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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. WEST 84-72-M
A.C. No. 42-01638-05501

v.

Veyo Mine

LAVA PRODUCTS, INC.,
RESPONDENT

DECISION

Appearances: JayLynn Fortney, Esq., Office of the Solicitor,
U.S. Department of Labor, Kansas City, Missouri,
for Petitioner;

Mr. Samuel N. Rucker, President, Lava Products,
Inc., Washington, Utah,
pro se.

Before: Judge Morris

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

After notice to the parties, a hearing on the merits took place in Las Vegas, Nevada on November 27, 1984.

The citations, the standards allegedly violated and the proposed penalties therefor are as follows:

Citation No.	30 C.F.R.	Proposed Penalty
2008000A	55.12-25	\$225
2008000B	55.12-2	225
2008000C	55.12-40	225
2084002	55.12-65	420
2084003	55.12-1	420

The cited regulations provide as follows:

55.12-25 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.

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55.12-2 Mandatory. Electric equipment and circuits shall be provided with switches or other controls. Such switches or controls shall be of approved design and construction and shall be properly installed.

55.12-40 Mandatory. Operating controls shall be installed so that they can be operated without danger of contact with energized conductors.

55.12-65 Mandatory. Powerlines, including trolley wires, and telephone circuits shall be protected against short circuits and lightning.

55.12-1 Mandatory. Circuits shall be protected against excessive overload by fuses or circuits breakers of the correct type and capacity.

The parties waived their right to file post-trial briefs.

Issues

The issues are what penalties are appropriate for the violations.

Stipulation

Samuel N. Rucker, President of respondent, admitted the company was in violation of the regulations. Further, the company was only contesting the amount of the penalties (Tr. 25-27).

Summary of the Evidence

Gary Ferrin, an MSHA inspector with extensive expertise in electricity, inspected Lava Products on September 15, 1983 (Tr. 6-10).

On that date the inspector issued five separate withdrawal orders and five separate citations under section 104 of the Act. He subsequently vacated the orders and citations and issued them under a single order (Tr. 28, 29).

There were three workers at the site. This was the average workforce (Tr. 29). When he returned to the site on September 20 he found three of the violative conditions had been abated. In his opinion, the condition of imminent danger no longer existed at the time of the later inspection (Tr. 30, 31).

The hazards here could cause death or serious injury to the three workers (Tr. 32). On his reinspection the entire plant had been grounded and the inspector terminated the violation of 55.12-25. The violations of 55.12-1 and 55.12-65 had not yet been abated (Tr. 33). Hazards of fire and a possible fatal shock could result from the violation of 55.12-65 (Tr. 39, 40).

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Concerning the violation of 55.12-2 there were two service entrances on the switches. This required a person to open the door and strike the contact with a stick (Tr. 34). In addition, the citation for this violation was issued because the switch was upside down and thus not properly installed. If a person opened the reversed switch handle the fuse remained energized (Tr. 34, 36, 37).

The violation of 55.12-40, which had existed for two years, was a highly dangerous condition. The 480 volts could cause death or serious bodily injury (Tr. 35-38).

After granting two extensions to abate the inspector returned to the mine on January 4, 1984. The violations concerning 55.12-65 and 55.12-1 had not been abated. At that point the inspector issued a closure order against the entire electrical system (Tr. 41, 42). The violative conditions were, in fact, abated on January 13, 1984 (Tr. 42).

Samuel N. Rucker testified for Lava Products. The witness, part owner and manager of respondent, failed to rapidly abate all of the citations because he had difficulty in obtaining the services of an electrician (Tr. 47-49). St. George, Utah, with a population of 10,000, has only three electricians (Tr. 49, 50).

The owners of Lava Products have lost about \$250,000 in the business. Mr. Rucker himself has not drawn any money from the company for 90 days (Tr. 51). The witness indicated the company had no funds and the proposed penalties might put the company into bankruptcy (Tr. 55).

Don Larkin, an accountant, owns seventy percent of the business. Larkin keeps the financial records and was aware of the hearing (Tr. 57, 58). The company had not filed for bankruptcy and the owners were attempting to sell it (Tr. 59).

Discussion

Respondent's admission of liability establishes the violations. All of the contested citations should be affirmed.

The Congressional directive to assess civil penalties is contained in Section 110(i), now 30 U.S.C. 820(i), of the Act. It provides as follows:

The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the ap-

propriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In considering the above factors I note that the company has no adverse prior history. The size of respondent's business must be considered as small, inasmuch as it has only three employees. The operator was negligent in failing to correct the violative conditions. The evidence that the imposition of penalties may force the company into bankruptcy is rejected because such evidence was without any supporting financial statements. Particularly, I note that the majority stockholder, a public accountant, did not appear nor seek to offer any evidence on this subject. The gravity of each of these electrical violations should be considered as high. The company's good faith is apparent in abating the violations of 55.12-25, 55.12-2 and 55.12-40 within four days of the first inspection (Tr. 56). However, the company receives no credit for the violations of 55.12-65 and 55.12-1 because it did not rapidly abate these violations. On balance, I consider that the following penalties are appropriate:

Citation No.	Penalty
2008000A	\$125
2008000B	125
2008000C	125
2084002	420
2084003	420

Conclusions of Law

Based on the entire record and the factual findings made in the narrative portions of this decision, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.
2. Respondent violated the citations herein and they should be affirmed and penalties for such violations should be assessed.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

1. The following citations are affirmed and the civil penalties, as noted, are assessed:

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Citation No.	Penalty
2008000A	\$125
2008000B	125
2008000C	125
2084002	420
2084003	420

2. Respondent is ordered to pay to the Secretary the sum of \$1,215 within 40 days of the date of this decision.

John J. Morris
Administrative Law Judge