspection, by MSHA and OSHA, no "convenience of administration" determination need be made under section 3(h)(1) for the former facility, since at that establishment, there is no dual jurisdiction.

As we understand it, the Basic Refractories operation involved here includes a refractory manufacturing operation, which in turn includes both milling and manufacturing, and a quarry which is clearly a "mine" under MSHA jurisdiction. According to the flow chart provided as an attachment to your January 14 memorandum, the stone from the quarry is transported first to a crushing plant (plant 35) and then to a sizing plant (plant 36) and an AG stone plant (plant 37), prior to entering the storage silos. Some of the stone from plant 36 goes to the AG stone plant or directly to railroad cars and does not enter the storage silos. The use to which this stone is put is not indicated, but it apparently does not enter the refractory manufacturing operation. Stone is then transported as needed from the storage silos to various kilns and other plants (plants 51, 53, 54), where it is prepared for use as the raw material in the refractory plants (plants 60, 61, 72). The products of the refractory plants are then shipped by truck and rail to the users of the products.

> Under the terms of the Mine Act and the MSHA/OSHA agreement, it is clear that the quarry should remain under MSHA jurisdiction. It is also clear that the shaped refractory and special refractory plants are engaged in manufacturing of "finished refractories" and are, therefore, under OSHA jurisdiction. The question to be determined under the "convenience of administration" provision of section 3(h)(1) and the MSHA/OSHA agreement is whether all or part of the remainder of the Basic Refractories facility can reasonably be regarded as an integral part of the refractories manufacturing plants and therefore, as part of a single "physical establishment" under OSHA jurisdiction; or whether some reasonable physical separation can be made in order to preserve MSHA jurisdiction over all or part of the remainder of the facilities.
>
> Based on an examination of the flow chart attached to your memorandum and discussions with MSHA personnel, it is our view that the point in the process at Basic Refractories where the stone enters the storage silos is the point at which MSHA and OSHA jurisdiction separates. It is at this point where the raw material (stone) can be said to "arrive at the plant stockpile," per the MSHA/OSHA agreement. Agreement Appendix A. The operations taking place before the arrival of the stone at the storage silo, i.e., quarrying, crushing (plant 35), sizing (plant 36) and the AG stone plant operation (plant 37) are classical mining and milling operations, and could very well take place even if the facility were solely a quarry and not associated with a refractory plant. Thus, drawing the line for purposes of jurisdiction at the storage silos is consistent with the MSHA/OSHA agreement and is reasonable from the standpoint of a traditional view of mining and milling operations.
>
> Accordingly, any MSHA citations or orders against Basic Refractories for violations relating to the quarry, the crushing plant (plant 35), the sizing plant (plant 36), or the AG stone plant (plant 37) should remain under MSHA jurisdiction.
>
> The other outstanding citations should be vacated. Although these citations were validly issued, since they arose prior to the execution of the MSHA/OSHA agreement, and could legally support the imposition of a penalty if they are established, our position is that because jurisdiction has been transferred to OSHA, no useful purpose would be served by continuing to process the case to its conclusion.

In view of the foregoing, the Petitioner's March 20, 1980, motion to dismiss will be granted.

VII. Petitioner's May 19, 1980, Motion Requesting Approval of Settlement

On May 19, 1980, the Petitioner filed a motion requesting approval of settlement and dismissal of the proceeding, and also filed a memorandum in support thereof, encompassing three of the citations at issue in this case.

Information as to the six statutory criteria contained in section 110 of the Act has been submitted. This information has provided a full disclosure of the nature of the settlement and the basis for the original determination. Thus, the parties have complied with the intent of the law that settlement be a matter of public record.

The proposed settlement is identified as follows:

Citation No.	Date	30 C.F.R. Standard	Assessment	Settlement
368848	11/29/78	56.14-1	$ 84	$ 84
368851	11/29/78	56.14-1	66	66
368854	11/29/78	56.14-1	66	66
		Totals:	$216	$216

The Petitioner advances the following reasons in support of the proposed settlement:

> The Respondent has agreed to pay the full amounts of the penalties proposed by the Office of Assessments for the [three] citations listed above. In support of the settlement, the Petitioner attaches the results of initial review, the proposed assessment, copies of the citations, terminations, and inspectors' statements compiled in documentation of the citations at issue.
>
> The size of Respondent's Quarry and Plant is 358,329 man hours per year. The size of the operator is 911588 man hours per year. The operator employs 230 surface miners and no underground miners. The mine accrued a total of 48 assessed violations and 21 paid violations during the period November 31, 1976, through November 30, 1978. (FOOTNOTE 8)

The reasons given above by counsel for the Petitioner for the proposed settlement have been reviewed in conjunction with the information submitted

as to the six statutory criteria contained in section 110 of the Act. After according this information due consideration, it has been found to support the proposed settlement. It therefore appears that a disposition approving the settlement will adequately protect the public interest.

VIII. Conclusions of Law

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

2. Basic Refractories and its Basic Refractories Quarry and Plant were subject to the provisions of the 1977 Mine Act at all times relevant to the issuance of the citations involved in this proceeding.

3. Federal mine inspector Michael Pappas was a duly authorized representative of the Secretary of Labor at all times relevant to this proceeding.

4. The Respondent's motion to dismiss at the close of the Petitioner's case-in-chief will be granted in part and denied in part for the reasons set forth previously in this decision.

5. The Petitioner failed to prove the violations charged in Citation Nos. 368841, 368847, and 368849.

6. The violation charged in Citation No. 368846 is found to have occurred as alleged.

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

IX. Proposed Findings of Fact and Conclusions of Law

The Respondent filed a trial brief during the hearing on November 14, 1980. The Respondent filed a posthearing brief and proposed findings of fact and conclusions of law on April 27, 1981. The Petitioner filed a posthearing memorandum on May 4, 1981. 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.

X. Penalties 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 penalties is warranted as follows:

Citation No.	Date	30 C.F.R. Standard	Penalty
368846	11/29/78	56.11-1	$125
368848	11/29/78	56.14-1	84 (settlement)
368851	11/29/78	56.14-1	66 (settlement)
368854	11/29/78	56.14-1	66 (settlement)
		Total:	$341

ORDER

Accordingly, IT IS ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief be, and hereby is, DENIED as relates to Citation No. 368846.

IT IS FURTHER ORDERED that the Respondent's motion to dismiss at the close of the Petitioner's case-in-chief be, and hereby is, GRANTED as relates to Citation Nos. 368841, 368847, and 368849; that such citations be, and hereby are, VACATED; and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citations. In the alternative, vacation and dismissal IS ORDERED as relates to such citations because the Petitioner failed to prove the violations charged by a preponderance of the evidence on the record as a whole.

IT IS FURTHER ORDERED that the settlement outlined in the Petitioner's May 19, 1980, motion requesting approval of settlement be, and hereby is, APPROVED.

IT IS FURTHER ORDERED that the Petitioner's March 20, 1980, motion to dismiss be, and hereby is, GRANTED; that Citation Nos. 368863, 368877, 368885, 368886, 368888, and 368889 be, and hereby are, VACATED; and that the petition for assessment of civil penalty be, and hereby is, DISMISSED as relates to such citations.

IT IS FURTHER ORDERED that the Respondent pay civil penalties totaling $341, as set forth in Part X, supra, within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

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~FOOTNOTE_ONE

1 The Respondent used inaccurate terminology when it moved for what it termed a "directed verdict" at the close of the Petitioner's case-in-chief. Proceedings before Administrative Law Judges of the Federal Mine Safety and Health Review Commission are tried without juries. The Administrative Law Judge is the trier of fact. Therefore, the Respondent's motion has been treated as a motion to dismiss at the close of the Petitioner's case-in-chief for failure to sustain its burden of proof. See James v. Du Breuil, 500 F.2d 155, 156 n. 2 (5th Cir. 1974), Martin v. E. I. du Pont De Nemours & Company, Inc., 281

F.2d 801, 802 n. 1 (3rd Cir. 1960); 5 J. MOORE, FEDERAL PRACTICE, 41.13[1] at p. 41-177 (1980)

~FOOTNOTE_TWO
2 Mandatory safety standard 30 C.F.R. 56.14-1 provides as follows:

"Gears; sprockets; chains, drive, head, tail and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded."

~FOOTNOTE_THREE
3 Federal mine inspector Michael Pappas issued Citation No. 368841 during the course of his November 28, 1978, inspection of the Respondent's Basic Refractories Quarry and Plant (Tr. 11). The citation alleges a violation of mandatory safety standard 30 C.F.R. 56.14-1 in that "[a] guard was not provided on the tail pulley of the stock out belt under the filter" (Exh. M-1, p. 1).

~FOOTNOTE_FOUR
4 Federal Mine inspector Michael Pappas issued Citation No. 368847 during the course of his November 29, 1978, inspection of the Respondent's Basic Refractories Quarry and Plant (Tr. 14-15). The citation alleges a violation of mandatory safety standard 30 C.F.R. 56.14-1 in that "[a] guard was not provided on the tail pulley of No. 7 conveyor belt" (Exh. M-3, p. 1).

~FOOTNOTE_FIVE
5 Federal mine inspector Michael Pappas issued Citation No. 368849 during the course of his November 29, 1978, inspection of the Respondent's Basic Refractories Quarry and Plant (Tr. 16). The citation alleges a violation of mandatory safety standard 30 C.F.R. 56.14-1 in that "[a] guard was not provided on the tail pulley of the No. 5 recrush belt" (Exh. M-4, p. 1).

~FOOTNOTE_SIX
6 Whether or not the east walkway is the sole means of access to the east end of the Symons screens is not the controlling consideration. The controlling consideration is that the Respondent maintained and used the east walkway as a means of access to the Symons screens with actual or constructive knowledge that such means of access was unsafe.

~FOOTNOTE_SEVEN
7 The August 3, 1979, memorandum from Thomas J. Shepich, Administrator for Metal and Nonmetal Mine Safety and Health, for MSHA district managers concerning MSHA jurisdiction over refractory mills states, in part, as follows:

"As you know, the MSHA/OSHA Interagency Agreement provides that OSHA shall have jurisdiction over "brick, clay pipe and refractory plants' (Section B.6.b.). The effect of this clause is to grant to OSHA jurisdiction over plants which include a manufacturing process resulting in a product such as bricks, clay pipe, insulators or other finished forms of refractories.

In these operations, both milling and manufacturing occur and there has been a joint MSHA/OSHA presence at one physical establishment.

"Section 3(h)(1) of the Mine Act states that "[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.' It was this type of dual jurisdiction that the provision was designed to correct. Therefore, in operations involving milling and the manufacturing of bricks, clay pipe or finished refractories, where there is a joint MSHA/OSHA presence, jurisdiction has been delegated to OSHA under the Interagency Agreement.

"The provision quoted above should not be applied to milling operations where there is no manufacturing process and OSHA presence. Therefore, a "refractory plant,' which is a free-standing mill engaged in milling and milling-related operations only and which has been inspected in the past solely by MESA or MSHA, remains subject to MSHA jurisdiction and has not been transferred to OSHA's jurisdiction."

A copy of the August 3, 1979, memorandum was attached to a request for admissions filed by the Respondent on January 2, 1980.

~FOOTNOTE_EIGHT

8 The violations charged in these three citations allegedly occurred on November 29, 1978. As noted in Part V (E), supra, the parties stipulated at the hearing that as of November 28 and 29, 1978, the Basic Refractories Quarry had no history of previous violations under the 1977 Mine Act (Tr. 5). In view of the stipulation, it must be concluded that the Respondent has no history of previous violations cognizable in connection with these three citations.