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SOL (MSHA) V. RAID QUARRIES
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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 PROCEEDINGS DOCKET NO. CENT 80-66-M A/O No. 13-00183-05002 F
v.	
RAID QUARRIES, DIVISION OF MEDUSA AGGREGATES COMPANY, RESPONDENT	DOCKET NO. CENT 80-199-M A/O No. 13-00183-05003 A
AND	DOCKET NO. CENT 80-200-M A/O No. 13-00183-05004 A
JAMES ANDERSON, RESPONDENT	DOCKET NO. CENT 80-378-M A/O No. 13-00183-05006 A
AND	
ROBERT ORR, RESPONDENT	MINE: Heinold Quarry

DECISION

Appearances:

J. Philip Smith Esq.
Office of the Solicitor, United States Department of Labor
4015 Wilson Boulevard, Arlington, Virginia 22203,
For the Petitioner

Gene R. Krekel Esq.
P.O. Box 1105
200 Jefferson, Burlington, Iowa 52601,
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The above four cases, which were consolidated for hearing, involve alleged violations of section 110(a) and 110(c), respectively, of the

Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. 820(a) and 820(c)(Supp. III, 1979). (FOOTNOTE 1)

Docket No. CENT 80-66-M involves a petition by the Secretary of Labor, (Secretary), under section 110(a) of the Act, for assessment of civil penalties against Raid Quarries, a division of Medusa Aggregates Company, (Medusa) for alleged violations of mandatory safety standards 30 C.F.R. 56.9-22 and 56.9-2. (FOOTNOTE 2)

Docket Nos. CENT 80-199-M and CENT 80-200-M involves petitions by the Secretary under section 110(c) of the Act, for assessment of civil penalties against James Anderson, (Anderson), superintendent of the Heinold Quarry for Medusa, with knowingly authorizing, ordering, or carrying out, violations of 30 C.F.R. 56.9-22 and 56.9-2.

Docket No. CENT 80-378-M, involves a petition by the Secretary under section 110(c) of the Act, for assessment of a civil penalty against Robert Orr, as vice president and general manager of Raid Quarries, a division of Medusa, with knowingly authorizing, ordering or carrying out violation of 30 C.F.R. 56.9-22.

A hearing was held in Burlington, Iowa, where all parties were represented by counsel. Post hearing briefs were filed.

At the conclusion of the hearing, petitioner moved to dismiss the petition against respondent Robert Orr (Docket No. CENT 80-378-M) due to

insufficient evidence to prove this case. The petitioner's motion is hereby AFFIRMED.

STIPULATION

The parties stipulated to the following:

1. Raid Quarries, a division of Medusa Aggregates Company, and the mine, Heinold Quarry, is engaged in an activity covered under the Federal Mine Safety and Health Act of 1977.

2. James Anderson and Robert Orr were employees of Raid Quarries, a division of Medusa Aggregates Company.

3. Medusa Aggregates Company is a large mine operator under the Act.

4. That if the penalties proposed were assessed against Medusa Aggregates Company, it would not be forced to go out of business.

5. Medusa Aggregates Company is a corporate entity.

6. In the event violations are found in Docket No. CENT 80-66-M the previous history of violations of respondent Medusa is such that it should neither increase nor decrease the civil penalties.

ISSUES

1. Whether respondent Medusa violated 30 CFR 56.9-22 and 56.9-2 as the corporate mine operator, and, if so, the appropriate amount of civil penalty which should be assessed against it for each such violation pursuant to section 110(a) of the Act?

2. Whether respondent James Anderson knowingly authorized, ordered, or carried out the aforesaid violations as an agent of the corporate operator, and, if so, the appropriate amount of civil penalty which should be assessed against him individually for each such violation pursuant to section 110(c) of the Act?

FINDINGS OF FACT

1. On May 21, 1979, a fatal accident occurred at the Heinold Quarry owned and operated by Raid Quarries, a division of Medusa Aggregates Company.

2. Heinold Quarry is a limestone mine located in Danville, Des Moines County, Iowa.

3. Respondent Medusa is a large mine operator under the Act, presently owning and operating some 31 mines.

4. Respondent James Anderson was superintendent of the J. Plant for Raid Quarries division of Medusa at the Heinold Quarry

at all pertinent

times herein. As superintendent he had approximately 16 to 17 miners and the equipment used at the quarry under his supervision. Anderson has considerable experience in the operation and maintenance of heavy equipment including the Michigan Clark 275B end loader involved in the accident which occurred on May 21, 1979.

5. Heinold Quarry was reopened for production with the J Plant, a portable plant, arriving about April 30, 1979. After the machinery for the plant was set up, work was started on widening and resurfacing the haul road. This road had been used in 1978 but had suffered damage caused by heavy rains to the surface.

6. Material used for widening and resurfacing the haul road was secured from a stockpile left over from the prior year and waste material from the mining process commenced in 1979. The mining process involved first removing eleven feet of merchantable stone exposing five feet of shale which was considered waste and to be used on the haul road. The road had been widened to provide two lanes of travel for a distance of approximately 175 feet during the week prior to May 21, 1979. In widening the road, the surface had been built up approximately 12 to 18 inches. This eliminated the berm that had existed on this haul road during the previous year.

7. There was production of merchantable material from Heinold Quarry during the week prior to May 21, 1979. During this period of time, the haul road was also being widened and resurfaced. Respondent Anderson intended to build a berm on the outer edge of the road when it was completed which was estimated would take two weeks.

8. On May 15, 1979, respondent Anderson, while performing maintenance on the Michigan Clark 275B end loader, discovered that the right rear brake cam shaft was broken. Anderson unhooked the airline to the brake chamber and blocked off the line (Tr. 244 and 277). Greg Hensley was generally assigned to operate the 275B end loader, and used the machine for three days after the broken airline was plugged (Tr. 245). Replacement parts were ordered for this machine on May 15, 1979 (Tr. 277).

9. On May 21, 1979, Steven Knotts, age 19, reported to the Heinold Quarry to begin his regular work as an end loader operator. He was assigned to operate the 275B end load which was not the machine he usually ran. He usually operated the Caterpillar 980 which was similar to the 275B. Knotts initially operated the 275B end loader in the lower pit loading haul units. Respondent Anderson operated the end loader on May 21, 1979 to show Knotts how to use this machine on decline mucking (Tr. 279, 280). At approximately 4:30 p.m., Knotts drove the machine to the maintenance area of the quarry for greasing and fuel (Tr. 287). Knotts was to work an additional two hour shift after normal production hours on removing shale and rebuilding the haul road (Tr. 287).

10. Upon leaving the maintenance area Knotts drove the 275B end loader through the stockpile area, made a right turn to go down a ramp for

a distance of approximately 225 feet where he made a 90 degree turn on the main ramp or haul road. Knotts proceeded to travel down this haulage road approximately 110 feet when the end loader made a 35 degree turn to the right going over an embankment. The end loader traveled 80 feet down the bank from the edge of the haul road to its resting place. Knotts was thrown from the end loader and covered with loose material and expired due to asphyxiation.

11. The Michigan Clark Model 275B front-end loader involved in this fatal accident was equipped with a 7-cubic-yard capacity bucket and had tire protection chains on all four wheels. It was also equipped with seatbelts and a rollover protection type cab and weighed approximately 90,000 pounds gross weight with all of the above equipment installed. The brakes were four-wheel straight air, shoe type.

12. The haul road was 20 feet wide at the point where the accident occurred with approximately a ten percent grade. Weather was warm and visibility good at the time.

DISCUSSION

DOCKET NO. CENT 80-66-M

As a result of an investigation of the fatal accident occurring on May 21, 1979, two citations were issued to respondent Medusa. Citation No. 178555 charged a violation of mandatory safety standard 30 C.F.R. 56.9-22 and stated as follows:

> A berm was not installed along the outer edge of the elevated haulages road for approximately 100 feet south and 50 feet north of the point where the end loader went over the edge. The absence of a berm could have been a contributing factor to the fatal accident.

Order No. 178558 cited a violation of the mandatory safety standard 30 C.F.R. 56.9-2 and stated as follows:

> During the safety inspection of the Michigan end loader, Model 275B Serial No. 425C485, that was involved in the fatal accident on May 21, 1979, it was discovered that the right rear brake shaft was broken, the brake air line unhooked and plugged by Jim Anderson, superintendent.

Petitioner argues that the absence of a berm on the haul road had existed for several weeks prior to the accident and that during this time the road had been used for production purposes. (FOOTNOTE 3)

Respondent argues that an adequate berm had been present on this haul road prior to April 30, 1979, but the height of the berm was decreased

when the surface of the road was filled in and widened upon opening the quarry in 1979. Also, respondent argues that a berm did exist on May 21, 1979 which would restrain a vehicle traveling on the haul road and that further construction on said berm was to be part of rebuilding this road which was to be completed within two weeks. (FOOTNOTE 4)

After careful consideration of the arguments presented by the parties, and particularly the facts presented in this case, I conclude that petitioner's position is correct and that respondent's arguments must be rejected. (FOOTNOTE 5) A preponderance of the evidence including a visual examination of the photographs taken on May 23, 1979, shows an absence of sufficient material to constitute a berm at the point on the road where the end loader went over the embankment (Exhibits P7 thru P12). MSHA inspector Lyle K. Marti testified that upon his arrival at the accident scene, he observed that the haul road ran from the plant area at the south end of the quarry down a 9 to 10 percent grade for approximately 220 feet where the end loader went over the embankment. For a distance of 50 feet to the south and 100 feet to the north, there was some material approximately eight to twelve inches high which he did not consider would constitute any berm whatsoever (Tr. 32, 38 and 122). Inspector Doyle Fink testified that no berm existed at the location where the end loader went over the embankment due to fill material being used to build up the road surface (Tr. 348).

The respondent's argument that the material existing on the edge of the haul road constitutes an adequate berm must be rejected. A berm is defined in 30 C.F.R. 56.2 as follows:

> "Berm" means a pile or mound of material capable of restraining a vehicle.

Respondent did not contend, and rightly so, that the material along the outer edge of the haul road would restrain or prevent the end loader from going over the edge of the embankment. However, respondent proposes that because the roadway was under construction and repair, a berm was not required. I reject this argument for the reason that the haul road was being used on a daily basis for production of material from the quarry and had been so used for a period of time prior to the fatal accident.

The intent of the mandatory safety stand 56.9-22 is to provide protection for men and equipment when required to travel along elevated roadways while performing work connected with the mining process. I find the respondent knew that the berm was not adequate. The evidence shows

that superintendent Anderson had intended to use waste material from the production of marketable material at the quarry to repair and widen the haul road and that such work on the road would be done after the regular production of the day was concluded. That was what Knotts was on his way to do on the day of the accident. After the accident, respondent hired a contractor to finish the work on the haul road and install an adequate berm which took only three and a half days to complete (Tr. 304).

As to Order No. 178558, respondent admits that the right rear brake shaft was broken and that he plugged the air line on the 275B end loader involved in the fatal accident (Tr. 277). However, respondent argues that the brakes were adequate and that the end loader was otherwise in good mechanical condition. Further, that the evidence does not conclusively show that the broken brake shaft and plugged airline contributed in any way to the accident.

I find respondent's arguments unpersuasive. The standard 56.9-2 cited in this violation provides that equipment defects affecting safety shall be corrected before the equipment is used. The defect in this instance involved the brakes on the 275B end loader which respondent admitted were defective. That is, they were not mechanically the same as they were when the end loader was designed, manufactured, and sold. The question is whether the alterations to the braking system effected the safe use of this machine? The applicable law is stated in Ziegler Coal Company, 3 IMBA 336, 373 (1974) wherein the Interior Board held as follows:

> The presence of defective equipment in a working area of a mine is prima facie evidence of the violation of the Act; however, such evidence can be rebutted by the operator, and where he demonstrated by a preponderance of the evidence that the equipment was under repair, and had not been used, and was not to be operated until it met the required safety standards, no violation of the Act has occurred.

The evidence shows that the end loader was placed in use after the brake was disconnected. No argument can be made that the brakes were not defective. However, respondent argues that the brakes were adequate. The 275B end loader with tire chains and additional equipment installed weighed approximately 90,000 pounds gross and was operated in the quarry on roadways used by other machines and employees of the respondent. Superintendent Anderson who disconnected and plugged the airline to the right rear brake testified that he felt the brakes were "adequate' but admitted that it would have "some" affect on the safe operation of the end loader (Tr. 308-310). I find that the preponderance of the evidence shows that the action taken by Anderson in plugging the airline to the right rear wheel brake on the end loader would affect its braking capacity and could affect safety as a result of its continued use at the quarry.

STATUTORY CRITERIA

Section 110(i) of the Act requires that the following criteria be considered in the assessment of a civil penalty:

> [t]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The parties offered stipulations regarding each of these criteria except for respondent Medusa's negligence and the gravity of the violation.

NEGLIGENCE

As to the violation of 56.9-22, the record shows that respondent Medusa failed to install a berm of adequate height on the outer edge of an elevated roadway. Further, respondent knew that a berm is required in this instance, but contends that the roadway was unfinished and therefore a berm could not be permanently installed.

MSHA inspector Marti testified that a "moving berm" could be used in cases such as this but respondent's witness denied knowledge of such a berm. Further, respondent argued that the fact that they fully intended to install a berm when the road was completed should be considered in assessing any penalties in this case.

The facts show that respondent Medusa had operated the quarry for several weeks without a berm on the elevated road, as it was to its advantage to resurface and widen the road from waste materials secured through the mining process. After the accident, the road was finished and the berm was built in a period of three and a half days indicating that this could be accomplished in a short period of time.

The evidence did not show that a lack of a berm was the direct cause of the fatal accident involved herein. However, it is reasonable to assume that an adequate berm could have stopped or deflected the end loader from going over the embankment as the evidence shows that the machine was traveling at a slow rate of speed when the accident occurred.

In view of the above, it is found that respondent Medusa was negligent in its failure to comply with the requirements of the standard 56.9-22.

As to the violation of 56.9-2, the record shows respondent Medusa, through its agents and employees, was aware of the defect in the braking system of the Michigan 275B end loader. The

respondent's employee Greg Hensley operated the end loader for three days after the airline had been

disconnected and plugged and testified the brakes worked satisfactory. Anderson tested the brakes and operated the machine after the airline was plugged and encountered no loss of braking power. Based upon this, respondent contends that the disconnected airline did not affect safety at the mine.

Admittedly, there is no evidence to show that the condition of the brakes on the end loader was directly involved in this accident. However, the contrary is also true as no evidence was presented by the respondent to show that the brakes were not involved in this accident. The facts do establish that respondent's employees made temporary repairs on the braking system of a large piece of equipment to be used in a quarry on uneven and inclined roadways with dangerous embankments. Further, respondent Medusa knew or should have known this machine would be operated by other than the regular operator, in this case Knotts, who was not experienced with the operation of this particular machine. I conclude that this machine with less than full braking power could affect safety.

In view of the above, it is found that respondent Medusa was negligent in its failure to comply with the requirements of 56.9-2.

GRAVITY

As to the violation of 56.9-22, the petitioner does not allege that the accident in this case was caused directly by the lack of a berm. However, I am convinced that the lack of an adequate berm at the point on the haulage road, where the end loader went over the edge and down the embankment resulting in the operators death, points out the results that can be anticipated from the failure to comply with the requirements of the berm standard.

As to the violation of 56.9-2, by plugging the airline to one of the brakes on the 275B end loader, respondent Medusa could foresee that such actions on the part of its employees could affect the safety of the operator and other miners in the quarry. Admittedly, Anderson and Hensley testified that the end loader's brakes performed satisfactory after the airline was disconnected. However, Anderson admitted that the condition of the brakes could affect safety. The size of the end loader and the area where it was required to be operated requires that it have full performance of its braking system. Anything less should be foreseen by respondent as inviting a possible accident, similar to the type that occurred on May 21, 1979.

Petitioner does not allege that the violation of 56.9-2 directly caused the accident involved herein. However, such a result can be anticipated from such a violation.

GOOD FAITH COMPLIANCE

As to the violation of 56.9-2, abatement was achieved in a timely manner by hiring an outside contractor to finish the

roadway and install an adequate berm. As to the violation of 56.9-22, rapid abatement was

achieved by obtaining the replacement parts immediately and installing them to bring the end loader to a safe operating condition (Tr. 96).

The inspector testified and I concur that the respondent exercised good faith in achieving rapid compliance in this case.

PENALTY

The original proposal for assessment of penalties in Docket No. Cent 80-66-M was the maximum penalty of $10,000 for violation of 30 C.F.R. 56.9-22 and $10,000 for violation of 30 C.F.R. 56.9-2. The petitioner urges that these penalties be adopted in this case. (FOOTNOTE 6)

Respondent Medusa argues that it was not in violation of the standards cited. However, assuming that the violations did occur, the proposal of maximum penalties is unreasonable considering the factors required by law to be applied in assessing a penalty. (FOOTNOTE 7)

As stated before, I have determined that the preponderance of the evidence shows that respondent Medusa was in violation of the two mandatory safety standards cited. However, I find there are several mitigating circumstances that should be considered in arriving at a proper penalty for these violations. Although respondent Medusa would be considered a large company in this type of business in that it operated 54 active quarries at the time of the occurrence, it was agreed to in the stipulation between the parties that Medusa had incurred an unimposing number of violations which should neither increase or decrease the civil penalty to be imposed. Further, Medusa demonstrated good faith in achieving rapid abatement of these violations. I find that the above considerations should be given its proper weight in fixing the amount of these penalties. The Fifth Circuit Court of Appeals considered a similar question in the case of Allied Products Company v. Federal Mine Safety and Health Administration Review Commission, Court Docket No. 80-7935,___ Fed 2d ___, (February 1, 1982) and opined that the $10,000 civil penalty provided for in 30 U.S.C. 820(i) refers to the maximum that can be assessed for a violation and that penalties approaching that amount would be used only in the most severe situations. The court went on to state as follows:

> We do not doubt that these violations were serious ones, and the death of an employee is always a serious matter. The berm and ROPS rules, especially, are designed to protect employees regardless of, even in spite of, their fault or misconduct. . . . However, the law does not authorize or suggest that maximum fines are to be imposed whenever a fatality occurs.

In light of the mitigating circumstances referred to above and the Court's decision in Allied Products Company, I find that a proper penalty for the violation of 30 C.F.R. 56.9-22 is $1,000 and the proper penalty for the violation of 30 C.F.R. 56.9-2 is $1,000.

DOCKET NOS. CENT 80-199-M and CENT 80-200-M
BACKGROUND

On February 25, 1980, the Secretary of Labor filed a Petition for Assessment of Civil Penalty, pursuant to section 110(c) of the Act against James Anderson. The two citations were assigned docket number Cent 80-199-M and docket number Cent 80-200-M and were combined in one petition predicated on the claim that James Anderson (Anderson), acting as the statutory agent of the corporate operator, within the meaning and scope of section 3(e) and 110(c) of the Act, knowingly authorized, ordered, or carried out the corporate operator's violations of 30 C.F.R., section 56.9-22 cited in citation no. 178555 and section 56.9-2 cited in order no. 178558.

DISCUSSION

Respondent Anderson argues that there was no knowing violation on his part of the berm violation contained in citation no. 178555. Respondent Anderson contends that, while he was aware of the condition of the haul road, it was his belief that a new berm could be built as part of the project to resurface and widen the road. He insists he was taking steps to make the haul road safer for the miners who were to use it.

Respondent further contends that he did not knowingly violate the mandatory safety standard 56.9-2 as it was his honest belief that after he disconnected the right rear brake on the 275B end loader, it had adequate brakes and was safe to operate.

The question here is whether Anderson "knowingly" failed to have a berm placed on the outer edge of the elevated haul road and "knowingly" placed the 275B end loader back in service after discovering the broken brake cam.

The Review Commission considered the definition of the term "knowingly" in the case of Secretary of Labor, Mine Safety and Health Administration v. Kenny Richardson, Barb 78-600P, (January 19, 1981) and held that the term "knowingly" under this provision means "knowing or having reason to know", and stated:

> If a person in a position to protect employees safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

The preponderance of the evidence in this case shows that Anderson knew that a berm was required on the elevated road in

the mine. He had

worked as superintendent of a plant for Raid Quarries since 1967 (Tr. 261). He was required to hold at least a one-half hour safety meeting every month for his employees (Tr. 266). Anderson testified he was responsible for resurfacing the haul road as part of setting up the J Plant at the Heinold Quarry when it was opened in April 1979 (Tr. 269). I reject Anderson's argument that he thought he could build a berm on the haul road as production at the quarry continued and work could be done on the road using waste material that was left over. Anderson had the responsibility to protect his employees safety and health and based upon his experience and the fact that he taught safety classes, had the knowledge or reason to know that the absence of an adequate berm was a violation of the safety standard. The fact that the end loader went over the embankment where there was not an adequate berm points up to the danger that existed to employees using the elevated haul road during the production of stone. This possibility should have been forseen by the respondent based upon his experience and knowledge.

Respondent admits that he discovered the broken brake cam on the 275B end loader during his investigation of a complaint by the operator that the brakes were not working properly (Tr. 276). He admitted that he disconnected and plugged the airline to the right rear brake fully eliminating this one brake out of the four on the machine (Tr. 307). However, he argues that the remaining brakes were adequate. He states that he drove the machine after disconnecting the brake and did not find it defective (Tr. 281). On direct examination respondent testified that when he operated the 275B end loader on May 21, 1979, to show Knotts how to run it on an incline, there was no problem that affected safety (Tr. 281). However, under cross examination, respondent testified in the following manner:

> Q. Well, you told us here earlier that you didn't have any problem with the brakes at all with the condition they were in. I'm curious why you ordered the part.
>
> A. Well, even though I didn't experience a direct problem at that time, suppose I had broke another one. Then it could catepult into a more serious mess.
>
> Q. Did you order parts because you knew that the machine had lost some of its safety as a result of that right-rear brake assembly being completely eliminated from this 91,000 pound machine?
>
> A. I'd have to say, yes.
>
> Q. Isn't it a true statement, sir, that you wanted to keep that machine in production and in use at the plant?

A. Yes.

Q. That's what I'm asking. It is your statement, sir, that the broken cam on the right-rear assembly of the Michigan front-end loader, and the plugging of the air line, did not affect the safety of that machine at all?

A. I don't believe I stated that it wouldn't affect the safety of the machine at all.

Q. Do you feel that it did have some effect on the safety?

A. I'm sure it did.

Q. Do you feel this now in retrospect or did you feel this at the time prior to the accident?

A. Both. (Tr. 310).

I find the record shows that Anderson failed to remove the end loader from service on May 15, 1979, when he discovered the broken brake cam and he knew or should have known it was unsafe to operate it in this condition. Further, Anderson ordered Knotts to operate the machine on the day of the fatal accident when he knew or should have known the machine was unsafe.

STATUTORY CRITERIA

Section 110(c) of the Act regarding the assessment of a civil penalty states in part as follows:

> Whenever . . ., any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties, fines, . . . that may be imposed upon a person under subsections (a) and (d). (Emphasis added).

Section 110(i) of the Act requires that the same six criteria be applied to the individual as was applied in determining a penalty against respondent Medusa.

NEGLIGENCE

The preponderance of the evidence shows that respondent Anderson was negligent in the acts that constituted the violations of both 56.9-22 and

56.9-2. He was in charge of both the opening and operating of the Heinold Quarry including the repair and construction of the haul road, production, employees and equipment. It was his decision that the road be worked on while mining and production of material continued. He cut the airline to the brake on the 275B end loader and ordered Knotts to operate the machine in this defective condition.

GRAVITY

The aforementioned action on the part of respondent Anderson was serious in nature for it exposed the miners to the possibility of a serious injury and even death to employees as occurred to Knotts on May 21, 1979.

The evidence in this case did not establish a direct cause between the lack of a berm on the haul road or faulty brakes on the end loader and the subsequent fatal accident. However, a reasonable man can conclude that the end loader would have stopped or had its direction changed by an adequate berm and that effective brakes may have stopped the machine from going over the edge of the embankment.

The record establishes that respondent Anderson cooperated fully in the investigation of the accident, and in the expeditious and rapid good faith abatement of these violations.

ABILITY TO PAY

Respondent Anderson's gross salary in 1979 was $21,800.00. At the time of the hearing his salary was $23,400.00. He supports a wife and six children, who presently live with him and pays $400.00 per month in support to an ex-wife and one child from a prior marriage. He owns his residence which is mortgaged but does not own other real estate.

PENALTY

The original proposal for assessment of penalty in this case was that respondent Anderson pay a sum of $400.00 for violation of section 56.9-22 and $1,000.00 for violation of section 56.9-2.

The Secretary proposes that Anderson pay $2,000.00 for each violation or a total of $4,000.00.

The evidence which militates for very substantial penalties in this case is the seriousness of the two violations and the capability of the respondent Anderson as the supervisor of this plant and machine, in allowing two serious hazards to exist which jeopardized the life and health of his fellow miners. However, mitigating factors to be considered in this case is the fact that the evidence does not show any history on Anderson's part of previous violations and that he exhibited good faith in assisting the MSHA inspectors with their investigation following the fatal accident and in attempting to achieve rapid compliance with the standards after the

inspector notified him of the violations. Anderson was totally straight forward in his testimony that he thought the brakes on the end loader were adequate and that the berm was not necessary until after the road was widened and filled. Further, Anderson is in a relatively disadvantageous economic position due to the many members in his family subject to his support.

Respondent Anderson is assessed a penalty in Docket Cent 80-199-M for violation of 30 C.F.R. 56.9-22 of $200.00 and a penalty in Docket No. 80-200-M for the alleged violation of 30 C.F.R. 56.9-2 of $200.00 or a total of $400.00.

ORDER

The petition filed in Docket Cent 80-378-M, Robert Orr, respondent is dismissed.

In Docket No. CENT 80-66-M, respondent Raid Quarries, a division of Medusa Aggregates Company is ordered to pay a penalty of $1,000 for violation of 30 C.F.R. 56.9-22 and a penalty of $1,000 for violation of 30 C.F.R. 56.9-2 for a total of $2,000.

In Docket No. Cent 80-199-M, respondent James Anderson is ordered to pay a penalty of $200 for violation of 30 C.F.R. 56.9-22 and a penalty of $200 for violation of 30 C.F.R. 56.9-2 for a total of $400.

The above penalty assessments are to be paid within 30 days of this decision.

Virgil E. Vail
Administrative Law Judge

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~FOOTNOTE_ONE
1 Section 110(a) of the Act provides as follows: "The operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health or safety standard may constitute a separate offense."

Section 110(c) of the Act provides as follows:

"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon

a person under subsections (a) and (d)."

~FOOTNOTE_TWO
2 30 CFR 56.9-22 provides as follows: "Berms or guards shall be provided on the outer bank of elevated roadways."
30 CFR 56.9-2 provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

~FOOTNOTE_THREE
3 Petitioner's Brief, page 14.

~FOOTNOTE_FOUR
4 Respondent's Brief, page 12.

~FOOTNOTE_FIVE
5 I am aware of and considered the Judge's decision in Secretary of Labor, (MSHA) v. United States Steel Corp., KENT 81-136 (February 26, 1982) and I disagree with the decision he reached regarding the berm standard 56.9-22.

~FOOTNOTE_SIX
6 Petitioner's Brief, page 21.

~FOOTNOTE_SEVEN
7 Respondent's Brief, page 15.