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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

v.

INDUSTRIAL CONSTRUCTORS  
CORPORATION,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 84-15-M  
A.C. No. 42-01755-05501 NYO

Mercur Mine

DECISION

Appearances: Margaret A. Miller, Esq., and James H. Barkley, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Petitioner;  
James A. Brouelette, EEO/Safety Officer, Industrial  
Constructors Corporation, Missoula, Montana, pro se.

Before: Judge Morris

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"), arose from an inspection of the Mercur Mine at Mercur, Utah on August 10, 1983. The Secretary of Labor seeks to impose a civil penalty because respondent allegedly violated a regulation promulgated under the Act.

Respondent denies any liability for the violation.

After notice to the parties, hearing on the merits was held in Missoula, Montana on April 17, 1984.

Issues

The issues are whether respondent violated Title 30, Code of Federal Regulations, Section 55.9-40(c). (FOOTNOTE 1) If respondent violated the regulation then the appropriateness of a penalty must be considered.

### Stipulation

During the hearing the parties stipulated that respondent can pay the proposed penalty herein. Further, the actions by the worker discussed here constituted a violation of the regulation. In addition, Arlen Hanson, the project manager, had authority to abate the citation (Tr. 37, 38).

### Summary of the Evidence

MSHA Inspector Richard White inspected the Mercur Mine in Mercur, Utah on August 10, 1983 (Tr. 7).

The operator, Getty Mining Company, employed 209 workers at this open pit gold ore mine. Industrial Constructors Corporation, (ICC), had 20 workers on the site (Tr. 8).

During the inspection Zeke McCurdy, a Getty representative, accompanied Mr. White. The inspector indicated he wanted to check the work site of the contractor who was building the tailings pond (Tr. 8, 9).

After an inquiry, an ICC secretary referred the inspector to Arlen Hanson, project engineer as well as an ICC employee (Tr. 9, 28). Hanson declined to accompany the inspection party but he stated that any citations should be issued to him (Tr. 10).

At approximately 3:15 p.m., the inspector observed a dump truck (FOOTNOTE 2) eastbound on the haul road. The truck was moving up the arm of the dam at about 20 miles per hour. A person was riding on the outside of the truck (Tr. 12). Zeke said the person on the truck was not a Getty employee (Tr. 12).

There was a place for a rider inside the truck cab but he was standing on the driver's side, more or less on a step indented into the gas tank. He was hanging onto the truck's mirror or door (Tr. 13).

The 20 foot wide haul road was rough with rocks scattered on it. It would give an empty truck a bumpy ride (Tr. 13, 14; Exhibit P 1). The road had a 20 inch berm (Tr. 14).

The inspector followed the truck and ascertained that Paul Farley was the offending person. Farley stated he "knew better". In view of that statement the inspector concluded it was a situation of employee misconduct (Tr. 20, 21).

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Farley told the inspector that Hanson, his immediate supervisor, was in charge (Tr. 30). Hanson abated the violation by instructing the employee, in the presence of the inspector, regarding his activity. Hanson expressed no disagreement about receiving the citation (Tr. 29, 30, 32).

The hazard here is that the person on the side of the truck could fall off and be crushed under the rear tandem tires (Tr. 15).

There were two legal IDs on the property. The main ID was issued to Getty Mining Company. The additional ID was issued to ICC (Tr. 18).

The side on the truck Farley was riding had a sign reading "Western Excavating" (Tr. 20). The inspector had been told this company was a subcontractor for ICC (Tr. 20). But at the prehearing conferences no one claimed there were any other contractors on the site except Getty and ICC (Tr. 27).

ICC's work practices were generally good and ICC had a safety program (Tr. 19, 20, 33). ICC has no adverse history (Tr. 29).

Respondent presented no evidence.

#### Discussion

Respondent contends that the inspector failed to ascertain the identity of the employer of Paul Farley. Further, respondent cites Phillips Uranium Company, 4 FMSHRC 549 (April 1982), in support of its view that the citation should have been issued against the subcontractor, Western Excavating, and not ICC.

It is true that the inspector did not learn the name of Farley's employer. But the evidence abounds with circumstantial evidence that ICC was Farley's employer. There is no persuasive credible evidence to the contrary.

Respondent relies on Phillips, supra, to support its position that the citation should be against Western Excavating. I disagree. Even if we assume Farley was not an employee of ICC, the Commission decision in Phillips predated the Secretary's guidelines relating to independent contractors. These guidelines now provide:

Enforcement action against production-operators for violations involving independent contractors is ordinarily appropriate in those situations where the production-operator has contributed to the existence of a violation, or the production-operator's miners are exposed to the hazard, or the production-operator has control over the existence of the hazard. Accordingly, as a general rule, a production-operator may be properly cited for a violation involving an

independent contractor: (1) when the production-operator has contributed by either an act or omission to the occurrence of a violation in the course of an independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement. 44 FedReg. 44497 (July 1980).

The Commission has recently approved these guidelines. Cathedral Bluffs Shale Oil Company, WEST 81-186-M (August 29, 1984).

In sum, respondent here would be liable under the Secretary's guidelines even if Farley was not ICC's employee. On this record ICC's employee, Arlen Hanson, was the project manager. He claimed to be in charge and, in fact, he abated the violation. The elements necessary in paragraph 4 of the guidelines are established.

The citation should be affirmed.

#### Civil Penalty

The statutory criteria for assessing a civil penalty are set forth in 30 U.S.C. 820(a).

Considering these guidelines, I find that respondent has no adverse history (Tr. 29). The size of the penalty does not appear excessive in relation to the size of respondent. The operator was minimally negligent since Farley "knew better." It was further indicated that this activity was against company rules (Tr. 29, 31). For this reason, I conclude that the proposed penalty is excessive as it relates to the operator's negligence.

The parties have stipulated that the penalty will not affect the operator's ability to continue in business. The gravity of Paul Farley's actions was exceedingly high. To respondent's credit is its good faith in rapidly abating this condition.

On balance, I deem that a civil penalty of \$150 is appropriate for this violation.

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

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Order

1. Citation 2083731 is affirmed.
2. A civil penalty of \$150 is assessed.
3. Respondent is ordered to pay the sum of \$150 to the Secretary within 40 days of the date of this decision.

John J. Morris  
Administrative Law Judge

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~FOOTNOTE\_ONE

1 55.9-40 Mandatory. Men shall not be transported:

(c) Outside the cabs and beds of mobile equipment,  
except trains.

~FOOTNOTE\_TWO

2 A GMC 8-ton dual tandem vehicle, License No. Utah NV 2080  
(Tr. 13).