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SOL (MSHA) V. SHERMAN LIME
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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 79-7-M
A/O No. 47-02546-05001 R

v.

Sherman Lime and Rock Quarry

SHERMAN LIME AND ROCK COMPANY,
RESPONDENT

DECISION

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor,
U.S. Department of Labor, Chicago, Illinois, for
the Petitioner
Thomas Eder, Partner, Sherman Lime and Rock Company,
Elk Mound, Wisconsin, for the Respondent

Before: Judge Cook

I. Procedural Background

On May 4, 1979, the Secretary of Labor (Secretary) 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 charges Sherman Lime and Rock Company (Respondent) with a violation of section 103(a) of the 1977 Mine Act as set forth in a citation issued pursuant to section 104(a) of the 1977 Mine Act.

The Respondent failed to file an answer and, on September 30, 1980, Chief Administrative Law Judge James A. Broderick issued an order to show cause requiring the Respondent to either file an answer within 15 days or to show good reason, in writing, for its failure to do so. The Respondent filed an answer on October 22, 1980. On November 19, 1980, an order was issued by the undersigned Administrative Law Judge receiving the answer for late filing.

Various notices of hearing were issued which ultimately scheduled the matter for hearing on the merits on March 12, 1981, in Eau Claire, Wisconsin. The hearing was held as scheduled with representatives of both parties present and participating. The Respondent delivered a closing argument and a schedule was set for the filing of posthearing briefs and proposed findings of fact and conclusions of law.

~385

The briefing schedule was later revised due to difficulties experienced by the Respondent. The Secretary and the Respondent filed posthearing briefs on April 21, 1981, and August 3, 1981, respectively. The Secretary filed a reply brief on August 19, 1981.

II. Violation Charged

Citation No.	Section	Date
287437	103(a)	May 11, 1978

III. Witnesses and Exhibits

A. Witnesses

Both the Secretary and the Respondent called Robert C. Goins, a Federal mine inspector, and Thomas Eder, a partner in the Respondent, as witnesses.

B. Exhibits

1. The Secretary introduced the following exhibits in evidence:

M-1 is a three-page document containing copies of Citation No. 287437, section 103(a), May 11, 1978; and the May 12, 1978, modification thereof.

M-2 is a copy of the inspector's statement pertaining to M-1.

M-3 is a certified copy of a court record in the case of Secretary of Labor v. Thomas Eder, Pat Eder, and Mike Eder, t/d/b/a Sherman Lime and Rock Company, Civil Action No. 78-C-273 (W.D. Wis.), certified by the Clerk of the United States District Court for the Western District of Wisconsin, which contains copies of the complaint (filed June 22, 1978), the answer (filed July 17, 1978), and the consent judgment (filed November 2, 1978).

2. The Respondent introduced the following exhibits in evidence:

O-1 is a copy of an order issued on July 13, 1978, in the case of Secretary of Labor v. Thomas Eder, Pat Eder, and Mike Eder, t/d/b/a Sherman Lime and Rock Company, Civil Action No. 78-C-273 (W.D. Wis.), denying the Plaintiff's motion for a preliminary injunction.

O-2 is a letter dated September 5, 1978, from Richard L. Wachowski, Esq., to Mr. Thomas Eder.

O-3 is a letter dated September 8, 1978, from Richard L. Wachowski, Esq., to Mr. Thomas Eder.

O-4 is a letter dated September 14, 1978, from Richard L. Wachowski, Esq., to Mr. Thomas Eder.

IV. Issues

Two basic issues are involved in this civil penalty proceeding: (1) did a violation of section 103(a) of the 1977 Mine Act 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

The parties entered into the following stipulations (FOOTNOTE 1) on March 12, 1981:

1. At all times relevant to this matter, Thomas, Patrick, and Michael Eder traded and did business as Sherman Lime and Rock Company (Tr. 5).

2. At all times relevant to this matter, the Respondent operated a mine (quarry) located west of Menomonie, Dunn County, Wisconsin (Tr. 6).

3. A citation for violation of section 103(a) of the 1977 Mine Act was written by Inspector Robert C. Goins on May 11, 1978. The citation was mailed to the Respondent on May 12, 1978, due to the Respondent's refusal to accept personal service on May 11, 1978 (Tr. 6).

4. The Respondent is a small, family-owned business (Tr. 11).

5. The Respondent's Sherman Lime and Rock Quarry produced approximately 2,000 tons in 1978 (Tr. 11-12).

B. Occurrence of Violation

Federal mine inspectors Robert C. Goins and John L. Davidson arrived at the Respondent's Sherman Lime and Rock Quarry at approximately 7:50 a.m. on May 11, 1978, to conduct a safety and health inspection pursuant to the provisions of the 1977 Mine Act (Exh. M-1). The inspectors identified themselves and informed Patrick and Michael Eder as to the purpose of their visit (Exh. M-1). The inspectors were told that the Respondent's operation was a family-owned and operated business, that there was nothing to inspect, and that if

~387

they were allowed onto the property to perform an inspection, then they could return at any time to shut down the mine (Exh. M-1). Patrick and Michael Eder denied the inspectors entry to the facility stating that they would not be allowed onto the property for the purpose of conducting an inspection (Exh. M-1). The inspectors asked Patrick and Michael Eder if they would accept a citation, and they responded in the negative. The inspectors left the facility at approximately 8:25 a.m.

Later that day, Inspector Goins prepared Citation No. 287437 charging the Respondent with a violation of section 103(a) of the 1977 Mine Act in that "Robert C. Goins and John L. Davidson, MSHA mine inspectors, were refused entry to the Sherman Lime and Rock Quarry at 0750. After letting operators read memorandum from Thomas Shepich, 4-27, the operators still refused entry to the quarry * * *" (Exh. M-1). The citation was mailed to the Respondent by certified mail on May 12, 1978, due to the Respondent's refusal to accept personal service on May 11, 1978 (Exh. M-1).

Section 103(a) of the 1977 Mine Act provides, in part, that "[f]or the purpose of making any inspection or investigation under this Act, the Secretary, * * * with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary * * *, shall have a right of entry to, upon, or through any coal or other mine."

The Respondent defends against the charge of violation by maintaining that it was under no legally enforceable duty on May 11, 1978, to grant the authorized representatives of the Secretary entry to, upon, or through the Sherman Lime and Rock Quarry for the purpose of conducting a health and safety inspection.

The material facts reveal that the Respondent is a small, family-owned business which is organized as a partnership. The Sherman Lime and Rock Quarry is located in Dunn County, Wisconsin, and consists of a limestone quarry and related milling operation used to produce agricultural lime. The agricultural lime is sold to farmers in the immediate geographic area who use it to neutralize soil acidity, and it appears that the Respondent delivers the agricultural lime to its customers. However, the Respondent does not sell any of its products outside the State of Wisconsin. The business is seasonal, operating only during the fall and spring for a total of approximately 4 months per year. Additionally, it appears that the Respondent was making deliveries and performing maintenance work on May 11, 1978, but that no actual mining or milling activities were underway at the time of the attempted inspection.

It appears that the partnership is composed solely of Patrick, Michael, and Thomas Eder. Mr. Thomas Eder testified that Patrick Eder, Michael Eder, and he are the only individuals who work at the facility. However, he also testified that the Respondent occasionally enters into contracts with powder companies who perform at least some of the drilling and blasting

operations necessary to extract the limestone from the earth. According to Mr. Eder, the drilling and blasting operations are performed by one person who appears to be either an employee of the powder company or an independent owner-operator hired by the powder company.

As relates to the type of equipment used at the facility, Inspector Goins testified that he saw a John Deere 450 front-end loader, a Ford single-axle end dump truck, an Allis Chalmers patrol grader, and a Cedar Rapids plant. According to Inspector Goins, the Cedar Rapids plant consisted of a jaw crusher, a hammermill and probably a small rollmill. Mr. Eder testified that a shovel, a loader, a primary hammermill, trucks, and several Gardner Denver drill rigs are used at the facility. Mr. Eder further testified that the Respondent has used Ford, International, and Chevrolet trucks. Additionally, he testified that most of the equipment is "purchased local or as close to local as possible." It appears that all of the equipment was purchased in Wisconsin. The Respondent makes use of the telephone to communicate with its customers and has made occasional use of newspapers to advertise its products.

Following the May 11, 1978, denial of entry, the Secretary filed a civil action in the United States District Court for the Western District of Wisconsin pursuant to section 108 of the 1977 Mine Act to obtain injunctive relief. (FOOTNOTE 2) Secretary of Labor v. Thomas Eder, Pat Eder, and Mike Eder, t/d/b/a Sherman Lime and Rock Company, Civil Action No. 78-C-273 (Exh. M-3). The Secretary's complaint, filed on June 22, 1978, alleged that at all relevant times mentioned therein, Thomas, Pat, and Mike Eder traded and did business as Sherman Lime and Rock Company, and operated a mine subject to the 1977 Mine Act in or near Menomonie, Dunn County, Wisconsin, within the jurisdiction of the United States District Court for the Western District of Wisconsin; that on May 11, 1978, pursuant to section 103 of the 1977 Mine Act, authorized representatives of the Secretary went to the mine operated by the Defendants to conduct a health and safety inspection of that mine; and that

~389

on May 11, 1978, the Defendants failed and refused to permit the Secretary's representatives to enter and inspect the mine. (FOOTNOTE 3) The Secretary prayed that the Defendants, their agents and employees and all persons in active concert and participation with them be preliminarily and permanently enjoined: (1) from refusing to admit authorized representatives of the Secretary to, upon or through the Defendants' mine; (2) from refusing to permit the inspection of the mine by authorized representatives of the Secretary; (3) from interfering with, hindering, and delaying authorized representatives of the Secretary in carrying out the provisions of the 1977 Mine Act; and (4) for such other relief as the Court may deem just and proper.

The Defendants filed an answer on July 17, 1978, admitting all of the above-stated factual allegations in the complaint with the exception of the allegation that the Defendants' mine is subject to the 1977 Mine Act. That allegation was specifically denied.

~390

On November 2, 1978, a "consent judgment" was entered by United States District Judge James E. Doyle, and approved and consented to by the parties as evidenced by the signatures of their respective attorneys. The "consent judgment" provides as follows:

This matter having come before the Court on the Complaint filed in the captioned matter, and the parties having stipulated to the material allegations of the Complaint as evidenced by the signatures of their attorneys, and the Court having considered the same; it is hereby ORDERED:

That Thomas Eder, Pat Eder, and Mike Eder, now doing business as Sherman Lime and Rock Company, their agents and employees, and all persons in active concert and participation with them be permanently enjoined as follows:

1. From refusing to admit authorized representatives of the Secretary entry to, upon or through defendants' mine;
2. From refusing to permit the inspection of the mine by authorized representatives of the Secretary; and
3. From interfering with, hindering, and delaying the Secretary of Labor or his authorized representatives in carrying out the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C.A. 801-961 (1971 and Supp. 1978).

The Respondent appears to concede that its limestone quarry and related milling operation falls within the definition of "coal or other mine" set forth in section 3(h)(1) of the 1977 Mine Act.(FOOTNOTE 4) The Respondent argues that the May 11, 1978, denial of entry was lawful because: (1) it is not engaged in an activity in or affecting interstate commerce; (2) the 1977 Mine Act's coverage does not extend to small, family-owned and operated mines

~391

in which the owners are the only miners; (3) nonconsensual safety and health inspections conducted without a search warrant violate the right guaranteed by the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures; and (4) active mining and milling operations were not underway at the time of the attempted inspection.

I conclude that the "consent judgment" entered by the United States District Court for the Western District of Wisconsin on November 2, 1978, prevents the Respondent from raising these four defenses in the instant civil penalty proceeding because, as a general rule, consent decrees in equity are accorded *res judicata* effect. *Safe Flight Instrument Corporation v. United Control Corporation*, 576 F.2d 1340 (9th Cir. 1978); *Wallace Clark & Co., Inc. v. Acheson Industries, Inc.*, 532 F.2d 846 (2nd Cir. 1976). Both the Federal Court action which culminated in the entry of the "consent judgment" and the instant civil penalty proceeding arise from the same May 11, 1978, denial of entry. The wording of the "consent judgment," on its face, reflects an adjudication by the Court that the Respondent's mine and related milling operation falls within the statute's coverage and that the May 11, 1978, denial of entry was unlawful. See *Wallace Clark & Co., Inc. v. Acheson Industries, Inc.*, *supra* (similarly worded consent decree characterized as an adjudication).

The Respondent is clearly attempting to mount a collateral attack on the District Court's "consent judgment" in this proceeding. "[A] collateral attack is an attempt to avoid, defeat, or evade a judicial decree, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." 1B J. MOORE, *FEDERAL PRACTICE*, §57 0.407 at 934 (1980). The statute does not empower the Federal Mine Safety and Health Review Commission (Commission) to entertain a collateral attack on a Federal District Court's section 108 injunction. Accordingly, the Respondent's attempt to avoid, defeat, or evade the injunction, or to deny the injunction's force and effect, in this proceeding must fail.

As an alternative basis for decision, I conclude that the four defenses fail on the merits.

The Respondent maintains that it is not subject to the provisions of the 1977 Mine Act by arguing that its products do not enter commerce, nor do its products or operations affect commerce. Section 4 of the 1977 Mine Act provides that "[e]ach coal or other mine, the product of which enter commerce, or the operations or products of which affect commerce, and each operator of

such mine, and every miner in such mine shall be subject to the provisions of this Act." In support of its position, the Respondent cites *Morton v. Bloom*, 373 F. Supp. 797 (W.D. Pa. 1973), and argues that none of its products cross state lines.

The evidence shows that the Respondent's agricultural lime is sold wholly within the State of Wisconsin to farmers who use it to neutralize soil acidity. The Respondent delivers the agricultural lime to its customers, and has used Ford, International, and Chevrolet trucks. The Respondent uses certain equipment, identified previously in this decision, in its operation; uses the telephone to contact its customers; and has made occasional uses of newspapers to advertise its products. In view of the decisions in *Marshall v. Anchorage Plastering Company*, No. 75-2747, 6 OSHC 1318 (9th Cir., filed February 2, 1978), and *Marshall v. Bosack*, 463 F. Supp. 800 (E.D. Pa. 1978), I conclude that the Respondent's products or operations affect commerce within the meaning of section 4 of the 1977 Mine Act.

The Respondent's reliance on *Morton v. Bloom*, supra, is misplaced. *Bloom* involved a one-man mine operation whose coal was sold "exclusively within Pennsylvania." 373 F. Supp. at 798. The Court held that this operation was not the type which Congress intended to cover when it enacted the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. | 801 et seq. (1970). More significantly, the Court found itself unable to conclude "that defendant's one-man mine operation will substantially interfere with the regulation of interstate commerce." 373 F. Supp. at 799. Even under the standard set forth by the United States Supreme Court in *Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L.Ed. 122 (1942), the Court determined that the operation was "one of local character in which the implementation of safety features required by the Act will not exert a substantial economic effect on interstate commerce." 373 F. Supp. at 799.

A review of the Court's reasoning in *Bloom* indicates that it should not be followed in the instant case. First, it appears that the Court failed to properly consider all of the possible means by which the operation could have affected commerce. The Court noted at one point in its opinion that the "defendant does use some equipment in his mine which was manufactured outside of Pennsylvania * * *," 373 F. Supp. at 798, but determined that this did not bring the mine within the scope of the commerce clause since the purchase of the equipment was "so limited that its use would be de minimis." 373 F. Supp. at 798. This reasoning appears to run contrary to the United States Supreme Court's determining in *Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 181, 66 S. Ct. 511, 90 L.Ed. 607 (1946), that the de minimis maxim should not be applied to commerce clause cases absent a Congressional intent to make a distinction on the basis of volume of business. The 1977 Mine Act does not require the effect on commerce to be substantial before a mine can be held to fall within the statute's coverage. See *Marshall v. Bosack*, supra.

Second, "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign

nations." *Fry v. United States*, 421 U.S. 542, 547, 95 S. Ct. 1792, 44 L.Ed.2d 363 (1975). The Court in *Bloom* does not appear to have considered the effects which many small, owner-operated mine operations might collectively have on commerce. The Court in *Bosack* considered these effects and determined that such operations or their products affect commerce.

The Respondent's second argument asserts that the 1977 Mine Act's coverage does not extend to small, family-owned and operated mines in which the owners are the only miners. (FOOTNOTE 5) This argument is without foundation because owner-operated mines in which the owners are the only miners have been held to be subject to the provisions of the 1977 Mine Act. *Marshall v. Sink*, 614 F.2d 37, 38 n. 2 (4th Cir. 1980); *Marshall v. Kraynak*, 604 F.2d 231 (3rd Cir. 1979); *Marshall v. Kniseley Coal Company*, 487 F. Supp. 1376 (W.D. Pa. 1980); *Marshall v. Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978); *Marshall v. Bosack*, 463 F. Supp. 800 (E.D. Pa. 1978); *Secretary of the Interior v. Shingara*, 418 F. Sup. 693 (M.D. Pa. 1976).

The Respondent's third argument asserts that nonconsensual safety and health inspections conducted without a search warrant violate the right guaranteed by the Fourth Amendment to the United States Constitution to be free from unreasonable searches and seizures. This argument is rejected. The United States Supreme Court has held that warrantless safety and health inspections authorized by section 103(a) of the 1977 Mine Act are constitutionally permissible and do not violate the Fourth Amendment. *Donovan v. Dewey*, No. 80-901 (U.S. Supreme Court, filed June 17, 1981). See also, *Marshall v. Sink*, 614 F.2d 37 (4th Cir. 1980); *Marshall v. The Texoline Company*, 612 F.2d 935 (5th Cir. 1980); *Marshall v. Nolichuckey Sand Company*, 606 F.2d 693 (6th Cir. 1979); *Marshall v. Stoudt's Ferry Preparation Company*, 602 F.2d 589 (3rd Cir. 1979); *Marshall v. Cedar Lake Sand & Gravel Company, Inc.*, 480 F. Supp. 171 (E.D. Wis. 1979); *Marshall v. Donofrio*, 465 F. Supp. 838 (E.D. Pa. 1978); *aff'd.*, 605 F.2d 1194 (3rd Cir. 1979).

Finally, the Respondent argues that the May 11, 1978, denial of entry was lawful because active mining and milling operations were not underway at the time of the attempted inspection. This argument is without foundation because it appears that the Respondent was performing maintenance work and delivering agricultural lime to customers on May 11, 1978. In *Marshall v. Gilliam*, 462 F. Supp. 133 (E.D. Mo. 1978), it was held that the cessation of active mining operations in the pit area does not suspend the provisions of the 1977 Mine Act when the mine operator continues to load and ship previously mined minerals from his stockpile. So long as the operator continues to load and ship minerals from his stockpile, he may be inspected and regulated under the 1977 Mine Act.

The Respondent also appears to argue that a civil penalty cannot be imposed in this proceeding because a section 108(a)(1) injunction had not been

entered as of May 11, 1978. This argument is rejected. In Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1702, 2 BNA MSHC 1376, ---- CCH OSHD par. ---- (1981), the Commission held that a mine operator who denies an authorized representative of the Secretary the right of entry for the purpose of conducting an inspection commits a violation of section 103(a) of the 1977 Mine Act for which a civil penalty must be assessed. The Commission expressly rejected the argument that the Secretary's exclusive remedy is an injunction under section 108(a)(1), stating that the statute provides the Secretary with dual remedies: "an administrative remedy under sections 104 and 110(a), and a civil injunctive remedy under section 108(a)(1)." 3 FMSHRC at 1704.

In view of the foregoing, I conclude that the Respondent committed a May 11, 1978, violation of section 103(a) of the 1977 Mine Act for which a civil penalty must be assessed in this proceeding.

C. Negligence of the Operator

Federal mine inspector Robert C. Goins attempted to conduct an inspection at the Respondent's Sherman Lime and Rock Quarry on October 6, 1977, pursuant to the provisions of the Federal Metal and Nonmetallic Mine Safety Act of 1966, 30 U.S.C. | 721 et seq. (1966 Metal Act). (FOOTNOTE6) The Respondent refused to allow Inspector Goins to conduct the inspection.

Mr. Thomas Eder testified that a "mutual agreement" existed amongst the partners which predated May 11, 1978, to refuse entry to Federal mine inspectors. He further testified that he agreed with his sons' decision to refuse entry to Inspectors Goins and Davidson.

In view of the foregoing, it is found that the May 11, 1978, denial of entry was accompanied at least by ordinary negligence.

D. Gravity of the Violation

A denial of entry is a serious violation of the 1977 Mine Act. One of the principal purposes of inspections conducted pursuant to the provisions of the 1977 Mine Act is to detect violations of the mandatory health and safety standards and to determine whether imminent dangers exist, and to order the abatement of any violations or imminent dangers found so as to remove the associated hazards from the miners' work environment. Absent entry to the mine, these salutary and Congressionally mandated objectives cannot be achieved.

Additionally, Inspector Goins gave testimony which indicated that the violation was serious, and his testimony on this point was not rebutted by the Respondent. In fact, the Respondent appeared to concede during his closing argument that "plenty" of safety factors needed correction.

In view of the foregoing, it is found that the violation was serious.

E. Good Faith in Attempting Rapid Abatement

Mr. Thomas Eder testified that he is unwilling to comply with Judge Doyle's November 2, 1978, order and allow Federal mine inspectors to inspect his property. He testified that he would prohibit Federal mine inspectors from conducting inspections, and indicated that he would temporarily close the mine in order to avoid an inspection.

F. Size of the Operator's Business

The parties stipulated that the Respondent is a small, family-owned business, and that the Sherman Lime and Rock Quarry produced approximately 2,000 tons in 1978.

In view of the foregoing, it is found that the Respondent is small in size.

G. History of Previous Violations

The Secretary concedes that the Respondent has no history of previous violations (Tr. 73).

H. Effect of a Civil Penalty on the Operator's Ability to Remain in Business

No evidence was presented to establish that the assessment of a civil penalty in this proceeding will affect the operator's ability to remain in business. (FOOTNOTE 7) In Hall Coal Company, 1 IBMA 175, 79 I.D. 668, 1 BNA MSHC 1037, 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 civil penalty will affect the operator's ability to remain in business is within the operator's control, resulting in a rebuttable presumption that the operator's ability to continue in business will not be affected by the assessment of a civil penalty.

Therefore, I find that a civil penalty otherwise properly assessed in this proceeding will not impair the Respondent's ability to remain in business.

VI. Conclusions of Law

1. The Sherman Lime and Rock Company and its Sherman Lime and Rock Quarry have been subject to the provisions of the 1977 Mine Act at all times relevant to this proceeding.

2. Under the 1977 Mine Act, the Administrative Law judge has jurisdiction over the subject matter of, and the parties to, this proceeding.

3. Federal mine inspector Robert C. Goins was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation No. 287437.

4. The violation charged in Citation No. 287437 is found to have occurred as alleged.

5. All of the conclusions of law set forth in Part V of this decision are reaffirmed and incorporated herein.

VII. Proposed Findings of Fact and Conclusions of Law

The Respondent delivered a closing argument on March 12, 1981. The Secretary and the Respondent filed posthearing briefs on April 21, 1981, and August 3, 1981, respectively. The Secretary filed a reply brief on August 19, 1981. Such briefs and closing argument, insofar as they can be considered to have contained proposed findings and conclusions, 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 ground 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.

VIII. Penalty 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 a civil penalty is warranted as follows:

Citation No.	Date	Section	Penalty
287437	May 11, 1978	103(a)	\$200

"1. I am an authorized representative of the Secretary of Labor employed by MSHA as a Metal and Nonmetal Mine Inspector and assigned to the Madison, Wisconsin field office. In this capacity I conduct inspections and investigations of mines pursuant to Section 103 of the Federal Mine Safety and Health Act of 1977. I have personal knowledge of the facts and circumstances contained herein.

"2. On May 11, 1978, accompanied by John L. Davidson I went to the Sherman Lime and Rock Company quarry located west of Menomonie, Dunn County, Wisconsin. The mine is owned by Tom Eder and operated by him and his two sons, Pat and Mike.

"3. We arrived at the quarry at 7:30 A.M. and met Pat Eder at the gate. He approached our car and asked what we wanted. We introduced ourselves and informed him that we were on his property to conduct an inspection. Mr. Eder asked, 'What is there to inspect?' At this point Mike Eder arrived and joined in the conversation.

"4. Mike Eder stated that the company, being family owned and not having any employees, was not within the coverage of the Act. We explained to Mr. Eder that we believed that Public Law 95-164 applied to their mine.

"5. Mike Eder said, 'If I allow you in here now, you could come any time and close us down. No one is coming in here to inspect us.' We asked both brothers if they were denying us the right of entry. Both brothers responded, 'Yes.'

"6. We explained to the Eders that we would be required to issue a citation for their refusal of the statutory right of entry. The brothers told us to issue the citation but that we would not be allowed on the property to inspect. They also would not accept the citation, and therefore had to be mailed by certified mail to the company office.

"7. We left the property at 8:25 A.M."

~FOOTNOTE_FOUR

4 Section 3(h)(1) of the 1977 Mine Act provides as follows:

"'[C]oal or other mine' means (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In 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."

Operations such as the Respondent's have been held to fall within this definition. Waukesha Lime and Stone Company, Inc., 3 FMSHRC 1702, 2 BNA MSHC 1376, ---- CCH OSHD Par. ---- (1981).

~FOOTNOTE_FIVE

5 Section 3(g) of the 1977 Mine Act defines the term "miner" as "any individual working in a coal or other mine." Thomas, Patrick, and Michael Eder each fall within this definition.

~FOOTNOTE_SIX

6 The Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 STAT. || 1290-1322, amongst other things, enlarged the definition of mine set forth in section 3(h) of the 1969 Coal Act to include those mines previously covered by the 1966 Metal Act. S. Rep. No. 95-181, 95th Cong., 1st Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT OF 1977 at 647 (1978).

~FOOTNOTE_SEVEN

7 Business and tax records are the type of evidence necessary to establish a claim of financial impairment. Hall Coal Company, 1 IBMA 175, 180, 79 I.D. 668, 1 BNA MSHC 1037, 1971-1973 CCH OSHD par. 15,380 (1972), see also, Davis Coal Company, 2 FMSHRC 619, 1 BNA MSHC 2305, 1980 CCH OSHD par. 24,291 (1980) (Lawson, C., dissenting).