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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. DENV 79-366-PM

v.

OATVILLE SAND & GRAVEL COMPANY,  
RESPONDENT

Appearances:

Eliehue C. Brunson Esq.  
Office of the Regional Solicitor, Tedrick A. Housh, Jr.  
United States Department of Labor  
Kansas City, Missouri 64106,  
For the Petitioner

Jeff Sturn Esq.  
Lambdin and Kluge  
Wichita, Kansas 67201,  
For the Respondent

Before: Judge John J. Morris

DECISION

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

After notice to the parties a hearing was held in Wichita, Kansas on September 21, 1982.

The Secretary filed a post trial brief.

ISSUES

The issues are whether respondent violated the regulations, and, if so, what penalties are appropriate. An additional issue is whether prior cases involving the same parties relieves respondent from liability in this case.

PETITIONER'S EVIDENCE

David Lilly, an MSHA inspector, issued eight citations against respondent on September 7, 1978. These were as follows:

Citation No.	C.F.R. Title 30 Standard Alleged Violated	Proposed Penalty
181535	56.14-8A	\$38
181536	56.12-25	38
181537	56.14-1	38
181538	56.18-12	34
181542	56.12-20	38
181551	56.9-32	34
181552	109A	16
181574	56.9-32	38

(Exhibit P-1-8)

Respondent dredges, screens, and sells its product (Tr. 11). There were two mechanics, as well as the foreman Lorenzo Hubbard, on the property (Tr. 27, 38). At the time of the inspection the dredge was not operating but they were removing sand from the stockpile (Tr. 36). Eisenring, the owner, stated he was in the process of selling the business (Tr. 36, 52).

Citation 181535(FOOTNOTE 1): A peripheral guard was missing on the side of a bench grinder in the shop area (Tr. 13, P1). The grinder, while not in operation, had been used since there was material on the floor (Tr. 13). A guard protects a person from being struck with pieces of an exploding flywheel (Tr. 13, 14). This could cause serious injuries (Tr. 14).

Citation 181536(FOOTNOTE 2): The three way plug was missing on the cord of an electric impact wrench. A two way plug eliminates the ground and thereby creates a shock hazard (Tr. 15, P-2). The wrench was in the same area as the grinder (Tr. 15). Eisenring said the wrench didn't belong to him or to his company (Tr. 16).

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Citation 181537(FOOTNOTE 3): In the area of the grinder and wrench a squirrel type fan was connected to a motor by a V belt. The V belt was not guarded. This condition could probably result in an injury (Tr. 16, 17, 18, P-3).

Citation 181538(FOOTNOTE 4): There were no telephone numbers posted anywhere on the property. There was a telephone in the scale house (Tr. 18-20, P-4). The office was accessible to all employees (Tr. 19-20).

Citation 181542(FOOTNOTE 5): A person working the electrical control switch would stand on wet ground. There was no insulation mat, wooden platform, or anything to stand on while using the main control switch box. The switch was in daily use. The operator should have been aware of this condition (Tr. 20-22, P-5). Possible burns in the hands and feet are hazards here (Tr. 21).

Citation 181551(FOOTNOTE 6): An old crane boom, extended partially across the roadway, was elevated at a 45 degree angle. The cables were rusty and weeds had grown in the area (Tr. 22, 23, P-6). Trucks and people pass this area.

Citation 181552(FOOTNOTE 7): The main office was not posted designating it as the office (Tr. 24, P-7).

Citation 181574(FOOTNOTE 8): The bed of a heavy-duty dump truck was raised to its maximum position. There were no stops to prevent the bed from falling if a hydraulic hose broke (Tr. 26, P8). When they observed the inspector approaching, two mechanics inserted a tie to prevent the bed from falling (Tr. 26).

#### RESPONDENT'S EVIDENCE

Victor B. Eisenring, the owner of Vic's Sand and Gravel, sold Oatville Sand and Gravel under a sale contract dated October 2, 1978 (Tr. 56, 57). At the time of the inspection in September 1978 they were in a cleanup mode (Tr. 57, 58).

Eisenring previously contested the same citations as were involved in the instant case. A hearing was held before Commission Judge George Koutras and these citations were settled for \$425 (Tr. 58-69, R1).

#### DISCUSSION

At the hearing this Judge took official notice of the Commission decision in CENT 79-40-M and CENT 79-41-M (Tr. 67, 68). The decision, by Judge George Koutras, is published at 2 FMSHRC 1522-1528. That case involves as respondents Oatville Sand and Gravel Dredge and Vic's Sand and Gravel Pit. Oatville Sand and Gravel is the respondent in the instant case.

A review of the prior decision indicates that the owner of these companies is mistaken when he asserts that the citations in this case were heard by Judge Koutras. The citations in their numbering as well as in their content are different.

In CENT 79-40-M: fourteen citations are in no way related to the allegations in this case. One citation, alleging a violation of Section 109(a) of the Act, parallels a citation here.

In CENT 79-41-M: four citations involve a lack of backup alarms. No such allegation is involved in this case.

It is true that all of the citations were issued about the same time. But it is equally clear that the doctrine of res judicata does not apply since the subject matter is different.

Respondent did not file a post trial brief but his arguments are of record (Tr. 81-83).

His initial position asserts that MSHA was dilatory in bringing its charges, that Eisenring was at a hearing in 1980, that the dates of violation are the same, and that inspector Lilly was present at the previous hearing.

I consider these to be a due process argument. Accordingly, it is in order to review the activities of this case which reflect the following:

1. September 7, 1978: citations issued and served on foreman Hubbard and Victor Eisenring.
2. February 28, 1979: petition for assessment of Civil Penalty filed with the Commission. Certificate of Service to Oatville Sand & Gravel.
3. March 22, 1979: Amended Certificate of Service filed. Copy served on Vic Eisenring.
4. October 3, 1979: Motion for order to show cause filed by Solicitor.
5. October 12, 1979: Order to show cause directed to respondent by Commission Chief Judge.
6. October 29, 1979: Response to order to show cause filed.
7. February 22, 1980: Notice of Jurisdiction entered by Judge Boltz.
8. July 30, 1981: Notice of Hearing setting case for October 9, 1981.
9. August 18, 1981: Order for Prehearing statement issued and amended Notice of hearing.
10. September 22, 1981: Case reassigned by Judge Boltz to Judge Morris.
11. September 24, 1981: Notice of Jurisdiction and amended notice of hearing setting case for October 9, 1981.
12. September 30, 1981: Letter from respondent requesting postponement of hearing.  
  
Order entered granting postponement.
13. October 5, 1981: Order cancelling hearing of October 27, 1981.
14. March 8, 1982: Notice of hearing setting case for June 17, 1982.
15. March 18, 1982: Hearing rescheduled.
16. May 21, 1982: Hearing set for September 21, 1982.
17. September 21, 1982: Hearing held, Wichita, Kansas.

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Respondent has known since December 21, 1978 that the eight citations in this case were pending against him. Constitutional due process does not require any specific form or content for pleadings as long as the parties are given adequate notice. S.S. Kresge Company v. NLRB, 416 F.2d 1225, (6th Cir. 1969), NLRB v. United Aircraft Corporation, 490 F.2d 1105 (2nd Cir. 1973).

Due process has been afforded in this case. Respondent was given written copies of all eight citations at the time of the inspection and was also served with the Secretary's petition which stated each and every allegation being made against it. If respondent wanted a hearing of these citations before Judge Koutras he could have made a request for a consolidation pursuant to Commission Rule 29 C.F.R. 2700.12.

Respondent, in a rhetorical question in closing argument asks whether there were negotiations in Judge Koutras' hearing to dismiss all of the citations. No evidence supports this proposition and it is rejected.

Respondent also asserts the Secretary failed to prove that he was operating the plant. It is contended they were in the process of shutting down the operation at the time of the inspection.

The evidence of both parties establishes the plant was operated by Oatville Sand and Gravel. The inspection took place in September and the sale was not until October 2. Even if the plant was in a shutting down mode it was nevertheless in operation.

No issue of fact is raised concerning the violations themselves. Accordingly, all of the citations herein should be affirmed.

#### CIVIL PENALTIES

Section 110(i) of the Act, 30 U.S.C. 820(i), contains the statutory criteria for assessing civil penalties.

Considering the statutory mandate and in view of the fact that respondent is a small operator, that he abated all of these citations, and that he is no longer in the mining business causes me to conclude that the proposed penalties should be reduced as provided in the order in this case.

The Solicitor filed a detailed brief which has been most helpful in analyzing the record, defining the issues, and in deciding the case. I have reviewed and considered that brief as well as respondent's oral argument entered at the close of the hearing. However, to the extent that the positions of the parties are inconsistent with this decision, they are rejected.

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

ORDER

1. The following citations are affirmed and a civil penalty is assessed as provided after each such citation.

Citation No.	Penalty Assessed
181535	\$20
181536	20
181537	20
181538	15
181542	20
181551	15
181552	10
181574	10

2. Respondent is ordered to pay said sum of \$130 within 40 days after the date of this order.

John J. Morris  
Administrative Law Judge

FOOTNOTES START HERE-

1 Each footnote cites the standard in Title 30, Code of Federal Regulations, allegedly violated by respondent.

This citation alleges a violation of 56.14-8 which provides:

56.14-8 Mandatory. Stationary grinding machines other than special bit grinders shall be equipped with:

(a) Peripheral hoods (less than 90 throat openings) capable of withstanding the force of a bursting wheel.

2 56.12-25 Mandatory. All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery-operated equipment.

3 56.14-1 Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

4 55.18-12 Mandatory. Emergency telephone numbers shall be posted at appropriate telephones.

5 56.12-20 Mandatory. Dry wooden platforms, insulating

mats, or other electrically nonconductive material shall be kept in place at all switchboards and power-control switches where shock hazards exist. However, metal plates on which a person normally would stand and which are kept at the same potential as the grounded, metal, non-current-carrying parts of the power switches to be operated may be used.

6 56.9-32 Mandatory. Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use.

7 Section 109(a) of the Act provides, in part, as follows:

Sec. 109(a). At each coal or other mine there shall be maintained an office with a conspicuous sign designating it as the office of such mine.

8 The citation alleges a violation of 56.9-32, supra, n. 6.