FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE, SUITE 400
DENVER. COLORADO 80204

FEB 2 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING
v.	DOCKET NO. CENT 80-337-M
SIERRA BLANCA MILLING & PROCESSING CO., Respondent.	A/C No. 29-01796-05002
	MINE: Sierra Blanca Mill

DECISION AND ORDER

Appearances:

Allen Reid Tilson, Esq., Office of the Solicitor
United States Department of Labor, 555 Griffin Square, Suite 501
Dallas, Texas 75202
For the Petitioner

Billy D. Thomas, President
Sierra Blanca Milling & Processing Company
Ruidoso, New Mexico 88345
Pro Se

Before: Judge Jon D. Boltz

STATEMENT OF THE CASE

Petitioner filed a petition pursuant to the Federal Mine Safety and Health Act of 1977 (the "Act") requesting the assessment of a civil penalty against the respondent for alleged violation on January 16, 1980, of 30 C.F.R. § 55.15-6 1/

1/ The pertinent part of the regulation states as follows:

Mandatory. Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever (2) chemical hazards, ... are encountered in a manner capable of causing injury or impairment.

By way of answer respondent alleged that the land on which any violation occurred had been subleased to two other mining companies and that the employees "who were in violation" had not worked for respondent since September 16, 1979.

At the commencement of the hearing an additional issue was added by the respondent. Respondent contended that it had also intended to contest seven other citations which had also been served on respondent for alleged violations occurring on January 16, 1980, and January 17, 1980.

The petitioner contends that the Office of Assessments had duly notified respondent that the forms which were sent to it were the ones on which it should make notice of contest; and that since respondent properly completed only one of the forms, it did not contest the other citations issued. Thus, having failed to contest those citations in accordance with the rules of procedure, the proposed penalties became the final order of the Commission and were not subject to review.

The petitioner agreed that ruling on whether or not all eight citations were at issue instead of just the one alleged by the pet it ioner would be reserved until evidence on all citations were received at the hearing. Accordingly, evidence was presented as if the complaint had alleged all eight citations along with proposed penalties applying thereto.

Findings and Conclusions in Regard to Ruling Reserved at the Hearing

After the proposed assessment forms on all eight citations had been sent to the respondent by the Office of Assessments of MSHA, respondent, within the 30 days allowed, wrote on one of the cards which had been sent to him, the following words :

> "None of the penalties applied to our operation! No mining operations since August 1979.'

Respondent had also marked an "X" on the card by the following printed words:

> "I. wish to contest and have a formal hearing on all the violat ions listed in the proposed assessment ."

The card was signed "Billy D. Thomas, Pres."

The card was stapled to the other cards which respondent had received, and all the cards were returned to and date stamped by the Office of Assessments on June 23, 1980. However, none of the other cards had any notat ions on them indicating whether or not any further citations were being contested. Respondent had also sent a letter which was received by the same Office of Assessments on June 16, 1980, in which respondent listed all eight citation numbers. In the letter respondent alleged that the citations did not apply to it. Since only one card had been specifically marked, the petitioner filed a "Complaint Proposing Penalty", alleging only one citation, No. 173872.

I find that respondent did intent to contest all eight citations. Although each card returned to the Office of Assessments by the respondent was not signed separately, they were all sent together in one letter. The notation by "Billy D. Thomas, Pres.", showed that he did not believe any of the "penalties" applied to his corporation. Thus, all of the citations were placed in issue.

I find that respondent was in substantial compliance with procedural rule 25 in that the petitioner received the return cards and the letter within the required 30 days. Therefore, all eight citations were properly at issue at the hearing.

Additional Findings and Fact:

1. There is no history of previous violations by the respondent.

2. Respondent is a small operator.

3. The assessment of penalties proposed will not affect respondents ability to continue in business.

4. Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the alleged violations.

CITATION NO. 173877

Petitioner alleges that the operator in charge of the mill had not given the required notice to MSHA pursuant to 30 C.F.R. 55.26-l 2/, before commencement of construction of its mill, and that the mill had been under construction for approximately four months prior to the inspection on January 16, 1980. Respondent contends that it was merely landlord of the property which it had subleased to two other companies, namely, Eagle Peak Mining Company and Double Eagle Mining Company, and, that, therefore, respondent was not responsible for the alleged violat ions.

The MSHA inspector testified that when he arrived at the site there was "beginnings of what was required to construct a mill." There was a corrugated metal building under construction with dimensions of approximately 30 feet by 60 feet. There was a partly submerged tank in -place to hold fluid and an earthern tank at the rear of the building with a drain from the building to the tank. There was a house trailer also located on the site. Three persons were in the metal building disassembling the fittings on a large vat which was not in operation. Electrodes had not

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2/ The pertinent part of the regulation states as follows:

. Mandatory. The owner, operator, or person in charge of any metal and non-metal mine shall notify the nearest Metal and Nonmetal Mine Safety and Health Subdistrict Office of the Mine Safety and Health Administration before starting operation of the approximate or actual date mine operation will commence ....

been installed and as yet there was no electrical power wired to' the building. One of the three persons in the metal building who was an employee of the respondent told the MSHA inspector that the mill was under construction and that ore would be milled by a mill located nearby until such time as construction of the. mill on which they were working was completed. The minerals to be milled or processed were coming from the Jicarilla Pit, a location owned by the respondent.

Since the facility and equipment were to be used in the milling of minerals, the location inspected constituted a mine and was subject to the jurisdiction of the Act, according to the definition contained in section 3(h)(1) of the Act . . The pertinent part of that sect ion defines a mine as

> ". . . lands, structures, facilities, equipment, . . . or other property . . . to be used in the milling of such minerals ...

The cited regulation, 30 C.F.R. 55.26-1, does not require that the facility be in any particular stage of completion before the required notification must be given to MSHA. The regulation requires that notice be given of the approximate or actual date the operation will commence. Since no notice had been given as required, there was a violation of the regulation.

The question then is, who was the "owner, operator, or person in charge" who should have given the notification to MSHA? By way of defense respondent has denied that it was the operator, but was merely "landlord" of the property where the mine facility was located.

The definition of "operator" is set forth in section 3(d) of the Act, and includes:

> "... any owner, lessee, or other person who operates, controls, or supervises a ... mine ...".

To control is to "exercise restraining or directing influence over" a matter. 3/ The conduct of the respondent must be examined in order to determine whether or not respondent exercised control over the mine facility. If respondent did exercise control, then respondent is an operator; but if respondent did not exercise control, then by definition respondent is not an operator. It should also be noted that the definition of operator in the Act does not mention that the control or the supervision of the operator must be exclusive.

3/ Black's Law Dictionary defines to control as to "exercise restraining or directing influence over; regulate; restrain; dominate . ..".

Billy Thomas, the President of the respondent corporation, testified that on behalf of respondent, he leased six acres of land from American Mineral Recovery, Inc., (hereinafter, "American") which had a mill on land contiguous to the six acres. The respondent leased the property because American wanted respondent to set up a refinery in order to refine the ore processed through the mill at American. The ore would come from respondent's Jicarilla pit to the mill at American. After it was processed there, it would go to respondent's refinery located on the six acres of land leased from American. The refined concentrate would then be sent to the smelter. When respondent leased, the acreage from American there were no improvements on the property. Respondent had moved a house trailer onto the property in preparation for pursuing refinery operations.

Billy Thomas testified further that the six acres leased was then subleased to two entities, namely, Eagle Peak Mining Company and Double Eagle Mining Company. Dale Runyon was the apparent owner of Eagle Peak Mining Company. A contract introduced into evidence showed that American was planning to mill respondents ore and also ore supplied by Mr. Runyon. Billy Thomas testified that his agreement with Mr. Runyon was that when Mr. Runyon finished using the building that Double Eagle Mining Company and Mr. Runyon were constructing on the six leased acres, they would vacate it, and respondent would then become owner of the building, It was anticipated that Mr. Runyon and Double Eagle Mining Company would use the building about six months. The sublease between these parties was never signed and no copy of it was received into evidence.

Assuming the facts as to be as stated by respondent, it is apparent from a review of all the testimony and exhibits that respondent had exercised substantial control over the operation of the facility. This conclusion is reached based on the following facts:

1. Although the site had been subleased to Eagle Peak Mining Company and Double Eagle Mining Company respondent exercised control over the property by moving the house trailer onto the property November, 1979, approximately two months before the inspection.

2. When the MSHA inspector arrived at the site on January 16, 1980, three persons were disassembling fittings on a large vat. Two of those persons were employed by Double Eagle Mining Company, but the third person was employed by the respondent.

3. Two persons employed by Double Eagle Mining Company at the site told the MSHA inspector that Billy Thomas, President of the respondent, frequented the site to give them instruction and to supervise, guide, or direct the operation.

4. The MSHA inspector observed that three persons may have been in contact with cyanide while working on the vat. When Billy Thomas was contacted by the inspector in regard to the presence of cyanide, Thomas

indicated he did not approve its use, but he would provide "the people" with protective clothing. After Thomas found out about the use of cyanide on the property he directed the owner to remove it.

5. At some time prior to January 16, 1980, Billy Thomas had sent his son, who was employed by the respondent, along with another employee of the respondent, to the leased property with instructions to help the three persons who were working there on the construction of the building to install the roof trusses. Of the three persons already working on the building, two were employees of Double Eagle Mining Company and one was an employee of the respondent. These were the same persons who were present at the time of the inspection on January 16, 1980.

6. Respondent had operated a mill in another location prior to the time the six acres were subleased from American. After the inspection the MSHA inspector contacted Billy Thomas by telephone, and Mr. Thomas informed the inspector that he thought he had already informed the Federal Government of his change of location by showing it on a quarterly employment form. This indicates that respondent intended to change his business location to the new site prior to the inspection.

7. On January 17, 1980, the son of Billy Thomas who was employed by the respondent corporation went to the mill site to remove some furniture from the mobile home. While he was there he encountered the MSHA inspector and the three persons who had been working there. The MSHA inspector informed Mr. Thomas' son that he had closed down the building temporarily due to some problems. Thomas' son told the three persons who had been working, two employed by Double Eagle Mining Company and one employed by the respondent, to keep out of the building until "we get everything straight". The MSHA inspector gave the citation to Thomas' son and he took them to Billy Thomas.

8. When the MSHA inspector contacted Billy Thomas to ask him who was in charge at the work site, Thomas said that Ted Zamora was in charge and that Thomas would send Zamora a letter to that effect. At that time Zamora was being paid as an employee. of Double Eagle Mining Company.

If respondent had merely leased the six acres and exercised no further control over the improvements being constructed, respondent would not be classified as the operator according to the definition. However, respondent's conduct shows that the sublease to Double Eagle Mining Company and Eagle Peak Mining Company was not an "arm's length" transaction. Respondent continued to exercise some control over the operation even though two of the employees present when the inspection took place were employed by Double Eagle Mining Company.

Accordingly, I conclude that there was a violation of 30 C.F.R. 55. 26-1, that respondent was the "operator or person in charge" within the meaning of the regulation, and that Citation No. 173877 should be affirmed.

CITATION NO. 173872

Petitioner alleges that on January 16, 1980, special protective clothing was not provided to employees in violation of 30 C.F.R. 55-50.6. 1 Employees were observed working on a chemical vat that had previously been used in a cyanide milling process. The liquid solution of cyanide liberated from the vat was observed as having saturated an area of sand approximately 10 feet by 10 feet. The employees were required to work over and walk through the sand and liquid material. The employees were wearing leather boots with neoprene soles. One employee was wearing leather gloves, and one was not. Thus, the employees were wearing no special protective clothing.

When the samples, taken from the liquid solution and sand that was directly under the vats where workers were standing, were analyzed by a laboratory, it was found that they contained quantities of cyanide. The testimony was undisputed that the workers could have become ill from contact with the cyanide while using no special protective clothing.

Petitioner has shown by preponderance of the evidence that there was a violation of the cited regulation. The Citation should be affirmed.

CITATION NO. 173873

Petitioner alleges that hazardous material was being stored in the corrugated metal building in an open 55 gallon drum which was not labeled to indicate the hazardous material contained therein, namely, ore concentrate material containing cyanide. A violation of 30 C.F.R. 55. 16-4 4/ was alleged.

The evidence is undisputed that the drum was not labeled. A sample taken from the drum was analyzed by a laboratory and it was found to contain cyanide. Petitioner's witness testified without rebuttal that had the material been picked up by an employee, the cyanide could have been absorbed into the skin and could have caused illness.

Since the material allegations of Petitioner have been proven by a preponderance of the evidence, the Citation should be affirmed.

4/ Mandatory. Hazardous materials shall be stored in containers of a type approved for such use by recognized agencies; such containers shall be labeled appropriately.

CITATION NO. 173874

Petitioner alleges that at the time of the inspection a competent person was not designated by the mine operator or was not in attendance at the mine site to take charge in case of an emergency, in violation of 30 C.F.R. 55.18-9.5/

The MSHA inspector testified that when none of the three persons at the site would admit to being in charge, the inspector telephoned Billy Thomas, President of the respondent, and Thomas said that Ted Zamora, an employee being paid by Double Eagle Mining Company, was in charge and that he "always had 'been". Thomas also stated that he would send Zamora a letter to that effect.

Based on the testimony of Billy Thomas, I find that Ted Zamora was designated as a competent person in charge, and that he was in attendance at the time of the inspect ion.

Accordingly, the Citation should be vacated.

CITATION NO. 173875

Petitioner alleges a violation of 30 C.F.R. 55.15-1.6/ The Citation alleges that water or neutralizing agents were not available for employees to use in the event of contact with corrosive chemicals and harmful substances being stored at the mill.

There was a 55 gallon drum of ore concentrate on the property and an analysis of the material in the drum showed that it contained some cyanide. Petitioner's witness testified that absorption of the cyanide into the unprotected skin of a worker could cause illness. There was also cyanide present in the sand under the vat on which 'the employees were working.

Water was available on the adjacent property at American, but there 'was no evidence to show that this water would have been available at all times while persons were working on respondent's property.

5/ Mandatory. When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency.

6/ The pertinent part of the regulation states as follows :

Mandatory. ... water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled, or used.

Consequently, a violation of the regulation was proven a by preponderance of the evidence and the Citation should be affirmed.

CITATION NO. 173876

Petitioner alleges that adequate first aide material including blankets were not provided at the mill site. Further allegations are that the three employees working at the mill stated that they had not seen or been informed as to the location of any first aid material at the mill, all in violation of 30 C.F.R. 55.15-1. 7/

Respondeat presented no evidence that adequate first aid materials were provided. Thus, the petitioner has proven by a preponderance of the evidence that the cited regulation was violated. The Citation should be affirmed.

CITATION NO. 173879

Petitioner alleges that records of examination of each working place that were conducted by a competent person designated by the operator and conducted at least once each shift were not available for review by an MSHA represent at ive . 8/

The evidence shows that the improvements on the property were still under construction and development, and that there was no production nor any particular designated work place or shift for the three employees . 9/ Under these circumstances I find that no violation has been proven by preponderance of the evidence. The Citation should be vacated.

7/ The pertinent part of the regulation states as follows:

Mandatory. Adequate first aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. . . .

8/ The pert inert part of the regulation stat'es as follows:

Mandatory. A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety or health ... (b) a record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

9/ A shift is defined as the "number of hours or the part of any day work. Also called tour." U.S. Department of the Interior, Bureau of Mines, a dictionary of Mining, Mineral, and Related Terms. Page 1000 (1968).

CITATION NO. 173889

Petitioner alleges that the 7000-2 quarterly employment report was not retained at the immediate mine site office and made available for review by an MSHA representative in violation 30 C.F.R. 50.30(a). 10/

At the time of the inspection on January 16, and 17; 1980, there was no Form 7000-2 at the mine site. According to the requirements of the regulation the quarterly report for employees who worked in January, 1980, would not be due until 15 days after the quarter ended on March 31, 1980. The lease agreement in which the six acres were subleased from American was dated October 16, 1979. Although an individual may have worked at the mine during the quarter of October, November, and December, there was no evidence presented to show what took place during that period of time. Thus, the petitioner failed to present evidence that any individual worked at the mine during a calendar quarter which would have required that Form 7000-2 be filed.

The petitioner having failed to present a prima facie case, the Citation should be vacated.

In regard to all citations which should be affirmed, I find that the grav'ity of the violations was not serious, and that the operator is chargeable with ordinary negligence.

CONCLUSION OF LAW

1. The undersigned Administrative Law Judge has jurisdiction over the parties and subject matter of these proceedings.

2. The Petitioner has proven by preponderance of the evidence that the Respondent violated the regulations as cited in Citation Nos. 173877, 173872, 173873, 173875, and 173876.

3. The Petitioner has failed to prove by a preponderance of the evidence that Respondent violated regulations as cited in Citation Nos. 173874, 173879, 173889.

10/ The pertinent part of the regulation states as follows:

(a) Each operator of a mine in which an individual worked during any day of a calendar quarter shall complete a MSHA Form 7000-2 in accordance with the instruction and criteria in section 50.30-l and submit the original to . . . MSHA... within 15 days after the end of each calendar quarter.

ORDER

Citation Nos. 173874, 173879, and 173889 and the penalties therefor are vacated. The following Citations are affirmed and the respondent is ordered to pay civil penalties assessed in the total sum of $578.00 within 30 days from the date of this Decision.

CITATION NO.		CIVIL PENALTIES ASSESSED
173877		$ 20.00
173872		240.00
173873		240.00
173875		44.00
173876		34.00
	TOTAL	$578.00

Jon D. Boltz
Administrative Law Judge

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