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SOL (MSHA) v. ADAMS STONE
SOL (MSHA) v. MAGOFFIN, JOHNSON & MORGAN STONE
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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. KENT 84-171-M A.C. No. 15-00061-05502
v.	Docket No. KENT 84-178-M A.C. No. 15-00061-05503
ADAMS STONE CORPORATION, RESPONDENT	Docket No. KENT 84-194-M A.C. No. 15-00061-05505
	Docket No. KENT 84-234-M A.C. No. 15-00061-05506
	MJM Mine and Mill
	Docket No. KENT 84-208-M A.C. No. 15-00056-05501
	Jenkins Mine and Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Docket No. KENT 84-235-M A.C. No. 15-00061-05504
	Docket No. KENT 84-239-M A.C. No. 15-00061-05507
v.	MJM Mine and Mill
MAGOFFIN, JOHNSON & MORGAN STONE COMPANY, RESPONDENT	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
No one appeared at the hearing on behalf of Respondent.

Before: Judge Steffey

Pursuant to an order providing for hearing issued January 24, 1985, a hearing in the above-entitled proceeding

was held on February 27, 1985, in Prestonsburg, Kentucky, under section 105(d), 30 U.S.C. 815(d), of the Federal Mine Safety and Health Act of 1977. The order explained that I would receive evidence from both parties and would render a bench decision at the conclusion of presentation of evidence unless the parties expressed a wish to file posthearing written briefs.

When the hearing was convened, counsel for the Secretary of Labor entered her appearance, but no one appeared at the hearing to represent respondent. Normally, when a respondent fails to appear at a hearing, I return to my office and issue a show-cause order pursuant to section 2700.63 of the Commission's rules, 29 C.F.R. 2700.63, requiring respondent to show cause why it should not be held in default for failing to appear at the hearing. If respondent fails to answer the show-cause order or fails to give a satisfactory reason for failing to appear at the hearing, I simply find respondent in default and order respondent to pay the penalties proposed by MSHA as provided for in section 2700.63 of the rules. For the reasons hereinafter given, I did not follow that procedure in this instance. Instead, I allowed counsel for the Secretary to present evidence with respect to several alleged violations which she believed to be serious. After she had completed the presentation of evidence, I rendered a bench decision (Tr. 135-174) which will hereinafter be issued as a part of this decision, but a procedural event occurred after I had rendered the bench decision which requires that I amend the first part of the bench decision to show that I have taken that procedural occurrence into consideration.

Belated Filing of Financial Data

The procedural event referred to above consisted of the filing by respondents' counsel, Mr. David Adams, of some financial data which he had been ordered to submit prior to the hearing. Mr. Adams filed the material on March 7, 1985, 8 days after the hearing had been completed. The material was submitted to support Mr. Adams' claim that payment of penalties would cause respondent Magoffin, Johnson & Morgan Stone Company to discontinue in business. As indicated above, a bench decision was rendered at the conclusion of the hearing held on February 27, 1985, which Mr. Adams had declined to attend. Since respondent had presented no financial data whatsoever at the time the bench decision was rendered, I necessarily concluded in the bench decision that respondent had failed to prove that it was unable to pay penalties. Therefore, the portion of the bench decision which considered the criterion of whether the payment of penalties would cause respondent to discontinue in business must now be revised to show that I have examined the financial information belatedly submitted by Mr. Adams.

An additional reason for rewriting the first part of my bench decision lies in the fact that the Secretary's counsel made the following request at the conclusion of her presentation of evidence (Tr. 133):

> MS. RAY: The Secretary would urge that you consider, not in assessing the amount of penalties, but for your consideration and perhaps referral to the Commission, Mr. Adams' lack of attendance at all the past hearings, his lack of response to your orders in this case as well as in other cases, and we just ask you to take that into consideration and do what you will with it.

When I rendered the bench decision, I noted in it the many times that Mr. Adams had failed to appear at hearings and his failure to respond to my orders requesting that he submit various types of information, but I did not recommend that the Commission take any disciplinary action against him pursuant to section 2700.80 of the rules, because I believed that my giving emphasis in a public decision to his lack of response to the judges' orders and his failure to follow the Commission's procedural rules would be sufficient to impress upon him that he cannot continually ask the Commission to give consideration to his arguments while continuing to ignore the Commission's procedural rules and the judges' orders.

I still think that the publicity given to his past conduct is all that is necessary at the present time, but I shall hereinafter discuss Mr. Adams' conduct in more detail than I would have if he had appeared at the hearing and had introduced his financial exhibits in a manner which would have made it possible for the Secretary's counsel and me to ask clarifying questions about their meaning and interpretation.

Mr. Adams' Practice of Ignoring Procedural Requirements

It is astonishing to me how Mr. Adams continues to ignore the Commission's rules and the judges' orders. He proceeds in each case as if he is a law unto himself and he seems to think that he can with impunity continue to supply as few of the materials he is requested to submit as suits his inclination and purpose and that he is absolutely entitled to submit any sort of material he sees fit to provide with the belief that everyone is required to give his contemptuous approach full consideration despite the fact that he never appears at hearings or presents a witness who can explain the basis for his arguments or the validity of his claims.

I have had at least three previous proceedings involving Mr. Adams who, in addition to acting as respondents' counsel, is also shown in the Legal Identity Reports filed with MSHA as respondents' vice president (Exh. 1). Mr. Adams indicated in his pleadings filed in each of the previous three proceedings that he wanted a hearing. Yet, when the hearings in those three proceedings were convened, no one appeared to represent respondent. When show-cause orders were thereafter sent to Mr. Adams, he either failed to answer the show-cause orders or failed to give a satisfactory reason for failing to appear at the hearing. Therefore, in each case, a default decision was issued holding respondent in default and assessing the penalties proposed by MSHA. Secretary of Labor v. Adams Stone Corp., Docket No. KENT 80-254-M, issued January 16, 1981 (unreported); Secretary of Labor v. Adams Stone Corp., Docket Nos. KENT 81-71-M, et al., issued December 30, 1981 (unreported); and Secretary of Labor v. Adams Coal Enterprises, Inc., Docket No. KENT 82-10, 4 FMSHRC 1159 (1982).

In a pleading filed on December 7, 1984, in this proceeding, Mr. Adams purports to excuse his failure to appear at the hearings by stating that Magoffin, Johnson & Morgan Stone Company (hereinafter called MJM) "is on the brink of bankruptcy" and that "it has failed to send counsel to several hearings due to the lack of funds to protest, present proof, and pay legal fees." The lack of merit to that contention is shown by the fact that the above-mentioned default proceeding in Docket No. KENT 82-10 pertained only to Adams Coal Enterprises, Inc., as to which no claim of bankruptcy has been raised. Also three of the seven cases involved in the default proceeding in Docket Nos. KENT 81-71-M, et al., pertained to the Jenkins Mine or to Adams No. 3 Preparation Plant, which are owned and operated by Adams Stone Corporation, as to which no claim of bankruptcy has been raised.

Moreover, in the default proceeding in Docket No. KENT 80-254-M, only MJM was involved, but Mr. Adams replied to the show-cause order issued in that case, asking him to explain why he had failed to appear at the hearing, by stating that he had had to appear before a Federal district court on the same day the hearing was held in Docket No. KENT 84-254-M and he requested that I schedule another hearing in that case so that he could be given another chance to appear. Obviously, if the reason he had failed to appear in that case was MJM's lack of funds to pay counsel, that same lack of funds would have prevented him from coming to the second hearing just as it allegedly prevented him from appearing at the first hearing. Since that was my first experience with Mr. Adams' practice of failing to appear at hearings, I would naively have granted

his request for rescheduling the hearing, had it not been for the fact that the Secretary's counsel in that case had tried repeatedly to talk to Mr. Adams on the day prior to the hearing but Mr. Adams had declined to return the calls made to his office by the Secretary's counsel. Additionally, at no time prior to the hearing, did Mr. Adams ever try to let me or the Secretary's counsel know that he had to appear in another proceeding in a Federal court.

The Evidence Shows that MJM Is Not Operated as a Completely Independent Company As Claimed by Mr. Adams

Because of Mr. Adams' statement that MJM is being operated under an agreement between the union and MJM, the Secretary's counsel requested that I order Mr. Adams to supply "any and all union arbitration agreements which may have an effect on the MJM Mine and Mill." Mr. Adams was ordered to supply the above information in my order issued January 24, 1985, but he failed to do so,(Footnote.1) despite his statement in his pleading filed on December 7, 1984, that "[r] espondent is willing to submit any and all records including financial statements, union contracts, or any other information which the Regional Solicitor would need or the Department of Labor herein."

In his answer filed on February 8, 1985, to my order of January 24, 1985, Mr. Adams stated as follows:

> This corporation [MJM] has been in effect for many years and has been in good standing with the State of Kentucky. It has its own corporate records and books along with its own employees and equipment. All records are kept separate, including separate sales, payroll, accounts payable, general ledger, and job cost from the Adams Stone Corporation [which operates the Jenkins Mine and Mill]. There is no intermingling of the employees or equipment and the two operations are over 100 miles apart geographically and serve different customers in different geographical areas.

> Attached hereto is a copy of the bill of sale when said company [MJM] was purchased.
>
> By an error, either on the Respondent (sic) or the Petitioner's part in past years, the MJM Stone Company has been referred to as the Adams Stone Company, when in fact there was no connection between the two as far as corporate identity.

When one of the inspectors was testifying in this proceeding, he stated that MJM's employees had advised him that the slippage switches used to abate the violation alleged in Citation No. 2249133 (Exh. 18) were brought from the Jenkins Quarry and installed on conveyor belts being used at MJM (Tr. 104). He also stated that Adams Stone Corporation exchanged equipment between its various operations, including the construction and asphalt operation. He additionally stated that it was his understanding that the same general superintendent is in charge of all of the operations (Tr. 105).

As to Mr. Adams' statement, quoted above, that Adams Stone Corporation has erroneously been shown to be in charge of the MJM operations, it is clear from an examination of the material attached to that statement that Adams Stone Corporation is the alter ego of MJM. One of the documents submitted by Mr. Adams is a copy of a judgment issued on September 25, 1974, by the United States District Court of the Eastern District of Kentucky in Civil Action No. 1611. That judgment explains that Adams Stone Corporation purchased the capital stock of MJM during the calendar year of 1970 and agreed to pay certain indebtedness of MJM, but the financial arrangements between the parties were never consummated.

The judgment thereafter approves a settlement under which Stuart Adams, individually and personally, and Adams Stone Corporation were made liable for the payment of $600,000 in discharge of a loan made to MJM by the United States of America through the Small Business Administration. The settlement concluded all claims between Stuart Adams, Adams Stone Corporation, Adams Construction Company, MJM, and any other corporation in which Stuart Adams has a controlling interest and the Estate of Gaines P. Wilson, Sr., Alexander Equipment and Trucking Company, Greenup Stone Company, Greenup Aggregate Company, Inc., Ken-Ten, Inc., Gaines P. Wilson & Son, Inc., Wilson Contracting Co., Estate of Donald L. Schieman, Mercer Stone Company, A & W Construction Company, and all other companies in which the Estate of Gaines P. Wilson, Sr., is a substantial stockholder.

The judgment additionally noted that the parties having possession of the stock book and minute book of MJM would forthwith deliver those books to Adams Stone Corporation, that the Estate of Gaines P. Wilson, Sr., would convey to MJM real estate used in quarry operations and property adjacent to the quarry, that the Citizens Fidelity Bank & Trust Company would dismiss all claims against Stuart Adams, Adams Construction Company, Adams Stone Corporation, and MJM, and that the parties would secure a release of a working capital loan needed by MJM.

There was also attached to Mr. Adams' statement in reply to my order of January 24, 1985, a satisfaction of judgment issued on January 2, 1975, by the Federal Court in Civil Action No. 1611 stating that MJM had paid the sum of $600,000 "as required by the terms of the Judgment entered in this proceeding on September 25, 1974."

Under 30 C.F.R. 41.10 each operator of a coal or other mine is required to file with MSHA "the name and address of such mine, the name and address of the person who controls or operates the mine, and any revisions in such names and addresses." Section 41.10 also states that the required information is to be submitted on a Legal Identity Report Form 2000.7. The Legal Identity Report submitted for the MJM Mine and Mill is dated January 30, 1979, and shows that S.H. Adams is president and that D.H. Adams is vice president of Adams Stone Corporation. No change in the name of the operator of the MJM Mine and Mill was made until a "Change Notice" was filed on July 12, 1984, showing that the operator of the MJM Mine and Mill is Magoffin, Johnson & Morgan Stone Company and that Stuart H. Adams is president, that David H. Adams is vice president, and that Barbara Adams is Secretary-Treasurer of Magoffin, Johnson & Morgan Stone Company.

The Legal Identity Report filed on January 30, 1979, with respect to the Jenkins Quarry shows that Adams Stone Corporation is the operator and that S.H. Adams is president of Adams Stone Corporation. The Legal Identity Report filed on April 29, 1980, with respect to the Adams No. 3 Preparation Plant shows the operator to be Adams Stone Corporation and indicates that S.H. Adams is president, and that both D.H. Adams and Robert S. Adams are vice presidents.

MSHA issues all citations and orders in the names of the operators shown on Legal Identity Reports. All of the citations in this proceeding were issued in the name of

Adams Stone Corporation because all citations, except Citation No. 2386423 dated July 16, 1984, in Docket No. KENT 84-239-M, were written before July 12, 1984, when the revised Legal Identity Report was filed showing that the operator of the MJM Mine and Mill had been changed from Adams Stone Corporation to Magoffin, Johnson & Morgan Stone Company. The Secretary's counsel filed the proposals for assessment of civil penalty in Docket Nos. KENT 84-235-M and KENT 84-239-M in the name of Magoffin, Johnson & Morgan Stone Company, but apparently the association of Adams Stone Corporation with the MJM Mine and Mill was so embedded in the minds of those who processed the pleadings, that the name of Magoffin, Johnson & Morgan Stone Company was crossed out and the name of Adams Stone Corporation was inserted as the respondent in both Docket Nos. KENT 84-235-M and KENT 84-239-M. My order of January 24, 1985, explained that the cases in Docket Nos. KENT 84-235-M and KENT 84-239-M would be processed in the name of Magoffin, Johnson & Morgan Stone Company, instead of Adams Stone Corporation since the Secretary's counsel had initially filed those two cases in the name of Magoffin, Johnson & Morgan Stone Company.

Mr. Adams had not, up to the time of his filing of his pleadings in this proceeding, attempted to obtain a change in previous cases to indicate that Adams Stone Corporation is not the operator of the MJM Mine and Mill. The default decisions which I have previously mentioned in Docket Nos. KENT 80-254-M and KENT 81-71-M, et al., showed Adams Stone Corporation as the operator of the MJM Mine and Mill. Mr. Adams' failure to file a revised Legal Identity Report from 1979 to 1984 and his failure to ask that the name of the respondent in previous cases be changed from Adams Stone Corporation to Magoffin, Johnson & Morgan Stone Company as the operator of the MJM Mine and Mill show that he did not distinguish between the two affiliates as the operator of the MJM Mine and Mill until he decided to raise a claim in this proceeding that Magoffin, Johnson & Morgan Stone Company is financially unable to pay civil penalties.

Moreover, the Federal U.S. Corporation Income Tax Return for 1983, belatedly submitted by Mr. Adams on March 7, 1985, shows that it was filed in the name of Stuart Adams Corporation & Subsidiaries. An attachment in that tax return lists the "Subsidiaries in Consolidated Group" as follows:

Burdine Coal
Adams Sand Corporation
Adams Concrete Products Corporation
Adams Construction Company
Adams Diversified
Adams Ford Company
Adams Stone Enterprises
Adams Equipment Corporation
Adams Stone Corporation
Magoffin, Johnson & Morgan Stone

Although the Legal Identity Report filed on July 12, 1984, is checked to state that Magoffin, Johnson & Morgan Stone Company is not a subsidiary of Stuart Adams Corporation, the tax return for 1983 clearly indicates otherwise.

MJM Failed to Prove in this Proceeding that It Cannot Pay Civil Penalties

The hearing in this proceeding was convened on February 27, 1985, primarily to provide Mr. Adams with an opportunity to prove his allegation that Magoffin, Johnson & Morgan Stone Company (MJM) cannot pay penalties. Mr. Adams failed to appear at that hearing and the only excuse he gives for failure to appear is that MJM is so close to bankruptcy that it cannot afford to pay any one to represent it at a hearing. The Commission held in Sellersburg Stone Co., 5 FMSHRC 287 (1983), aff'd, 736 F.2d 1147 (7th Cir.1984), that a judge may presume that an operator is able to pay penalties unless he presents financial evidence proving that he is, in fact, unable to pay penalties. Therefore, the burden is on the operator to prove that it is unable to pay penalties. Mr. Adams is not even entitled to have that question determined in this proceeding because he failed to respond to my order requiring him to present many types of evidence which he declined to do. The burden should not be on the Secretary's counsel or me to spend hours examining the complicated tax returns he did finally submit 8 days after the hearing had been completed and a bench decision had been rendered, finding that he had failed to prove that MJM cannot pay penalties.

Despite the fact that Mr. Adams is not procedurally entitled to have his incomplete financial evidence considered on its merits, I have spent a great deal of time examining it. The materials he submitted raise far more questions than they answer. The Secretary's counsel was entitled to have a witness explain the tax returns and balance sheets submitted by Mr. Adams because an ordinary person without a background in tax and accounting is unable to determine the exact financial condition of Stuart Adams Corporation & Subsidiaries.

It should also be noted, before I discuss the details of the financial information submitted by Mr. Adams, that the criterion here involved, as stated in section 110(i) of the Act, is "the effect [that payment of civil penalties will have] on the operator's ability to continue in business." That criterion is not proven by a showing that an operator participated in providing its affiliated companies with tax deductions which resulted in a negative taxable income on line 30 of a U.S. Corporation Income Tax Return Form 1120.

Companies which are making profits which would require them to pay taxes have been known to purchase corporations in financial difficulty for the sole purpose of using such companies' losses as deductions on their Forms 1120 so as to avoid the payment of income taxes. One of the questions which I would have asked Mr. Adams, or his witness, if he had appeared at the hearing held on February 27, 1985, would have been just what motive the Stuart Adams Corporation had in paying the United States Government $600,000 and assuming the debts of the Estate of Gaines P. Wilson, Sr., in return for acquiring MJM's equipment and real estate interests.

Mr. Adams submitted the Forms 1120 filed by Stuart Adams Corporation and Subsidiaries for the years 1979 through 1983. He also submitted the individual balance sheets of MJM for the years 1979 through 1983. All that can be determined for certain from that stack of materials is that they were chosen selectively and are very incomplete. For example, the portion of the return for 1983 consists of only seven pages, but those seven pages refer to 62 back-up and explanatory statements which were not submitted along with the return. While I do not purport to say that I would have understood every aspect of them even if they had been submitted, it is certain that I cannot conclude from my examination of the selective portions of the returns submitted by Mr. Adams that Stuart Adams Corporation is going to stop operating MJM simply because it is required to pay the civil penalties hereinafter assessed in this proceeding.

A few pertinent figures from the returns will serve to illustrate the difficulty of analyzing the information submitted by Mr. Adams. The respective returns, on line 11, show that Stuart Adams Corporation and Subsidiaries had a total income in 1979 of $6,534,981, in 1980 of $4,432,352, in 1981 of $6,867,541, in 1982, of $6,286,028, and 1983 of $346,330. Line 30 of the returns shows that Stuart Adams Corporation and Subsidiaries (hereinafter referred to as SACS) had a taxable income of $700,852 in 1979, a negative taxable income of $1,542,880 in 1980, a taxable income of $132,612 in 1981, a taxable income of $45,348 in 1982, and a negative taxable income of $602,207 in 1983. Thus, in 3 of the 5 years, SACS had a taxable income.

The second largest negative taxable income of $602,207 occurred in 1983 and the return for that year was prepared by a different accounting firm from the one which prepared the returns for the previous 4 years. That firm changed the method for calculating gross profit on line 3 of the form by including salaries and wages in the cost of goods sold,

whereas the previous accounting firm had included salaries and wages on line 13 of the form under deductions. The new accounting firm also included deductions for depreciation in determining the cost of goods sold, whereas the previous accounting firm had included depreciation as a deduction on line 21 of the form. The new accounting firm also made other changes in the method of determining the ultimate important figure of taxable income on line 30. Those changes cannot be evaluated for effect because they are explained in statements which were not provided by Mr. Adams.

The balance sheets submitted by Mr. Adams for MJM raise questions about the interrelationship of SACS and MJM. For example, in 1979, the cost of MJM's equipment is shown as $969,892 and accumulated depreciation is shown as $697,502, but the balance sheet for 1980 shows that the cost of MJM's equipment has been drastically reduced to $577,836 and that accumulated depreciation has been reduced to $281,626. That decline in the cost of MJM's equipment by nearly $400,000 in a single year may be the result of a realistic reevaluation of the equipment or the transfer of equipment from MJM to some other subsidiary.

Another unanswered question about the balance sheets submitted by Mr. Adams for MJM is that each sheet for the 5 years from 1979 through 1983 shows among MJM's assets an amount ranging from $476,010 in 1979 to $336,000 in 1983 as being "due from affiliates." That figure is unexplained on any of the balance sheets, but its presence does add support to my previous finding that MJM is not the independent company which Mr. Adams claims that it is.

There are, of course, many aspects of MJM's balance sheets which show that it is not a profitable company. The information supplied by Mr. Adams does show that MJM had a net loss of $59,443 in 1979, a net loss of $105,733 in 1980, a net gain of $20,184 in 1981, a net loss of $108,681 in 1982, and a net loss of $105,541 in 1983. In other words, out of the 5 years reflected in the information submitted by Mr. Adams, MJM suffered a net loss on its operations in 4 of those years. The balance sheets also indicate that MJM did not produce many products in 1982 because it purchased no explosives, purchased little electrical power, experienced few repair bills, and paid only $11,895 in wages and salaries in that year. It should be noted, however, that MJM began to increase its operations again in 1983. Although it still had a large net loss for 1983, there are indications of improvement in production and sales. It should also be noted that Mr. Adams submitted the financial information on

March 7, 1985. While SACS had not submitted its 1984 Form 1120 by that date, there is no doubt but that Mr. Adams could have supplied some indication by March of 1985 concerning the nature of MJM's operations by the end of 1984. I have always required a respondent in a civil penalty case to provide financial information for the period immediately preceding the hearing if the respondent made a claim that its financial condition was so poor that it could not pay civil penalties. The only facts which Mr. Adams did provide for MJM for the year 1984 is that the tons sold by MJM increased from 6,697.52 in 1983 to 72,669.50 in 1984 and that the total hours worked by MJM's employees in 1984 increased from 3,648 in 1983 to 17,444 in 1984. The hours worked and the tons produced show a substantial increase for 1984 and support a conclusion that MJM is not as close to bankruptcy as Mr. Adams has represented.

The main theme which I have expressed above is that one cannot make definite conclusions from the information submitted by Mr. Adams because of the inherent conflicts in the way the information was prepared and submitted. A final illustration of the inconsistent nature of the information may be seen in the fact that the balance sheet for MJM's operations for 1983 shows that MJM had a total loss of $105,541. Yet another tabulation submitted as a part of SACS' consolidated tax return for 1983 shows that MJM had a negative taxable income of $324,964. It is not possible to determine from the information submitted by Mr. Adams how a net loss of $105,541 can be increased by three times that amount for purposes of filing a tax return, but that seems to be what happened.

If Mr. Adams had appeared at the hearing on February 27, 1985, and had explained in person, or through a witness, the exact nature of MJM's operations, it is possible that he could have proven his contention that MJM is in such dire financial condition that it will discontinue in business if it has to pay the civil penalties hereinafter assessed. The information submitted by Mr. Adams on March 7, 1985, however, is too complicated, inconsistent, and incomplete to permit me to make a finding that the civil penalties in this proceeding should be reduced under the criterion that payment of civil penalties will cause MJM to discontinue in business.

The remainder of this decision consists of the bench decision which I rendered at the hearing held on February 27, 1985 (Tr. 143-174):

This proceeding involves seven proposals for assessment of civil penalty filed by the Secretary of Labor seeking to have penalties assessed for a total of 33 alleged violations of the mandatory health and safety standards by Adams Stone Corporation and Magoffin, Johnson & Morgan Stone Company. A tabulation showing the docket number, dates of filing, and the number of violations alleged in each case is set forth below.

Docket No.	Date of Filing	Number Alleged Violations
KENT 84-171-M	June 21, 1984	8
KENT 84-178-M	July 9, 1984	5
KENT 84-194-M	July 30, 1984	6
KENT 84-208-M	August 13, 1984	8
KENT 84-234-M	September 26, 1984	2
KENT 84-235-M	October 19, 1984	1
KENT 84-239-M	October 19, 1984	3
		33

The issues in a civil penalty proceeding are whether violations of the mandatory health and safety standards occurred and, if so, what monetary penalties should be assessed, based on the six criteria set forth in section 110(i) of the Act.

The Secretary of Labor presented evidence with respect to some of the violations, but did not present evidence as to other violations. I shall consider below all of the violations alleged under each docket number and indicate that I am either approving the penalty proposed by MSHA or I am assessing a penalty on the basis of a de novo hearing with respect to the violations as to which evidence was presented. The Commission held in the Sellersburg case, previously cited, and in U.S. Steel Mining Co., Inc., 6 FMSHRC 1148 (1984), that the Commission and its judges are not bound by the penalty formula used by MSHA to propose penalties under Part 100 of Title 30 of the Code of Federal Regulations. The penalties which I hereinafter assess are based on the evidence presented at this hearing.

DOCKET NO. KENT 84-171-M

Citation No. 2248435, or Exhibit 7, alleged a violation of 30 C.F.R. 57.15-4, because three employees were working to free a hangup of rock at the primary jaw crusher located underground and were not wearing safety glasses. Pieces of rock of various sizes were being thrown in the direction of the employees. That section requires that all persons shall wear safety glasses, goggles, or face shields when in or

around an area of a mine or plant where a hazard exists which could cause injury to unprotected eyes.

The inspector testified that the materials which would not go into the jaws of the crusher were being pried by one employee while another employee threw pieces of rock into the crusher, which was running, for the purpose of trying to get the crusher jaws to grasp the rocks and pull them into the crusher. Therefore, one employee was exposed to being hit with the rocks that were being thrown into the crusher. The other employee was exposed to the possibility that a piece of rock might fly out of the crusher and hit him.

This particular citation was written in conjunction with an imminent danger order and the inspector considered that there was a high degree of negligence as well as gravity associated with the violation.

I find that the violation occurred. Having found a violation, a civil penalty is required to be assessed. Tazco, Inc., 3 FMSHRC 1895 (1981). In the discussion at the outset of this decision I indicated, as to the criterion of whether the payment of penalties would cause respondent to discontinue in business, that respondent had failed to submit sufficient unambiguous information to prove its allegation that payment of penalties would adversely affect its ability to continue in business. Consequently, it will not be necessary to reduce a penalty determined under the other criteria, under the criterion of whether the payment of penalties would cause respondent to discontinue in business.

Counsel for the Secretary presented some information in Exhibit 2 indicating that the number of hours worked at the MJM Mine and Mill in 1983 was 13,500, and that the number of hours worked at the Jenkins Mine and Mill was 19,000. Those figures would support a finding that respondent is a small operator. Therefore, to the extent that penalties are based on the size of respondent's business, a relatively low penalty should be assessed. (Footnote.2)

The inspector testified that all of the violations were abated within the time that he provided in his citations and that he would conclude that respondent did demonstrate a good-faith effort to achieve rapid compliance. It has always

been my practice to increase a penalty under the criterion of good-faith abatement if the evidence shows that respondent failed to make a good-faith effort to correct the violation, and to deduct some amount from a civil penalty determined under the other criteria if respondent made some outstanding effort to correct a violation. In this instance, and in this entire proceeding, all of the violations were abated in a normal fashion by the operator correcting the violation within the time provided, so that none of the penalties assessed in this proceeding need to be increased or decreased under the criterion of good-faith abatement.

Counsel for the Secretary presented as Exhibits 3 and 4 a tabulation of prior violations as to which respondent has paid civil penalties. Neither exhibit shows that respondent has previously been assessed a penalty for a violation of section 57.15-4. Therefore, no portion of the penalty in this instance should be assessed under the criterion of history of previous violations.

The remaining two criteria are negligence and gravity. The inspector was unable to say that the foreman knew that the employees were working on the crusher without wearing safety glasses of any type. Consequently, I cannot find that there was negligence on the part of the operator in this instance. The Commission held in Southern Ohio Coal Co., 4 FMSHRC 1459 (1982), that an operator is not liable for the negligence of rank and file miners in assessing civil penalties. Therefore, no portion of the penalty should be assessed under the criterion of negligence.

The Commission has held in other cases that a respondent is liable for the occurrence of a violation without regard to fault. U.S. Steel Corp., 1 FMSHRC 1306 (1979). The discussion of the violation here at issue indicates that the employees had subjected themselves to a serious violation in this instance and that from the standpoint of gravity a penalty of $50 should be assessed.

Citation No. 2248436, or Exhibit 8, alleged a violation of section 57.12-16 because work was being performed on the vibratory feeder at the jaw crusher underground without the power switch being locked out and deenergized. The inspector believed that a very serious violation existed because the inadvertent start up of the feeder could cause the employee to fall into the crusher. Section 57.12-16 requires that electrically powered equipment be deenergized

before mechanical work is done on such equipment. Power switches are required to be locked out or other measures taken which will prevent the equipment from being energized without the knowledge of the individuals working on it. The locks placed on the switches are to be removed only by the person who installed them or by an authorized person. The inspector believed that the violation was very serious in this instance as indicated above, but he was not sure that the foreman was aware of the employee's failure to lock out the equipment. Therefore, I cannot assess any portion of the penalty under the criterion of negligence.

Exhibits 3 and 4 do not indicate that respondent has been cited for a previous violation of section 57.12-16. It is unnecessary for me to repeat the findings made above with respect to the size of the respondent's business or the ability to pay penalties or good-faith abatement.

Consequently, the penalty to be assessed is based entirely on the gravity of the violation, which was extremely serious in this instance, because the employee was in a position where rocks could have fallen on him from the feeder if it had started up. He could also have fallen or have been pushed by rocks into the crusher itself. In view of the extreme seriousness of the violation I believe that a penalty of $250 should be assessed for this violation.

Citation No. 2248437, or Exhibit 9, alleged a violation of section 57.4-24(c) because a fire extinguisher provided in the underground maintenance truck had been used and several days had passed without the fire extinguisher being immediately recharged or replaced with a fully charged extinguisher. Section 57.4-24(c) requires that fire extinguishers be replaced with a fully charged extinguisher or device or recharged immediately after any discharge. The inspector testified that the foreman did not know that the fire extinguisher had been discharged. Consequently, no portion of the penalty may be based on the criterion of negligence. There is no history of a previous violation of section 57.4-24(c), so that no portion of the penalty should be assessed under the criterion of history of previous violations.

The only remaining criterion not previously discussed above is gravity. The inspector said that the truck was an old model, in the late sixties or early seventies, and that if it had caught fire without having the fire immediately extinguished, there was a potential for the gasoline tank to explode. Of course, the rubber tires on the truck could

catch on fire, along with the wooden beams which it was hauling, with a result that toxic gases could be transported to the face area by the ventilation system. Therefore, he considered the violation to be serious. In such circumstances, I believe that a penalty of $50 should be assessed.

Citation No. 2248438, or Exhibit 10, alleged a violation of section 57.4-2 because a sign warning against smoking and open flames was not provided at the oil storage area located underground. Section 57.4-2 requires that signs warning against smoking and open flames be posted in areas or places where fire or explosion hazards exist. The inspector testified that there were several 55-gallon and 5-gallon containers filled with oil in this area and that there was some spillage from the tanks when the miners went to them to obtain oil for their vehicles. It is permissible for the employees to smoke in some areas of this particular underground mine since it is mining limestone rather than coal, and the inspector thought that an employee might forget that he was in an area where smoking was prohibited and go into the no-smoking area to obtain oil and drop a cigarette in the oil and cause a fire. Oil is not a highly inflammable substance, as gasoline would have been, and therefore the likelihood of fire or explosion was not great. Exhibits 3 and 4 show that no previous violation under this section has occurred.

There had previously been a sign prohibiting smoking in this area but it had disappeared and the foreman was surprised that the sign was not there at the time this alleged violation was cited. Therefore, I cannot find that respondent was negligent in the occurrence of this particular violation. The seriousness of the violation is not great because of the types of materials that were being stored. Consequently, I find that a penalty of only $25 should be assessed in this instance.

The next citation involved in this proceeding is No. 2248439, alleging a violation of section 57.14-1. That citation alleged that the belt drive for the No. 3 belt conveyor was not guarded to prevent persons from becoming caught in pinch points. The pinch points were exposed and accessible. The Secretary did not present any evidence with respect to this alleged violation. I have examined the proposed assessment which was based on the inspector's findings checked on the citation to the effect that there was moderate negligence and that there was a reasonable likelihood that a permanent disabling injury could be sustained as a result of the failure to guard the belt drive.

The Secretary proposed a penalty of $58 pursuant to the assessment formula contained in Part 100 of Title 30 of the Code of Federal Regulations. I find that that is a reasonable penalty and it will be affirmed.

Citation No. 2248481 alleged a violation of section 57.9-1, and stated that self-propelled equipment was not being inspected by the equipment operator before being placed in operation. The defects, if any, were not recorded or reported by the operator of the equipment.

The Secretary did not present any evidence with respect to this alleged violation, and since the inspector checked the citation as not involving a "significant and substantial" (Footnote.3) violation, a single penalty was assessed of $20 pursuant to section 100.4 of the Secretary's assessment formula. Since no evidence was presented to show that the violation was any more serious than the inspector considered it to be, I find that the $20 penalty is reasonable and should be affirmed.

Citation No. 2248482, or Exhibit 12, alleged a violation of section 57.12-25 because the 120-volt electric motor on the diesel tank located beside the mine office was not grounded. The ground conductor had been disconnected at the motor disconnect and the breaker panel. The pump is used daily and the area around the pump is at times wet.

Section 57.12-25 provides that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection."

The inspector testified that when persons were reaching for the nozzle of the diesel tank they could be exposed to a serious shock or electrocution hazard, and that a spark could also have the potential for igniting the diesel fuel. The inspector did not know whether the foreman was aware of the violation, but he had been in that area and should have notice

that the electrical pump was not grounded. Consequently, I find that there was a moderate amount of negligence associated with the violation of section 57.12-25 and that the violation was very serious.

The exhibits in this proceeding do not show that respondent has been previously cited for a violation of section 57.12-25. Therefore, a penalty of $25 will be assessed under the criterion of negligence, and a penalty of $100 will be assessed under the criterion of gravity for a total penalty of $125.

Citation No. 2248483, or Exhibit 13, alleged a violation of section 57.9-3 because the service brakes on the front-end loader were not adequate. Section 57.9-3 provides that "[p]owered mobile equipment shall be provided with adequate brakes." A distance of 20 feet was required for stopping the loader when it was traveling at a speed of 3 to 4 miles per hour, whereas the brakes should have stopped the end loader within a distance of 3 or 4 feet. The loader is operated in the plant and stockpile areas where foot traffic is present.

The inspector noticed that the brakes were probably inadequate because the operator of the end loader was putting the transmission in reverse to help stop it. The inspector stated that the driver of the front-end loader had not reported the defective brakes to the mine foreman and therefore respondent cannot be held liable for the employee's negligence in this instance.

The violation was serious because people coming to the mine to obtain crushed stone often walk in the area where the end loader is used, and were exposed to possible serious injury or death if the operator of the end loader had been required to stop in order to avoid hitting someone.

Exhibit 3 shows that respondent was previously cited for a violation of section 57.9-3 only about 4 months before the present violation was cited. Therefore, a penalty of $25 will be assessed under the criterion of history of previous violations. No portion of the penalty may be assessed under the criterion of negligence, but since the violation was serious, a penalty of $75 will be assessed under the criterion of gravity, for a total of $100.

Citation No. 2248486 alleged a violation of section 57.13-21 because a 2-inch high-pressure air hose to the drill and automatic shutoff valve was not provided with suitable locking devices. Section 57.13-21 provides:

> Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

The Secretary did not present any evidence with respect to this violation. The inspector's citation indicates that he considered the violation to be "significant and substantial." He rated negligence as moderate, and gravity as reasonably likely to involve an injury of a permanently disabling nature for one person. A penalty of $58 was proposed pursuant to section 100.3 of the assessment procedure. I find that that is a reasonable penalty and it will be affirmed.

Citation No. 2248434, or Exhibit 6, alleged a violation of section 57.15-5 because an employee was observed standing on two rocks that were lodged in the jaw crusher. The jaw crusher was operating and the employee was not wearing a safety belt and using a line while freeing a hangup of rocks in the crusher. Section 57.15-5 provides that "[s]afety belts and lines shall be worn when men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered."

The inspector cited this violation as part of an imminent danger order. The inspector believed that the employee was in extreme danger because the jaws of the crusher had an opening of from 30 to 42 inches and the employee was standing on two rocks at the jaws of the crusher while trying to get the rocks separated so that they would go into the crusher. Another employee was standing on the feeder of the crusher trying to free some other rocks. A third employee was standing near the crusher throwing rocks into the jaws of the crusher so as to promote the jaws to catch hold of the rocks which were hanging at the mouth of the crusher. The inspector stated that he felt that the employee was in danger of falling into the crusher at any moment and that

he wrote the imminent danger order to require him to be withdrawn, along with the employee in the feeder, until they could be provided with the proper lifelines and protected from falling.

Inasmuch as the foreman had been with the inspector up to the point that they found the employees engaged in this hazardous practice it cannot be said that the operator was aware of the employees' practice, assuming it was a practice, of freeing rocks in the crusher while failing to use the lifeline.

The inspector stated that section 57.16-2(a)(1) requires that the operator use a mechanical breaker or a hydraulic ram for the purpose of freeing hangups in the crusher, and that the operator did not have such equipment.

I find that this violation was a very serious one and that a penalty of $1,000 should be assessed under the criterion of gravity.

The exhibits do not show that respondent has been previously cited for a violation of section 57.15-5 and therefore no portion of the penalty will be assessed under history of previous violations.

Citation No. 2248440, or Exhibit 11, alleged a violation of section 57.9-2 because the parking brake was not operable on the truck used to transport powder and the brake cannot be set when employees are on the lift in the truck when it is raised to put explosives into a drill hole. The truck is used in several areas of the mine where the floor of the mine is not level. The inspector stated that the driver of the truck could not rely upon placing the truck in a low gear for holding it when it was engaged in filling holes or drilling roof bolts because at times the truck's hydraulic system was required for the work that was being performed. As a result only the foot brake would be a means of holding the truck at such times, and if the driver should happen to be distracted, or become fatigued, he might allow the truck to move while one or more persons were working on the lift.

Section 57.9-2 requires that "[e]quipment defects affecting safety shall be corrected before the equipment is used." The equipment in this instance was being used when the brakes were obviously defective. The violation was serious and a penalty of $100 should be assessed under the criterion of gravity. The operator of the truck had not reported the defective brakes to the foreman and no portion

of the penalty should be assessed under the criterion of negligence. There is no history of a previous violation of that section and therefore a total penalty of $100 will be assessed.

Citation No. 2248484 alleged a violation of section 57.11-1 because a safe means of access was not provided and maintained to the impact crusher area. Sections of the crusher platform floor were missing and persons were required to walk narrow concrete supports to reach the crusher for welding and maintenance operations.

Counsel for the Secretary did not present evidence as to Citation No. 2248484. The citation shows that the inspector believed that it was a "significant and substantial" violation, and that it was a violation that could reasonably be expected to result in a permanently disabling injury. MSHA proposed a penalty of $58 which appears to be appropriate and will be affirmed.

Citation No. 2248485 alleged a violation of section 57.14-1 because a guard for the V-belt drive on the impact crusher did not extend below the pinch point. The pinch point was exposed and accessible. One person works in the area when the crusher is operating. The inspector considered this violation to be "significant and substantial," and checked the citation to indicate his belief that it was reasonably likely that an injury of a permanently disabling nature could occur for one person. The Secretary's counsel did not present any evidence with respect to this alleged violation. A penalty of $58 was proposed by MSHA. That appears to be appropriate and that penalty will be affirmed.

DOCKET NO. KENT 84-194-M

Citation No. 2249127 alleged a violation of section 57.12-18 because the principal power switches located at the primary jaw crusher control deck were not labeled to show which unit each controlled. Identification by location could not readily be made. Work was being performed on two of the three units which did not have labeled switches.

The inspector considered the violation to be moderately serious and believed that it was reasonably likely that an injury might occur of a permanently disabling nature. MSHA proposed a penalty of $58. Since the Secretary's counsel did not present any evidence with respect to this violation, the penalty will be affirmed.

Citation No. 2249129, or Exhibit 14, alleged a violation of section 57.3-22 because loose ground was not taken down in the No. 5 entry before work was done. The loose ground consisted of rocks ranging in size from 3 inches by 5 inches to 8 inches by 16 inches and was located near the back a distance of 18 feet from the mine floor. Two employees were working in this area.

Section 57.3-22 provides that:

> 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.

The inspector said that the material was obviously cracked and loose, that he had discussed the operator's tendency to leave loose ground with the foreman on a previous inspection, that this was an active working area, and that since the roof was about 18 feet high in this area, the two men working in the vicinity of the loose material were exposed to a hazard which could cause serious injury or death if the loose material had been dislodged. Therefore, I find that he properly concluded that the operator was very negligent and that the violation was very serious.

I further find that the violation occurred, that a penalty of $200 should be assessed under the criterion of negligence, and that a penalty of $300 should be assessed under the criterion of gravity, for a total penalty of $500. There is no history of a previous violation of that section.

Citation No. 2249130, or Exhibit 15, alleged another violation of section 57.3-22 and stated that loose ground was not taken down in the No. 6 heading before work was done. The loose ground located high on the rib and face ranged in size from 6 inches by 12 inches to much larger sized slabs. Two mechanics were working in the area. The inspector believed that the second violation of section 57.3-22 was as serious as the first one and that respondent was equally negligent.

Since the materials were even larger in size than the materials described in the first citation, I find that a penalty of $200 should be should be assessed under the criterion of negligence, and $400 under gravity, for a total penalty of $600.

Citation No. 2249131, or Exhibit 16, alleged a violation of section 57.12-34. That section provides that "[p]ortable extension lights, and other lights that by their location present a shock or burn hazard shall be guarded." The guard for the portable light had been removed in this instance and was not in place to prevent a burn or shock injury.

The inspector said that the type of bulb used in the light was very different from the ordinary light bulb used in a home and that it was extremely hot. Since the employees were working within 4 feet of the light, they could easily have backed into it and burned themselves. He also pointed out that he knew of an employee who had been electrocuted when he came in contact with a fluorescent light fixture at a mine that does not belong to respondent in this case. The inspector's testimony supports a finding that the violation was serious.

The evidence does not show that respondent's foreman was aware of this particular hazard or violation so that no portion of the penalty should be assessed under negligence. In view of the gravity of the violation in the circumstances described by the inspector, a penalty of $50 will be assessed under the criterion of gravity. The evidence does not show that respondent has previously violated section 57.12-34.

Citation No. 2249134 alleged a violation of section 57.5-13 because sufficient water or other efficient dust-control measures were not being used during drilling operations. A large quantity of suspended dust was observed where three employees were working.

The Secretary did not present any evidence with respect to this violation and the inspector did not rate the violation as "significant and substantial" so that a penalty of $20 was proposed by MSHA. Since there is no evidence to show that a different amount should be assessed, I find that the amount of $20 is reasonable and should be affirmed.

DOCKET NO. KENT 84-234-M

Citation No. 2249132, or Exhibit 17, alleged a violation of section 57.16-2(a)(1). That section provides that:

> Bins, hoppers, silos, tanks and surge piles, where loose unconsolidated materials are stored, handled or transferred shall be equipped with mechanical devices or other effective means of handling materials so that during normal operations persons are not required to enter or work where they are exposed to entrapment by the caving or sliding of materials.

The inspector testified that a mechanical device had not been provided at the hopper for the vibratory feeder located at the jaw crusher so that persons could avoid working where they would be exposed to entrapment or the danger of falling into the jaw crusher. The inspector stated that he had previously cited the operator for failing to have such a device, and that no attempt had been made to obtain that type of device. He believed that the failure to have the equipment could result in serious or permanently disabling injuries.

The exhibits do not show that the respondent has previously been cited for a violation of this section. The inspector stated that he had orally discussed the need for the mechanical device and had refrained from citing the operator for that violation at the time the imminent danger order discussed above was written. Therefore, respondent was extremely negligent in failing to provide the mechanical device to make it possible for the rocks to be dislodged without having a person get into the feeder or crusher for that purpose.

I find that the evidence supports a finding that respondent was very negligent in this instance and that the violation was serious. Therefore a penalty of $300 will be assessed under the criterion of negligence, and $200 under the criterion of gravity for a total penalty of $500.

Citation No. 2247332 alleged a violation of section 57.11-58 because an accurate record of persons in the mine was not being kept. The check-in and check-out system indicated two persons were underground when there were actually four underground, and those four persons were not carrying a positive means of being identified.

The Secretary did not present any evidence with respect to this alleged violation. The inspector rated the violation as not being "significant and substantial" and a penalty of only $20 was proposed by MSHA. In the absence of evidence to support a greater penalty than $20, I shall affirm the penalty proposed by MSHA.

DOCKET NO. KENT 84-235-M

Citation No. 2249128 alleged a violation of section 57.9-22 because a berm or guard was not provided alongside the elevated roadway beginning at the No. 2 belt conveyor and extending to the jaw crusher feeder, a distance of about 60 feet. The level below the roadway averaged approximately 12 feet. A 35-ton truck traveled the roadway.

The inspector considered the violation to be "significant and substantial," that it was associated with moderate negligence, and that it was reasonably likely that someone would be injured in a permanently disabling fashion. The Secretary's counsel did not present any evidence with respect to this violation, and MSHA proposed a penalty of $58 pursuant to section 100.3 of MSHA's assessment formula. In the absence of any evidence to support a different penalty, I find that the proposed penalty of $58 should be affirmed.

DOCKET NO. KENT 84-239-M

Citation No. 2249249 alleged a violation of section 57.5-50(b) because the full shift exposure of the operator of the Michigan front-end loader to mixed noise levels exceeded the allowable rating by 1.55 times, or was 155 percent more than the permissible level. That exposure is the equivalent of subjecting an 8-hour employee to 93 decibels. Personal hearing protection was being used. The cab windows and windshield had been removed.

The inspector extended the time for compliance with respect to this alleged violation on about six occasions to allow time for installation of engineering controls until, in July of 1984, the loader operator was found to be protected and was not subject to an excessive noise level.

The Secretary did not present any evidence with respect to this violation and MSHA assigned a penalty of only $20 to the violation because it was not checked as being "significant and substantial." Since there is no evidence in this proceeding to show that a different penalty should be assessed, I shall affirm the penalty of $20.

Citation No. 2249133, or Exhibit 18, alleged a violation of section 57.4-75. That section provides that "[b]elt conveyors shall be equipped with slippage and sequence switches." The citation states that the Nos. 1 and 2 belt conveyors were not equipped with slippage and sequences switches and that both belts are located underground.

The purpose of having a slippage switch, according to the inspector, is to make sure that the belt will be deenergized if the belt starts slipping on a roller or a pulley. If the belt is not deenergized, friction from the slipping may result in the belt catching on fire. He further explained that the sequence switch was designed to stop other belts from dumping material on the belt that is stopped so that there will not be a pileup of material. He believed that the violation was serious because failure to have the slippage switch could result in a fire and the toxic fumes from the fire would be carried to the working section. He stated that he had previously discussed with the operator's foreman the need for providing slippage switches, but they had not been installed.

The evidence supports a finding that the violation occurred, that the operator was highly negligent in this instance, and that the violation was serious. Therefore, I find that a penalty of $300 should be assessed under the criterion of negligence, and $150 under the criterion of gravity, for a total penalty of $450. The exhibits do not show that there has been any previous violation of section 57.4-75.

Citation No. 2386423 alleged a violation of section 50.30(a) because respondent had not submitted the quarterly employment and production report in a timely manner. As a result, a copy of the quarterly report was not available at the mine office.

The Secretary did not present any evidence with respect to this violation and the inspector did not check it as being "significant and substantial." MSHA proposed a penalty of only $20. Since there is no evidence to support assessment of a different penalty I shall affirm the proposed penalty of $20.

DOCKET NO. KENT 84-208-M

Citation No. 2247321, or Exhibit 24, alleged a violation of section 56.14-6. Section 56.14-6 provides that "[e]xcept when testing the machinery, guards shall be securely in place while the machinery is being operated."

The inspector stated that the guards for the primary impact crusher V-belt drives were not in place. The guards were lying on the ground. He stated that the superintendent

or foreman did not know that the guards had been removed, but he believed the violation was serious because one of the belts was 2 feet above the ground and the other one was higher than that. The pinch point between the pulley and the belt was large enough for an arm to go into the exposed area. The machinery was being operated and there were several exposed tripping hazards in the vicinity, such as pieces of metal and soft drink bottles. The inspector believed that people would be walking close to the pinch points at least once daily, and believed that the violation was serious and could result in permanently disabling accidents, such as the severence of an arm if a person should fall into the pinch point.

Since there is no indication that respondent's foreman was aware of the violation, no portion of the penalty should be assessed under negligence, but the gravity of the violation warrants a penalty of $100. There is no evidence to show that a previous violation of this section has been cited.

Citation No. 2247322 alleged a violation of section 56.16-2(a)(1). That section has already been cited and I have quoted the language of the standard. It should be noted that this particular violation occurred at respondent's Jenkins mine rather than the MJM Mine.

The inspector had discussed the failure to provide the mechanical rock breaker, which is required by section 56.16-2 when he was at the MJM Mine, and he believed that respondent was very negligent in failing to provide the mechanical device at the Jenkins Mine. He stated that the employee was engaged in a very hazardous practice at the Jenkins Mine because he was going into the hopper and putting an explosive on a rock that needed to be broken into pieces small enough to go into the crusher. He would then place mud on top of the explosive and discharge it. That type of operation was very hazardous because flying rocks could injure a person. Just the fact that he was using explosives increased the seriousness of the violation.

Since respondent was very negligent in failing to provide a proper device for breaking up the rock, and since explosives were being used in a hazardous manner as a substitute for the type of equipment that should have been provided, I find that a penalty of $300 should be assessed under the criterion of negligence, and a penalty of $400 should be assessed under the criterion of gravity, for a total penalty of $700. The evidence fails to reflect a previous history for a violation of section 56.16-2(a)(1) except for the other violation which was cited in this proceeding.

Citation No. 2249136, or Exhibit 19, alleged a violation of section 56.12-25. That section provides that "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." The inspector testified that three disconnect switches located in the control room were not grounded or provided with equivalent protection. The middle lug was missing on the disconnect for heaters allowing the energized conductors to move about when the knife switch was in open position.

The inspector believed that the violation was very serious because when a person opens the compartment his body may become a conductor and result in a serious injury or electrocution. The inspector said that he did not think that the foreman was aware of the condition. Consequently, no portion of the penalty should be assessed under negligence, but in view of the seriousness of the violation, a penalty of $100 will be assessed under the criterion of gravity. The exhibits do not show that a previous violation of that section has been alleged.

Citation No. 2249137, or Exhibit 20, alleged a violation of section 56.12-32. That section provides that "[i]nspection and cover plates on electrical equipment and junction boxes shall be kept in place at all times except during testing or repairs."

The citation states that 16 covers were left off or not closed on electrical panels located in the main electrical room, and that these energized parts were exposed and accessible. The boxes were located at various heights, some as low as 2 feet, and others as high as 5 feet from the floor. The inspector said that a person could slip and fall against one of the conductors and that it was necessary for someone to go into the control room at least once a day. He said there was sufficient dirt in the panels to show that there was a practice of leaving a large number of them open. There were soft drink bottles and old electrical equipment in the area so that a person could fall against one of the conductors. Since they were 480-volt conductors, there was a danger of serious injury or electrocution.

The evidence supports a finding that the violation occurred and that respondent was very negligent in allowing this large number of covers to be left off of the panels. A penalty of $100 will be assessed under the criterion of negligence. Because of the seriousness of the violation, a penalty of $200 will be assessed under the criterion of gravity, for a total penalty of $300. There is no history of a previous violation.

Citation No. 2249138, or Exhibit 21, alleged a violation of section 56.11-1. That section requires that a "[s]afe means of access shall be provided and maintained to all working places." The citation states that handrails for the No. 13-2 belt conveyor were broken in several places, and completely missing in other areas. The conveyor belt is used to gain access to the head and trough rollers by maintenance personnel.

The inspector testified that there was fine dust on the belt which made it somewhat slippery. The belt was 15 to 20 feet above the ground and was on an incline. Generally when a person walks on the belt he is doing so for the purpose of performing maintenance work and therefore is carrying something in his hand. The existence of dust on the belt, the type of work being done, and the sloping nature of the belt are conditions which support a finding that respondent was negligent because the violation was clearly obvious to the foreman as well as to the person who had to walk on the belt. I find that the violation occurred, that a penalty of $100 should be assessed under the criterion of negligence, and that a penalty of $100 should be assessed under the criterion of gravity, for a total penalty of $200. There is no previous history of a violation of section 56.11-1.

Citation No. 2249139, or Exhibit 22, alleged a second violation of section 56.11-1 because a safe means of access was not provided to persons performing maintenance on the head and trough rollers of the No. 5-4 belt conveyor. No handrails at all were provided on this conveyor, which was approximately 15 to 20 feet from ground level.

I find that the violation occurred. Since the violation is almost identical to the previous violation discussed above, a penalty of $200 will be assessed for this violation also.

Citation No. 2249140, or Exhibit 23, alleges a violation of section 56.9-87. That section provides that:

> Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

The citation stated that the reverse signal alarm was not operable on the Michigan front-end loader. The loader operator had an obstructed view to the rear because the engine of the loader was located there and obstructed his view

directly behind him. His view was also obstructed by the large wheels of the vehicle.

Respondent's customers go into the area where the front-end loader operates for the purpose of getting crushed stone, and they often get out of their trucks and walk around in the vicinity of the end loader. There was a lot of noise from the crusher in this area, and the audible backup alarm, if it had been operating, would have been sufficient to alert a person that the machine was backing up. The inspector considered the violation to be serious because of the fact that people did walk in the vicinity of the end loader when it was in operation. In fact, the inspector saw two people in that area at the time the citation was written.

I find that the violation occurred. Since the end loader was operating in full view of the foreman, I find that respondent was very negligent for failure to have the backup alarm in operation, and that the violation was very serious in the circumstances. Therefore, a penalty of $200 will be assessed under the criterion of negligence, and a penalty of $150 under the criterion of gravity, for a total penalty of $350. There is no history of previous violations.

Citation No. 2249135 alleged a violation of section 50.30(a) because respondent had not submitted a quarterly employment and production Form 7000-2 for the past two quarters. The Secretary's counsel did not present any evidence with respect to this alleged violation. The inspector did not consider the violation to be "significant and substantial" and did not evaluate the criteria of gravity and negligence associated with the violation. MSHA proposed a penalty of only $20. In the absence of any evidence to support different findings, I shall affirm the penalty proposed by MSHA.

Adams Stone Corporation will hereinafter be ordered to pay all penalties in Docket Nos. KENT 84-171-M, KENT 84-178-M, KENT 84-194-M, and KENT 84-234-M because all of the proposals for assessment of civil penalty in those dockets for the MJM Mine and Mill were filed with the understanding that Adams Stone Corporation was the operator of the MJM Mine and Mill. Adams Stone Corporation will also be ordered to pay the penalties assessed for the Jenkins Mine and Mill in Docket No. KENT 84-208-M because the proposal for assessment of civil penalty named Adams Stone Corporation as the operator of the Jenkins Mine and Mill at the time the proposal was filed and Adams Stone Corporation is still the operator of the Jenkins Mine and Mill. Magoffin, Johnson & Morgan Stone

Company will be ordered to pay the civil penalties assessed for the MJM Mine and Mill in Docket Nos. KENT 84-235-M and KENT 84-239-M because the proposals for assessment of civil penalty in those two dockets named Magoffin, Johnson & Morgan Stone Company as the operator of the MJM Mine and Mill at that time.

Mr. Adams filed his answers in all dockets with captions showing Adams Stone Corporation as the respondent, including the answers filed in Docket Nos. KENT 84-235-M and KENT 84-239-M, even though the Secretary's counsel had shown Magoffin, Johnson & Morgan Stone Company as the respondent in those two cases. All prior case involving the MJM Mine and Mill have been processed with the understanding that Adams Stone Corporation was the operator of the MJM Mine and Mill. Therefore, it is appropriate for the processing of the cases here involved that they be completed in the name of the affiliated company in whose name the cases were originally filed by MSHA.

WHEREFORE, It is ordered:

(A) Adams Stone Corporation shall, within 30 days from the date of this decision, pay civil penalties in the amount of $5,728.00 for the penalties assessed in Docket Nos. KENT 84-171-M, KENT 84-178-M, KENT 84-194-M, KENT 84-234-M, and KENT 84-208-M which are allocated to the respective violations as follows:

Docket No. KENT 84-171-M

Citation No. 2248435	3/26/84	57.15-4. . . .	$ 50.00
Citation No. 2248436	3/26/84	57.12-16. . .	250.00
Citation No. 2248437	3/26/84	57.4-24(c) . .	50.00
Citation No. 2248438	3/26/84	57.4-2 . . .	25.00
Citation No. 2248439	3/26/84	57.14-1 . . .	58.00
Citation No. 2248481	3/27/84	57.9-1 . . .	20.00
Citation No. 2248482	3/27/84	57.12-25. . .	125.00
Citation No. 2248483	3/27/84	57.9-3. . .	100.00

Total Penalties Assessed in Docket No. KENT 84-171-M. . . . . $ 678.00

Docket No. KENT 84-178-M

Citation No. 2248486	3/28/84	57.13-21. . .	$ 58.00
Citation No. 2248434	3/26/84	57.15-5. . .	1,000.00
Citation No. 2248440	3/27/84	57.9-2. . .	100.00
Citation No. 2248484	3/27/84	57.11-1. . .	58.00
Citation No. 2248485	3/27/84	57.14-1. . .	58.00

Total Penalties Assessed in Docket No. KENT 84-178-M . . . . . $ 1,274.00

Docket No. KENT 84-194-M

Citation No. 2249126	4/26/84	57.14-1	$ 58.00
Citation No. 2249127	4/26/84	57.12-18. . .	58.00
Citation No. 2249129	4/26/84	57.3-22. . .	500.00
Citation No. 2249130	4/26/84	57.3-22. . .	600.00
Citation No. 2249131	4/26/84	57.12-34. . .	50.00
Citation No. 2249134	4/26/84	57.5-13. . .	20.00

Total Penalties Assessed in Docket No. KENT 84-194-M . . . . . $ 1,286.00

Docket No. KENT 84-234-M

Citation No. 2249132	4/26/84	57.16-2(a)(1)	$ 500.00
Citation No. 2247332	5/21/84	57.11-58. . .	20.00

Total Penalties Assessed in Docket No. KENT 84-234-M. . . . . $ 520.00

Docket No. KENT 84-208-M

Citation No. 2249135	5/7/84	50.30(a)	$ 20.00
Citation No. 2247321	5/8/84	56.14-6. . .	100.00
Citation No. 2247322	5/8/84	56.16-2(a)(1)	700.00
Citation No. 2249136	5/8/84	56.12-25	100.00
Citation No. 2249137	5/8/84	56.12-32	300.00
Citation No. 2249138	5/8/84	56.11-1 . . .	200.00
Citation No. 2249139	5/8/84	56.11-1 . . .	200.00
Citation No. 2249140	5/8/84	56.9-87 . . .	350.00

Total Penalties Assessed in Docket No. KENT 84-208-M. $1,970.00

(B) Magoffin, Johnson & Morgan Stone Company shall, within 30 days from the date of this decision, pay civil penalties

~725
totaling $548.00 for the penalties assessed in Docket Nos. KENT 84-235-M and KENT 84-239-M which are allocated to the respective violations as follows:

Docket No. KENT 84-235-M

Citation No. 2249128	4/26/84	57.9-22	$ 58.00
Total Penalties Assessed in Docket No. KENT 84-235-M			$ 58.00

Docket No. KENT 84-239-M

Citation No. 2249249	11/22/83	57.5-50(b)	$ 20.00
Citation No. 2249133	4/26/84	57.4-75. . .	450.00
Citation No. 2386423	7/16/84	50.30(a). . .	20.00
Total Penalties Assessed in Docket No. KENT 84-239-M.			$ 490.00
Total Penalties Assessed in This Proceeding			$6,276.00

Richard C. Steffey
Administrative Law Judge

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Footnotes start here:-

~Footnote_one

1 Mr. Adams was also ordered to submit, in reply to the Secretary's motion for a more definite statement, the reason each citation was being contested as required by 29 C.F.R. 2700.28. He was additionally directed to provide me with the number of witnesses he expected to present at the hearing, along with an estimate of the amount of hearing time his direct case would take, and a list of stipulations of any non-contested facts. He failed to submit any of the aforementioned materials and failed to reply to the proposed stipulations sent to him by the Secretary's counsel.

~Footnote_two

2 The information submitted by Mr. Adams on March 7, 1985, is somewhat different from the facts given in Exhibit 2, but the finding that respondent is a small operator would remain unchanged regardless of whether one uses the information in Exhibit 2 or the facts submitted by Mr. Adams.

~Footnote_three

3 In Consolidation Coal Co., 6 FMSHRC 189 (1984) the Commission held that an inspector may properly designate a

violation cited pursuant to Section 104(a) of the Act as being "significant and substantial" as that term is used in Section 104(d)(1) of the Act, that is, that the violation is of such nature that it could significantly and substantially contribute to the cause and effect of a mine safety and health hazard.