CCASE:
SOL (MSHA) V. MARKEY MINES
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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. WEST 80-376-M A.C. No. 42-00784-05003
v.	Docket No. WEST 80-416-M A.C. No. 42-00784-05004
MARKEY MINES, INCORPORATED, RESPONDENT	Docket No. WEST 80-487-M A.C. No. 42-00784-05005
AND	Docket No. WEST 81-76-M A.C. No. 42-00784-05006
CALVIN BLACK ENTERPRISES, RESPONDENT	Docket No. WEST 82-182-M A.C. No. 42-00784-05007 Markey Mines
	Docket No. WEST 81-392-M A.C. No. 42-00550-05002 Blue Lizzard Mine

DECISION

Appearances: Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Mr. Calvin Black, President, Markey Mines, Inc., Blanding, Utah, pro se.

Before: Judge Morris

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

After notice to the parties, a hearing on the merits was held on August 21, 1984, in Monticello, Utah.

The Secretary did not file a post-trial brief. Respondent, Markey Mines, filed a brief relating to certain threshold issues and was granted an opportunity to file a further brief on the merits of the alleged violations (Order, September 17, 1984). No further brief was filed.

Issues

Two threshold issues are presented: they concern whether the citations should be vacated because they were issued to the incorrect operator. Further, an issue concerns whether respondent is bound by the acts of its independent contractor. An additional issue is whether respondent is bound by certain evidence offered by a deposition.

Secondary issues are whether respondent violated the regulations. If a violation occurred, what penalty is appropriate.

Stipulation

In assessing any penalties the parties agreed that Markey Mines is a small mine; further, it has no adverse history for the 24 months prior to the issuance of the citations in these cases. (Tr. 145, 146).

WEST 80-376-M
Citation 336689

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.18-6 which provides as follows:

> 57.18-6 Mandatory. New employees shall be indoctrinated in safety rules and safe work procedures.

Summary of the Evidence

MSHA's evidence: Ronald L. Beason, an MSHA inspector, issued this citation because two survey helpers, Boyd Donaldson, age 28, and Scott Sanders, age 19, were not trained in safety rules (Tr. 14-17).

The miners, employees of Sanders Exploration Company, were surveying old workings. There were five employees of Markey Mines observed in the drift where the two surveyors were located (Tr. 17, 18).

The citation, an alleged S & S violation, was served on Wendell Jones and Hanson Bayless, Markey representatives who were present. The citation was issued because the two surveyors were untrained in the use of self-rescue equipment. Jones claimed the men were employees of Sanders Exploration Company and, therefore, respondent had no obligation to train them. In the inspector's opinion the men should also have been instructed in ground control, radiation, dust, evacuation, electricity and bulkheads. The surveyors responded to the orders of Jones and Bayless (Tr. 18-27, 40). Inspector Beason ordered the surveyors to leave the mine. He further instructed the men in the use of self-rescue equipment. The company was directed to complete their training within three days (Tr. 153-156).

Petitioner's evidence includes the decision of Commission Judge Virgil Vail in Secretary v. Calvin Black Enterprises, 5 FMSHRC 1440 (Tr. 9, 10; Exhibit P-1).

Calvin Black, Hanson Bayless, and Wendell Jones testified for respondent.

Calvin Black indicated that Calvin Black Enterprises (hereafter "CBE") is a sole proprietorship owned by himself. CBE owns the capital stock in Markey Mines and the lease on the minerals rights. CBE contracted with Markey Mines to operate the mine. Markey Mines owns the mining equipment.

CBE also contracted with Sanders Exploration to survey the mine. Sanders had general authority to enter the mine. But, in fact, on the day of this inspection, Donaldson and Sanders were underground without respondent's permission. The company later precluded such action by keeping its gates locked (Tr. 70, 74, 80).

Hanson Bayless and Wendell Jones both indicated that when they arrived at the mine at 8:00 a.m. on the day of the inspection the surveyors had already gone underground. In addition, Bayless, in his 30 years' experience, had never seen the need for self-rescue equipment in this mine. This condition may have been a hazard in some mines but not in the Markey Mines (Tr. 99-100, 123-125).

Wendell Jones claimed the inspector's instructions to the surveyors concerning self-rescue equipment took only 15 minutes. He further denied that the inspector directed him to give additional training to Donaldson and Sanders (Tr. 157).

Discussion

Respondent raises two threshold issues. Initially, it is asserted that the cases are fatally defective because the citations name the operator as "Calvin Black Enterprises." But the proposal for penalty was filed in five of the cases against "Markey Mines, Incorporated" namely, in WEST 80-376-M, WEST 80-416-M, WEST 80-487-M, WEST 81-76-M and WEST 82-182-M.

The second contention is that the two surveyors were employees of Sanders Exploration Company, an independent contractor. Therefore, respondent urges it cannot be held liable for the acts of an independent contractor.

Concerning the initial issue, it is correct that the citations in the above docketed cases show the operator as "Calvin Black Enterprises." The citations further identify the mine site as the "Markey Mines."

I find the facts concerning the interlocking ownership of CBE and Markey Mines to be as related by Mr. Black in his testimony. In short, Markey Mines was the operator. Although the citations were issued showing CBE as the operator, the same citations also identified the site as Markey Mines. CBE and Markey were fully apprised of the situation and the record fails to disclose that CBE or Markey were prejudiced. Section 104(a) of the Act, now 30 U.S.C. 814(a), requires the Secretary to issue his citation to the operator. But on the facts here, I conclude that whatever errors occurred in the issuance of the citations were cured by the Proposals for Penalty filed in these cases. The proposals filed named Markey Mines as respondent. In its answer Markey admits it is the operator, admits that its products affect commerce, and admits the issuance of the citations. In short, the Secretary amended the citations when he filed his proposals to assess penalties.

For the foregoing reasons I deny the motion to dismiss.

The second threshold issue concerns the status of Sanders Exploration Company as an independent contractor. It is asserted that its employees (Donaldson and Sanders) would likewise be independent contractors. Hence, it is argued that the production operator would not be responsible for the training of such individuals.

The latest Commission decision involving the independent contractor doctrine was issued on August 29, 1984 in Cathedral Bluffs Shale Oil Company, 8 FMSHRC 1871. In the decision the Commission considered the effect of the Secretary's formally adopted policy regarding the issuance of citations to an operator for violations of the Act committed by an independent contractor.

The citation in the instant case was issued before the Secretary's policy took effect. But, the production operator (Markey Mines), would be liable under the law applicable before the adoption of the Secretary's policy and it would also be liable under the Secretary's later policy. The liability arises from the fact that a part of the determination of liability includes an evaluation of whether the production operator's miners were exposed to the hazard created by the independent contractor. Old Ben Coal Co., 1 FMSHRC 1480 aff'd., No. 79-2367 (D.C.Cir. January 6, 1981); Cyprus Industrial Minerals Company, 3 FMSHRC 1 (January 1981), aff'd. 664 F.2d 1116 (9th Cir.1981).

The evidence here establishes that when the two Sanders employees were underground at least five employees of Markey Mines were in the drift where the surveyors were located (Tr. 17, 18).

The five Markey employees were thus exposed to any hazard the new inexperienced employees might generate due to their lack of training in safety and safe work procedures.

Accordingly, the independent contractor defense cannot prevail in this factual setting.

During the trial the Secretary offered the decision of Judge Vail in the case of Secretary v. Calvin Black Enterprises, cited supra. The Secretary offered the case to invoke the doctrine of res judicata. It is claimed that respondent is bound by Judge Vail's decision since that case involved Sanders Exploration Company, self-rescue equipment, and the independent contractor issue.

In support of his position the Secretary has cited United States v. Stauffer Chemical Company, 104 S.Ct. 575 (1984) (Tr. 8, 9). I disagree with the Secretary. The cited case is not controlling because the doctrine of defensive collateral estoppel does not apply unless the issue was litigated in another case involving "virtually identical facts." It is not shown that the facts in the instant case are identical with Judge Vail's case. I, accordingly, reject the Secretary's motion to invoke the doctrine.

As to the violative condition itself the evidence establishes that two men, who were only employees for two days, were untrained in many reas of safety. Violations of safety rules and procedures by these workers could endanger themselves and the five Markey Mine employees on the site. It is the operator's duty to control the independent contractor's workers and their activities, as they generally affect the respondent's employees in the mine.

Respondent further claims that the Sanders employees went underground before the operator's supervisors arrived on the morning and that they did so without permission. It is argued they were trespassers.

I reject this contention. Sanders Exploration, according to Mr. Black, had general authority to enter the mine. With such general authority they did not have to secure permission to enter on a daily basis.

The citation should be affirmed.

Citation 336810

This citation alleges a violation of 30 C.F.R. 57.11-51(b), which provides:

> 57.11-51 Mandatory. Escape routes shall be:
> (b) Marked with conspicuous and easily read direction signs that clearly indicate the ways of escape.

Summary of the Evidence

MSHA Inspector Ronald Beason asked Wendell Jones to go into the return air haulageway. Jones identified this area as his

escape route. The inspection party became lost and backtracked four times (Tr. 27-29).

The hazard, caused by a lack of signs, is that miners could be trapped because they would not have time to backtrack and search for an escape route during an evacuation (Tr. 29-30).

Respondent's evidence through witnesses Black, Bayless and Jones shows the new haulageway was completed in the week before the inspection. In addition, the company was in the process of installing large fans, airlines, and was cleaning up. At the time of the inspection there were no signs drift was without signs and it had never had any. The inspectors had never told the company that signs were necessary (Tr. 102-104, 123-135, 179).

Witness Wendell Jones indicated he did not get lost in the escapeway. Actually, he was looking for a jeep but he was neutral as to whether or not the inspection party found it (Tr. 129, 130).

MSHA's rebuttal evidence indicated that Calvin Black Enterprises was issued a notice under MESA (MSHA's predecessor) for failure to have a second escapeway on September 11, 1974. The condition was abated in April, 1976 (Tr. 148, 149; Exhibit P-2).

Bayless testified that MESA approved a refuge area as a second escapeway. Everyone who worked at the Markey Mine had been instructed where the area was located. The mine had five miners and a superintendent (Tr. 102-104, 123-135, 179).

Discussion

MSHA's evidence establishes the escape route was not marked in any fashion to indicate it was an escape route. Respondent's evidence confirms the violation.

The evidence is conflicting as to whether the escapeway was completed within the week before the inspection or in April, 1976. I credit respondent's evidence that the parallel haulageway was completed within a week before the inspection. The citation should be affirmed on the uncontroverted evidence that the escapeway was unsigned. But the short time since the opening relates to respondent's negligence, an issue to be considered in connection with the assessment of a penalty.

WEST 80-416-M
Citation 336866

This citation alleges a violation of 30 C.F.R. 57.12-20, which provides:

> 57.12-20 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.

Summary of the Evidence

Federal Mine Inspector Roy Maki, a person trained in the hazards of electricity, issued this citation (Tr. 160-162).

He wrote the citation at the entrance to a flank drift in a new development. A switch box was not grounded. Further, there as no insulating material for protection. The switch box controlled the fan, which was running. The fan provided air to the drift (Tr. 162-166).

The area around the 440-volt fan was dry. Anyone activating the fan would be exposed to the hazard of being injured if the ground fault system failed. In addition, a fire would be possible if a bearing on the fan burned out (Tr. 163-164, 169).

Inspector Maki had previously discussed this fan with Wendell Jones. At that time he noticed it lacked a ground. A worker could be burned or killed by this hazard. Inspector Maki issued this citation as an S & S violation. He still considered it to be such at the time of the trial (Tr.163-168).

A dry wood platform, such as the standard requires, prevents a person from being shocked. Rubber boots, such as those used by miners, are also a good insulator. If a miner was standing on dry rock, or sand, the electrical charge would not go any further to ground. However, if a miner's boots were wet or if the miner was standing on a dry board, an electrical charge would go to ground (Tr. 162, 169, 170).

If a mat had been present and there had been a ground, no citation would have been issued (Tr. 172, 173).

Witness Bayless, testifying for respondent, indicated that no one had ever been injured or shocked from turning on this fan. There is wet drilling at the face but Bayless had never seen a miner, who might have been wet, turn on the blower. The blower was equipped with fuses (Tr. 189-192).

Discussion

The regulation requires that the fan and switch have a frame ground. There was no such ground here and the inspector wrote the citation to that effect (Tr. 162). The dry wooden platform and the requirements for an insulating mat would be in lieu of a ground (Tr. 162).

The factual situation establishes a violation of the regulation.

Respondent's evidence does not present a defense. The citation should be affirmed.

WEST 80-487-M
Citation 337161

This citation alleges a violation of 30 C.F.R. 57.3-22, which provides:

> 57.3-22 Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

Summary of the Evidence

Larry Day, an MSHA inspector, has extensive experience concerning loose ground (Tr. 193-195). He issued this citation because there was a loose slab hanging onto a rib in a travelway. The slab was on the side of a pillar. Miners were walking by the slab and vehicles were hauling muck out of the pillar area (Tr. 195).

The drift was 10 foot high and 15 to 20 feet wide. The slab was 9 feet high and 15 feet long. The ground was very heavy and there was blasting in the area (Tr. 196). Pillars in the area were cracked and many were broken up; there were signs of stress on the roof. This particular slab had a four inch gap 24 inches long along the top and on both sides. The only place where the slab was holding was along its bottom portion (Tr. 196). The slab had come away from the wall at least four inches at the widest place (Tr. 197).

In the inspector's view the slab, which had moved, could either slide down the pillar and tip over or it could tip over and cover the drift (Tr. 197).

From the size of this rock a miner could be disabled or killed (Tr. 197). Falling rock is the primary cause of fatalities in underground mines.

Day agreed that Wendell Jones had told him that the slab could not tip over. As they watched, the slab did not slide towards the haulageway. It was resting on its base.

Respondent's witness Wendell Jones, with over 30 years' experience in mining, testified that this particular slab was already loose and resting on the sill (Tr. 203). It would not have come loose from this position because it would have to slide 5 or 10 feet all at once (Tr. 204).

Jones intended to take down the slab but under the circumstances here no one could be injured. It would not tip over because there were 3 to 4 bars holding it (Tr. 201).

After the citation was issued Jones shot the slab with a couple of sticks of powder (Tr. 202).

Discussion

I credit MSHA's evidence on this citation. Inspector Day describes the condition of a very large loose slab. The inspector correctly ordered the removal of the slab since it was in close proximity to the miners who were working nearby.

Respondent's evidence is not persuasive. Even though the slab was resting on a sill, its stability was suspect. It could be affected by the ground behind it, by the blasting, or by the work being carried on in close proximity. I, accordingly, reject respondent's premise that the condition presented no hazard. Cf. Homestake Mining Company, 4 FMSHRC 146, 150 (1982).

The citation should be affirmed.

WEST 81-76-M
Citations 576708, 576709, 576710

A portion of MSHA's proof of the alleged violations in this case arises from the deposition of George Rendon taken June 30, 1983 in Salt Lake City, Utah (Exhibit P-3).

Respondent strenuously objected to the use of the deposition of George Rendon on the grounds that Francis J. Nielson, Esq., was not authorized to represent respondent at the deposition. Accordingly, respondent asserts the deposition had no evidentiary value.

The judge admitted the deposition of witness Rendon and overruled respondent's objections (Tr. 207-223). At this point it is necessary to review the relevant factors concerning the deposition.

As an initial matter I note that Francis J. Nielsen, Esq., appears as attorney of record for respondent in WEST 80-376-M, WEST 80-416-M, WEST 80-487-M, and WEST 81-76-M (the instant case). Mr. Nielsen has never sought to withdraw.

The deposition of witness George Rendon was taken on June 30, 1983 to preserve his testimony since Rendon was leaving the country for Indonesia the following week (Deposition transcript, Exhibit P-3 at 6). At the deposition petitioner was represented by Phyllis K. Caldwell, Esq., and Francis J. Nielson, Esq., appeared for respondent. A reading of the deposition indicates that Mr. Nielsen was present and took part in the examination of witness Rendon. It is also true that Mr. Nielsen left the deposition before it was completed (see deposition page 21). He did not state his reason for leaving, but he entered a number of objections on the record. Most of the objections relate to the competency of witness Rendon to render an expert opinion on electrical matters. (FOOTNOTE 1)

A factor further bearing on this issue is that a hearing in the Markey Mine cases was scheduled on November 15, 1983. At that hearing respondent's request for a continuance was granted. The record of the proceeding at that hearing reflects some discussion of the status of attorney Nielsen (Tr. of November 15, 1983 at pages 10, 19, 20, 22-23). There is however, no indication that attorney Nielsen's services had been terminated as of November, 1983. I, accordingly, conclude Mr. Nielsen had the authority to represent respondent at the Rendon deposition in June, 1983.

The deposition was proper evidence under the Commission's Rules of Procedure, Rule 56, 29 C.F.R. 2700.56 and under the Federal Rules of Civil Procedure, Fed.R.Civ.P., Rule 26.

Citation 576708

This citation alleges a violation of 30 C.F.R. 57.12-13, which provides:

> 57.12-13 Mandatory. Permanent splices and repairs made in power cables, including the ground conductor where provided, shall be: (a) Mechanically strong with electrical conductivity as near as possible to that of

the original; (b) Insulated to a degree at least equal to that of the original, and sealed to exclude moisture; and, (c) Provided with damage protection as near as possible to that of the original, including good bonding to the outer jacket.

Summary of the Evidence

MSHA's evidence: George Rendon testified by deposition and Preston Hunt appeared in person.

George Rendon issued citations in 1981 and 1982 at respondent's uranium mine. The company mines by using a drift and room process (Exhibit P-3 at 7). Employment at the mine has ranged from a high of eleven to a low of three. In 1980 and 1981 they were mining at the site (P-3 at 8).

Rendon, who was not experienced in electricity, issued Citation 576708 on August 7, 1980 because a splice in a distribution cable was not adequately grounded. The citation was issued for a violation of 57.12-13, now docketed in case WEST 81-76-M (P-3 at 9, 10, 13; deposition Exhibit 1).

Wendell Jones and Preston Hunt accompanied Rendon. The original assessed penalty (FOOTNOTE 2) was $34 and at a conference it was reduced to $28.00 (P-3 at 10).

The citation arose when the inspection party stopped to see if a fan was grounded. The inspector noticed the cable was three-quarters of an inch thick (P-3 at 10, 11).

Jones said he didn't know if there was adequate insulation under the splice. As they walked towards the working face they saw two other places where the splice was smaller than the original cable. On unwrapping it they found there was no insulation. It consisted of bare wire and the connector (P-3 at 12). The cable was being used to power a fan (P-3 at 12-13). The three splices in the main airway were not mechanically strong and could not exclude moisture (P-3 at 16, 24). The cable was hung on hooks about every 20 feet (P-3 at 16). In the immediate vicinity of the cable there were three miners removing ore. Equipment operating in this eight-foot drift could hit the cable,

or the equipment could hook it and pull it apart. The miners were in close proximity to this condition (P-3 at 18-20). The equipment in the drift was 15 feet long by 5 feet wide (P-3 at 19).

If an accident occurred it would affect the entire mine. The condition was corrected within the time specified by the citation (P-3 at 24).

Rebuttal Witness Preston Hunt testified that he has been an electrician for 49 years. He possesses considerable electrical experience (Tr. 262-264).

Rendon issued this citation because Witness Hunt, at the time, was not a duly authorized representative of the Secretary (Tr. 264).

The outside diameter of the cable was 1 and 1/2 inches and the splices were of lesser thickness. The smallest diameter was three-quarters of an inch (Tr. 266; Exhibit P-4).

Bayless had used SCOTCHGUARD, a pliable taping material, to fill in a proper splice (Tr. 267).

Bayless, at Jones' request, took the splice apart and found there was insufficient insulation. A minimal impact could penetrate the wires and cause a short or a ground (Tr. 268).

The conductors in the cable were three No. 8 wires protected by a neoprene cover. It was 600 volts phase to phase. These splices would not be acceptable to a certified electrician. Here there was a loss of mechanical protection. With the loss of such protection the splices can pull apart (Tr. 270).

Respondent's evidence consisted of witnesses Hanson Bayless and Wendell Jones. The splices, in Bayless' opinion, were not defective. Initially, a split bolt connector is used to hold the two wires together. Insulating compound then covered the wires. Each wire is wrapped with electrical tape and all three wires are taped together. After wrapping the electrical wires in the splice the cable would be thinner than the original cable because the fiber cords had been cut away. Jones had seen qualified electricians make splices in this fashion (Tr. 223-227, 236, 237).

A dispute exists as to who unwrapped the splice. Hunt claimed that Bayless unwrapped it. But Bayless specifically denied that he did so (Tr. 282, 286).

Discussion

On this citation I credit the testimony of MSHA witness Hunt. He has 49 years of extensive experience as an electrician. It is

clear that the splices here were not as mechanically strong as nearly as possible because the original fibers had been cut away. Exhibit P-4, an illustrative drawing, shows the deterioration of the mine distribution cables.

Bayless testified that the splice was not defective; further, he had seen experienced electricians splice in this fashion. I am not persuaded. A splice made by an experienced electrician is not necessarily mechanically strong, insulated and provided with damage protection as near as possible to that of the original. Respondent's witnesses are not as experienced nor as expert as petitioner's witness Preston Hunt. Jones indicated the cable splice was a matter Bayless should handle (Tr. 237). Bayless, at best, had a minimal background in electricity (Tr. 224).

The citation should be affirmed.

Citation 576709

This citation alleges a violation of 30 C.F.R. 57.12-25, which provides:

> 57.12-25 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.

Summary of the Evidence

Inspector George Rendon issued this citation on August 7, 1980 for an alleged violation of 57.12-25 (P-3 at 24, 25; deposition Exhibit 2).

They were inspecting an emergency escapeway when they observed that a ground wire was not connected to a switch box. The inspector did not find any other ground. The ground wire, which was hanging loose, was about eight feet from the switch box (P-3 at 25, 26-28).

The main power source and ground wire came through a bore hole which had been drilled from the surface into the tunnel. The casing was ungrounded. Further, it was not protected by equivalent grounding protection (P-3 at 26). The 440-volt switch box, hanging on a rib, measured 24 inches wide and 36 to 40 inches long (P-3 at 26, 30). The company was aware of the grounding requirement because other switch boxes were properly grounded (P-3 at 30).

A lightning storm could cause a short. There was water in the drift.

A contractor does respondent's electrical work (P-3 at 28).

This citation was abated within the time specified (P-3 at 32).

The original assessment was $34 and at a conference it was reduced to $14. The notice of assessment proposes a penalty of $14 for this citation (P-3 at 25).

Hunt, MSHA's rebuttal witness, confirmed Rendon's testimony. Hunt observed that the messenger wire, which was loose, could have returned the fault current to the source of its generation. But the messenger wire was not attached to the metal portion of the switch gear to provide a path for the fault current to be returned. Hunt had prepared an illustrative drawing showing the 2/0 A.W.G. cable.

If a person touched the box he could be shocked even though the area was not damp. The absence of a dry platform increased the hazard. A dry floor has a measure of conductivity (Tr. 274-285; Exhibit P-5).

Respondent's witness Jones stated he didn't remember too much about this condition. They thought it had been properly grounded (Tr. 237).

According to Jones, no miner had ever been shocked at Markey Mines (Tr. 238, 241).

Discussion

The standard requires that all metal encasing electrical circuits shall be grounded or provided with equivalent protection. The uncontroverted evidence shows the main metal switch box was not so protected.

The fact that no miner has ever been shocked at the Markey Mines is not a defense. A prime purpose of the Act is to prevent the first accident.

The citation should be affirmed.

Citation 576710

This citation alleges a violation of 30 C.F.R. 57.12-20, which provides:

> 57.12-20 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.

Summary of the Evidence

MSHA Inspector Rendon wrote this citation for a violation of 57.12-20. At the main power control switch box (discussed in th prior citation) there was no insulating mat or dry wooden platform for a person to stand on when activating the switch. Shock hazards exist at this location. There was no metal plate kept at the same potential as the grounded metal non-carrying parts of the power switch. The hazard includes possible electrocution. Mats were supplied in front of similar switches and motors. The dangers are inherent in this situation as were discussed in connection with Citation 576709 (P-3 at 32, 33; deposition Exhibit 3).

This hazard was abated in the time specified.

MSHA's witness Hunt confirmed there was no mat. Further, there was water caused by a leaking water line approximately 50 feet from the switch (Tr. 279-281).

Wendell Jones testified he did not believe there was a hazard because a miner would be protected by his rubber boots (Tr. 243).

The parties stipulated that the evidence already in the record concerning hazards could be considered in connection with this citation (Tr. 244).

Discussion

No credibility issue is presented. Petitioner established a violation and respondent confirms it.

The citation should be affirmed.

WEST 82-182-M
Citation 584354

This citation, relating to ground conditions, alleges a violation of 30 C.F.R. 57.3-22. The standard was cited in WEST 80-487-M, supra.

Summary of the evidence

Inspector Rendon issued this citation on October 27, 1981. Walking down the main drift, the inspector observed loose slabs one to two inches from the roof. The slabs were two to three feet wide and four to six inches thick (P-3 at 35, 38; deposition Exhibit 4). The loose slabs were at three different locations in the middle of the back of the main haulageway (P-3 at 35). One was on the straightaway of the main drift, one was on the right side, and one was close to where they were doing the mining. This was a location where supervisors are to check daily. Further, in this area miners are to test the ground at the beginning of each shift (P-3 at 36).

The ground was not adequately supported. Work was not being done in this area but miners had to pass here to reach their work stations (P-3 at 37). In the inspector's opinion the slabs had been loose for more than a day or two. Blasting vibrations could have caused such a condition. A miner could be killed if the slab fell when he came under it (P-3 at 38).

Some ground control devices, such as rock bolts and chainlink wire, were in an area near one of the loose slabs. Foreman Bayless told the inspector that they had failed to see the loose. Further, they were working on another area and didn't have enough bolts to finish it. Three miners and a foreman working in the mine were exposed to this condition (P-3 at 40).

The original assessment on Citation 584354 was not reduced at conference and it remained at $14 (P-3 at 35).

Witness Wendell Jones testified that the condition for which the company was cited is called "feathered ground" (Tr. 247). The slabs are about as stated, namely two feet wide and three feet long and four to six inches thick (Tr. 247). As they go back they get a little thicker. They are periodically barred down (Tr. 247). When Jones tested the slabs they couldn't bar them down so roof bolts were used (Tr. 248). If they barred down the area periodically, none of the slabs would come down (Tr. 250).

Discussion

The recollection of witness Jones concerning this event is somewhat hazy. But the regulation requires loose ground to be either barred down or adequately supported. Since neither action took place before this citation was issued I conclude that a violation of the regulation occurred.

The citation should be affirmed.

Citation 584356

This citation alleges a violation of 30 C.F.R. 49.4, which provides, in part, as follows:

> (b) An application for alternative mine rescue capability shall be submitted to the District Manager for the district in which the mine is located for review and approval.

Inspector Rendon issued this citation because Mr. Bayless indicated to him that the mine rescue plan had not been mailed to the MSHA District Manager (P-3 at 41; deposition Exhibit 5). The mine did not have a mine rescue plan (P-3 at 43).

The witness had also reviewed the MSHA records in Moab, Utah and called the Denver District office prior to inspecting the mine. There was no evidence that the application had been submitted by Markey Mines (P-3 at 44, 45). Rendon had no knowledge that Markey Mines ever submitted an application under 49.3 to qualify as a small and remote mine (P-3 at 45). The mine abated this condition by submitting a plan (P-3 at 46).

Mr. Black testified that the mining operation was winding down immediately before this citation was issued. He also requested a waiver from MSHA but never received a reply. The parties stipulated that respondent could supplement the record with a copy of Mr. Black's letter requesting a waiver. A copy of the request was filed (FOOTNOTE 3) and marked as Exhibit R-1 (Tr. 253).

Witness Bayless indicated that he was told the company could get a waiver of the mine rescue plan. In October, 1981, there were either three or five employees at the mine.

Discussion

Mr. Black's letter, dated a month before this citation, requested a waiver of this regulation.

MSHA cannot issue a waiver for Title 30, Code of Federal Regulations, Part 49, relating to Mine Rescue Teams. But there is a provision permitting MSHA to approve alternative mine rescue capability for small and remote mines. Markey Mines fits that category (49.3).

Respondent is charged with violating 49.4. The regulation requires, in part, that an alternative rescue capability plan shall be submitted to MSHA's District Manager. On the facts

there was a technical violation but respondent's good faith and minimal negligence are established by his letter to MSHA written a month before the citation was issued. But these matters relate to the imposition of a penalty and not to whether a violation occurred.

WEST 81-392-M
Citation 583991

Respondent: Calvin Black Enterprises

This citation alleges a violation of 30 C.F.R. 57.5-39, which provides:

> 57.5-39 Mandatory. Except as provided by standard 57.5-5, persons shall not be exposed to air containing concentrations of radon daughters exceeding 1.0 WL in active workings.

Since petitioner offered no evidence to support this citation an order vacating the citation is proper (Tr. 246).

Citation 583992

This citation alleges a violation of the radon daughter regulation, 57.5-39, cited, supra.

In this case since petitioner offered no evidence, an order vacating the citation is proper (Tr. 246).

CLOSING REMARKS BY
CALVIN BLACK

At the conclusion of the hearing Mr. Black made a closing statement (Tr. 294-297). I indicated at the conclusion of his remarks that they should be addressed to a forum having legislative power and not one who has adjudicative authority (Tr. 298).

However, portions of Mr. Black's remarks do require a reply by the judge. Mr. Black stated in his remarks that he did not secure certain information he requested under the Freedom of Information Act (Tr. 296). I note that Mr. Black had not requested any information under the Commission's discovery rules. Such a suggestion was made by the judge to Mr. Black on December 15, 1983. (Tr. 11-12, hearing of December 15, 1983).

Mr. Black's remaining statements in his closing argument are not relevant to these proceedings and his allegations as to MSHA are not substantiated on the record.

CIVIL PENALTIES

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

Following the statutory directives I find the following facts: in accordance with the stipulation respondent has no adverse history of prior violations for a period of two years. The mine is small but so are the proposed penalties. Hence, I feel they are generally appropriate. The operator was moderately negligent as the violative conditions could have been readily corrected. As previously indicated the negligence of the operator in connection with Citation 336810 (unsigned escapeway) has been overstated. The operator has discontinued its mining operations; accordingly, the imposition of a penalty cannot affect its ability to continue in business. The gravity of each violation is apparent on the facts. Respondent's statutory good faith is established by its actions in abating the violative conditions. As previously discussed, respondent's good faith has been understated in connection with Citation 584356 (rescue plan).

In the following cases, wherein the respondent is Markey Mines Incorporated, the following penalties should be assessed:

Citation No.	Proposed Penalty	Disposition
	WEST 80-376-M	
336689	$26	$26
336810	36	18
	WEST 80-416	
336866	$38	$38
	WEST 80-487	
337161	$90	$90
	WEST 81-76-M	
576708	$28	$28
576709	14	14
576710	28	28
	WEST 82-182-M	
584354	$14	$14
584356	12	6

~2678

In the following case Calvin Black Enterprises is the respondent and all penalties should be vacated.

Case No. WEST 81-392-M

Citation No.	Proposed Penalty	Disposition
583991	$38	Vacate
583992	32	Vacate

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

ORDER

1. In WEST 80-376-M the following citations are affirmed and penalties assessed therefor:

Citation No.	Penalty
336689	$26
336810	18

2. In WEST 80-416-M the following citation is affirmed and a penalty assessed therefor:

Citation No.	Penalty
336866	$38

3. In WEST 80-487-M the following citation is affirmed and a penalty assessed therefor:

Citation No.	Penalty
337161	$90

4. In WEST 81-76-M the following citations are affirmed and penalties assessed therefor:

Citation No.	Penalty
576708	$28
576709	14
576710	28

5. In WEST 82-182-M the following citations are affirmed and penalties assessed therefor:

Citation No.	Penalty
584354	$14
584356	6

~2679
6. In WEST 81-392-M, wherein Calvin Black Enterprises is the respondent, the following citations and all proposed penalties therefor are vacated:

Citation No.
583991
583992

John J. Morris
Administrative Law Judge

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~FOOTNOTE_ONE
1 The judge did not have an opportunity to rule on the objections at the hearing. But, having read the deposition, I conclude that a number of them are well taken. Those objections, relating to the competency of witness Rendon to render an expert pinion pertaining to electricity, as stated in Exhibit P-3, on pages 16, 17, and 22 are sustained. The answers of the witness are, accordingly, stricken. The balance of respondent's objections are overruled.

~FOOTNOTE_TWO
2 The petition for assessments shows the original assessed penalty was $28.00.

~FOOTNOTE_THREE
3 There was no stipulation by the parties concerning MSHA's purported reply letter to Mr. Black and it is not evidence in the case.