

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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

APR 27 1982

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	CIVIL PENALTY PROCEEDING
Petitioner,)	DOCKET NO. WEST 80-75-M
v.)	A/C No. 45-01582-05005
BLACK RIVER SAND AND GRAVEL, INC.,)	Mine: Black River Pit
Respondent.)	

Appearances:

Faye vonWrangel, Esq., Office of Daniel W. Teehan, Regional Solicitor,
United States Department of Labor, Seattle, Washington
For the Petitioner

James L. Hawk, President, Black River Sand and Gravel
appearing Pro Se, Seattle, Washington
For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Federal Mine Safety and Health Administration, (MSHA), charges respondent with violating various safety regulations adopted under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held on July 7, 1981 in Seattle, Washington.

ISSUES

The issues are whether the proposed penalties are excessive.

STIPULATION

The parties stipulated that the violations existed on the date of the inspection, Respondent further reserved the right to show that the violations were not serious (Tr. 7).

CITATION 3545 10

This citation proposes a civil penalty of \$72 for the violation of 30 C.F.R. § 56.12-30. The cited standard provides as follows:

56.12-30 Mandatory. When a potentially dangerous condition is found it shall be corrected before **equipment** or wiring is energized.

The **evidence** shows that the outer insulation on respondent's cable had pulled apart. This involved a possible electrical hazard. If the ground fault was interrupted the area could be energized with resulting shock or electrocution to a worker (Tr. 13, 14).

CITATION 3545 13

This citation proposes a civil penalty of \$72 for the violation of the above cited electrical standard, 30 C.F.R. S 56.12-30.

The evidence shows that the cable to the jaw crusher was broken and within easy reach of ground level. The cable was located on a steel frame and workers could be electrocuted if the ground fault system failed (**Tr. 14-16, R-7**).

CITATION 354514

This citation proposes a penalty of \$72 for the violation of the above cited electrical standard, 30 C.F.R. § 56.12-30.

The evidence shows that the wires of the cable going **to the** second material conveyor had separated from the outer insulation at the junction box. The cable was hanging down in large loops (**Tr.15-16**).

CITATION 586007

This citation proposes a penalty of \$52 for the alleged violation of 30 C.F.R. § 56.16-5. The cited standard provides as follows:

56.16-5 Mandatory. Compressed and liquid gas cylinders shall be secured in a safe manner.

The evidence shows that there was an unsupported and untied acetylene bottle located next to a parts- trailer. The almost empty bottle was sitting atop a pile of rock. Workers as well as heavy equipment pass with seven or eight feet of the bottle (Tr. 16-19, 24).

This citation proposes a civil penalty of \$140 for the violation of the previously cited standard, 30'C.F.R. § 56.12-30.

The evidence shows that the power cable from the crushing plant was exposed to falling boulders (**Tr.** 18, R-3). Respondent abated this condition by abandoning this particular cable and **conveyor (Tr.** 32)

CONTENTIONS

Respondent contends that the violations are not serious, that human error is the greatest cause of injuries at the worksite, and finally respondent contends that OSHA has jurisdiction over this workaite rather than **MSHA.**

I disagree. The evidence establishes that all of the electrical hazards were potentially dangerous. If the ground fault failed electrocution could result.

The unsecured acetylene bottle is less serious than **the elect tic al** violations but as indicated petitioner proposes a lesser penalty **for** that violet ion.

Respondent further contends that human error is the cause of most **worksite** accidents. I disagree with respondent's argument. In these citations all of the defects involved equipment problems which are clearly under managerial control as well as ownership. Respondent's reliance on "**Fatalgrams**" (**R8**) and respondent's later accident involving a fatality is not relevant in this case.

Respondent 's final argument is that OSHA 1/ rather than **MSHA** has jurisdiction over its sand and gravel operation. **This** issue has been previously decided contrary to respondent's views. Cf Valley Rock Sand and Gravel **WEST** 80-3-M, 4 **FMSHRC** 113 (January 1982).

CIVIL PENALTIES

Section **110(i)** of the Act [**30 U.S.C. 820(i)**] provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the 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.

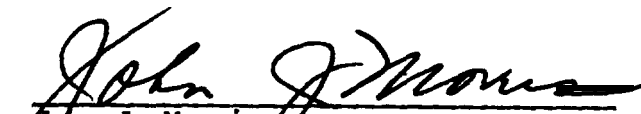
1/ Occupational Safety and Health Act, 29 U.S.C. 651 et seq.

In connection with the proposed penalties I note that Citation 586008 proposes a greater penalty than the other three violations of the same standard. In my view, petitioner has properly recognized the greater gravity that can be caused by the boulders falling on an extended cable. The penalty as proposed is, accordingly, a proper analysis of that violation compared with the other violations of the same standard. **Considering** the statutory criteria I am unwilling to disturb the petitioner's proposed penalties.

Based on the foregoing findings of fact and conclusions of law I enter the following

ORDER

1. Citations 354510, 354513, 354514, 586007 and 586008 and the proposed penalties therefore are **AFFIRMED**.
2. Respondent is ordered to pay the total sum of \$408 within 40 **days** of the date of this order.


John J. Morris
Administrative Law Judge

Distribution:

Faye vonWrangel, Esq.
Office of the Solicitor
United States Department of Labor
8003 Federal Building
Seattle, Washington 98174

Mr. James L. Hawk, President
Black Hawk Sand and Gravel, Inc.
68-8 South One Hundred Fortieth Street
Seattle, Washington 98178