

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

June 22, 1989

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 89-3-M
Petitioner	:	A. C. No. 44-02965-05516
	:	
v.	:	Louisa Plant
	:	
A. H. SMITH STONE COMPANY,	:	Docket No. VA 89-4-M
Respondent	:	A. C. No. 44-03995-05511
	:	
	:	Culpeper Plant

DECISION

Appearances: Jack Strausman, Esq., Office of the Solicitor,
U. S. Department of Labor, Arlington, Virginia,
for Petitioner;
Lisa M. Wolff, Representative for A. H. Smith
Stone Company, Branchville, Maryland, for
Respondent.

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against A. H. Smith Stone Company pursuant to section 110 of the Federal Mine Safety and Health Act of 1977, 30 U. S. C. § 820. A hearing was held on June 6, 1989, and the parties waived submission of post-hearing briefs.

Penalty proceedings before the Commission are entirely de novo. Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147, 1152 (7 Cir. 1984). Tennessee Chemical, Inc., 11 FMSHRC _____, at _____, (May 30, 1989).

Section 110(i) of the Act, 30 U.S.C. § 820(i), provides that where a violation is proved the Commission in determining the amount of penalty shall consider, (1) the operator's history of previous violations; (2) the appropriateness of the penalty to the size of the operator; (3) negligence; (4) the effect of any penalty upon the operator's ability to continue in business; (5) the gravity of the violation; and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation.

In accordance with the evidence of record and the **uncon-**troverted submissions of the Solicitor, I find the operator's size is moderate.

In the absence of evidence to the contrary, I find that imposition of penalties herein will not affect the operator's ability to continue in business. The unsupported and unverified financial statements submitted by the operator do not establish that the operator will be forced out of business due to payment of civil penalties under the Act. At the hearing in Docket No. VA 89-13-M, Administrative Law Judge William Fauver told the operator's representative what type of evidence was required to prove this defense. I adhere to the views expressed by Judge Fauver.

I further find the operator's history is as set forth in the Solicitor's pre-hearing statement, with the exception of the last two sentences of subparagraph **11(f)**.

Pursuant to the stipulations I conclude that the violations were abated in a timely manner.

VA 89-3-M

Citation No. 3045443

This citation sets forth the alleged violative condition or practice as follows:

"The guard for the drive pulley and V belts for the #1 jaw crusher had parts of the guard missing. This is along a travelway and would be hazardous to anyone traveling in the area. This condition was cited on the last regular inspection 1-27-88."

Section 56.14006 of the regulations, 30 C.F.R. § 56.14006, provides:

Except when testing the machinery, guards shall be securely in place while machinery is being operated.

The inspector testified that two portions of the guard were missing, one on the drive belt for the electric motor of the jaw crusher and the other for the drive pulley of the crusher itself (**Tr. 28, 30, 59**). The operator's former plant manager remembered as missing only the portion of the guard for the electrical motor, but admitted that there could very well have been two missing pieces (**Tr. 62**). I accept the inspector's testimony that two pieces of the guard were missing. I further adopt the inspector's statement that when he issued the citation the machinery was running and the plant was in full operating condition

(Tr. 31, 38). Based upon the foregoing, I find a violation of 30 C.F.R. § 56.14006.

The inspector stated that a ladder, which was used to go to and from the control booth of the crusher, was one foot in front of where the guard for the pulley of the jaw crusher was missing (Tr. 27, 35, 38). He believed there was a danger that if the belt broke, an individual on the ladder could be killed before he could get out of the way (Tr. 35, 38). He had read of fatal accidents where belts like the ones in this case had weakened and broken (Tr. 43). There was also a risk that an employee could lose his footing on the ladder and fall with his foot becoming caught in the drive pulley (Tr. 40). He saw employees going up and down the ladder (Tr. 41). The operator's former manager agreed that any injury would be permanently disabling **or** fatal (Tr. 54). Based upon the possibility of serious or fatal injuries from the missing guard, I find the violation was serious.

The inspector also found that the violation was significant and substantial. The Commission has held that a violation is properly designated significant and substantial if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained.

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The **Commission** subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" U. S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

As set forth above, the evidence shows a violation and discrete safety hazards. What is lacking however, is proof of a reasonable likelihood that the hazards will result in injury. When asked why he believed injury or illness was reasonably likely, the inspector merely referred to previous accidents and

fatalities in other operations (**Tr. 34-35**). He did not indicate the frequency of those occurrences. Moreover, he did not address the circumstances which led him to conclude that in this case there **was** reasonable likelihood. He spoke only of the possibility of an individual on the ladder becoming caught in a pinch point or losing his footing on the ladder due to grease or water, without indicating the condition of the ladder or surrounding **areas** at the time (**Tr. 39-40**). The statement of the operator's former manager that injury was reasonably likely to an individual on the work platform must be discounted because he made clear that a person would be on this platform only for pre-shift inspection and maintenance and not during normal operations (**Tr. 48, 57-58**). Accordingly, the finding of significant and substantial must be vacated.

As set forth herein, a violation may be serious while not satisfying the criteria required by Commission precedent for establishing significant and substantial. Quinland Coals, Inc., 9 FMSHRC 1614, 1622, n. 11 (**September** 1987); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987); Columbia Portland Cement, 10 FMSHRC 1363, 1373: 1375, 1384-1385; 1387, 1397; 1399, 1403; 1405, 1409 (September 1988). As also explained supra, penalty proceedings are de novo before the Commission which is bound to determine penalty assessments in accordance with the six criteria in section **110(i)** of the Act. The Commission is not bound by the Secretary's penalty assessment regulations.

I accept the inspector's testimony that the foreman observed this violation but took no action to **correct it (Tr. 35-36)**. On this basis **I** find the operator was negligent.

In light of the foregoing, a penalty of \$175 is assessed for this violation.

Order No. 3045449

This order sets forth the alleged violative condition or practice as follows:

"The disconnecting device for 'the electrical distribution box for the jaw crusher was broken. The device would not connect or disconnect the electrical current. This is an order of withdrawal [sic] all employees shall be withdrawn from in and around the electrical control house for the **#1** jaw crusher until repairs are made to the electrical disconnect device. The repairs must be made by an electrician that understands the hazards of working on electrical devices. The repairs must be inspected by an authorized representative of the Secretary of Labor before the plant can be restarted".

Section 56.12030 of the regulations, 30 C.F.R. § 56.12030 provides:

When a potentially dangerous condition is found it shall be corrected before equipment or wiring is energized.

The inspector testified that after he issued the citation for missing guards discussed supra, he went back to the area to see how the employees were coming along in correcting that situation (Tr. 66). He inquired whether power was disconnected from the electrical motor on the jaw crusher and was told it had been (Tr. 67). The foreman and the crusher operator then accompanied the inspector to the switchhouse where the electrical control boxes were located (Tr. 66-67). The inspector stated that the disconnect handle on the outside of the control box was not working and just flopped up and down (Tr. 67-68). The crusher operator then opened the box and pulled the inside switch down (Tr. 68-69). According to the inspector, contrary to what he had been told power had not in fact been disconnected and the equipment was energized (Tr. 69). Moreover, a plate that was supposed to be inside the box covering wires was missing (Tr. 69-70). The wires inside the box were uninsulated, live and exposed (Tr. 70, 72-73). The wires carried 480 volts which were sufficient to kill or seriously injure anyone who touched them (Tr. 72, 90-91). The inspector further reported that the wires were only 2" from the crusher operator's hand when he reached in to pull the inside switch (Tr. 72). The operator's former manager did not dispute the inspector's account of what he saw (Tr. 98, 104). I accept the inspector's testimony on the foregoing matters.

The condition of the control box including the broken outside handle, missing inside plate and exposed live wires was potentially very dangerous. The wires which could cause death or serious injury by electrocution were just a few inches away from the hand of anyone who would use the inside switch to disconnect power. The cited mandatory standard requires that this condition be corrected before equipment or wiring is energized. Based upon the evidence that power was not disconnected, I find a violation.

Because of the close proximity of the live and uninsulated wires to an individual disconnecting the inside switch as the crusher operator did, there was a very real danger of injury or death from electrocution. I find the violation was very serious.

The requirements necessary to **support** a finding of significant and substantial have already been explained. In this instance there was a violation. Second, the danger of electrocution presented a discrete safety hazard. Third, a reasonable likelihood existed that the hazard would result in an **injury** because a person's hand inside the box would be only 2" from live

wires. It would not be at all unusual for an individual to place his hand in that dangerous position since the inside switch would be used every time power was disconnected (Tr. 80). Indeed, the crusher operator told the inspector that for the past six months it had been his practice to shut off power in this manner (Tr. 81). Fourth, there was a reasonable likelihood the injury would be of a reasonably serious nature since electrocution by the 480 volts would cause serious injury or death. Accordingly, pursuant to Commission precedent I conclude the violation was significant and substantial.

The violation existed for six months. It was the crusher operator's practice to use the inside switch (Tr. 81). He did so in the presence of not only the inspector but also of his foreman who was not surprised, did not dispute this was the procedure followed, and did not attempt to stop him (Tr. 82). These circumstances demonstrate that supervision, training and discipline were all far from what was required. The negligence of the rank and file crusher operator-is therefore, attributable to the operator. A. H. Smith Stone Company, 5 FMSHRC 13 (January 1983); Southern Ohio Coal Company, 4 FMSHRC 1459 (August 1982). The foreman also was extremely negligent and, as a supervisor, his negligence is attributable to the operator. Wilmot Mining Company, 9 FMSHRC 684 (April 1987), affirmed in part, reversed and remanded in part, per curiam Wilmot Mining Company v. Secretary of Labor, (6 Cir. No. 87-3480) (May 17, 1988). Finally, the plant manager who was responsible for all operations was not even aware that employees were disconnecting power with the inside switch (Tr. 97-98). In light of the foregoing, I find that at all levels the operator was highly negligent.'

The operator's assertion that the main power switch was used to disconnect power is without merit. The crusher operator's conduct and statements demonstrate that the main was not being used to disconnect power (Tr. 81). In addition, I do not find it plausible that the main would be used in this manner because it would be impractical and expensive (Tr. 92-93).

A violation such as this is cause for great concern. The likelihood of grievous bodily harm was very great and the operator condoned perilously unsafe practices.

A penalty of \$1,800 is assessed for this violation.

Citation No. 3045442

This citation was issued for a violation of 30 C.F.R. § 56.15002 because employees in the plant area were observed not wearing hard hats. The original assessment was \$168 and the recommended settlement is \$150. The Solicitor explained that the violation was significant and substantial as well as serious

because employees were working in areas where there was a danger of falling materials. According to the Solicitor the operator was negligent because the violation was obvious. The Solicitor stated he agreed to the slight reduction because the plant was not operating at the time the citation was issued (Tr. 12-14). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 14).

Citation No. 3045444

This citation was issued for a violation of 30 C.F.R. § 56.9087 because the back-up alarm on the front-end loader was inoperative. The original assessment was \$147 and the recommended settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because customers and truck drivers in the area were' subject to a risk of injury. According to the Solicitor the operator was negligent because the foreman himself was operating the loader (Tr. 14-16). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 16).

Citation No. 3045445

This citation was issued for a violation of 30 C.F.R. § 56.15003 because an employee was observed wearing tennis shoes in areas where a hazard existed which could cause an injury to the feet. The original assessment was \$74 and the recommended settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because of the risks posed to feet by heavy hand-held tools. According to the Solicitor the operator was negligent because the violation was obvious (Tr. 16-17). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 17).

Citation No. 3045447

This citation was issued for a violation of 30 C.F.R. § 56.12016 because two employees were observed working on electrically powered equipment without the power switches being properly locked out. The original assessment was \$178 and the proposed settlement is \$168. The Solicitor explained that the violation was significant and substantial as well as serious because employees could be injured if the conveyor belt were started from push button switches without the employees' knowledge. According to the Solicitor the operator was negligent since the foreman observed the condition. The Solicitor stated that he agreed to the slight reduction because the feared injury was not quite as serious as had originally been thought (Tr. 19). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (Tr. 19).

Citation No. 3045448

This citation was issued for a violation of 30 C.F.R. § 56.16005 because four compressed gas cylinders were not secured. At the hearing the operator offered to settle this violation for the \$20 original assessment and the Solicitor accepted. At the hearing I approved the recommended settlement (**Tr. 65**).

VA 89-4-M

Citation No. 2852770

This citation was issued for a violation of 30 C.F.R. § 56.15003 because employees including the plant superintendent were observed not wearing proper footwear in areas where a hazard existed which could cause injury to the feet. The original assessment was \$68 and the settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because hazards to the feet existed in the plant at the time the citation was issued. **Employees** were engaged in various tasks using heavy hand-held **tools**. According to the **Solicitor** the operator was negligent, especially since the superintendent himself was not wearing the required shoes (**Tr. 6-7**). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (**Tr. 7**).

Citation No. 2852771

This citation was issued for a violation of 30 C.F.R. § 56.16005 because there were two unsecured gas cylinders in the area of the primary crusher where four employees were working. The original assessment was \$157 1/ and the recommended settlement is for the same amount. The Solicitor explained that the violation was significant and substantial as well as serious because the tasks being performed by the employees required the use of compressed gas (**Tr. 8-9**). According to the Solicitor the operator was negligent, because the superintendent was in the area. At the hearing I accepted the **Solicitor's** representations and approved the recommended settlement (**Tr. 9**).

Citation No. 2852772

This citation was issued for a violation of 30 C.F.R. § 56.12016 because employees were observed working on the crusher without the electrically powered switches being properly locked out and tagged. The original assessment was \$178 and the **pro-**posed settlement is for the same amount. The Solicitor explained

1/ The transcript erroneously gives the amount as \$175 (**Tr. 9**).

the violation was significant and substantial as well as serious because the crusher could be inadvertently started while work was being performed. According to the Solicitor the operator was negligent because the superintendent should have known and probably did know that the employees were working on electrically powered equipment (**Tr. 11**). At the hearing I accepted the Solicitor's representations and approved the recommended settlement (**Tr. 13**).

Order

Citation No. 3045443

It is **ORDERED** that the finding of a violation be **AFFIRMED**.

It is further **ORDERED** that the finding of significant and substantial be **VACATED**.

It is further **ORDERED** that a penalty of \$175 be **ASSESSED**.

Order No. 3045449

It is **ORDERED** that the finding of a violation be **AFFIRMED**.

It is further **ORDERED** that the finding of significant and substantial be **AFFIRMED**.

It is further **ORDERED** that a penalty of \$1,800 be **ASSESSED**.

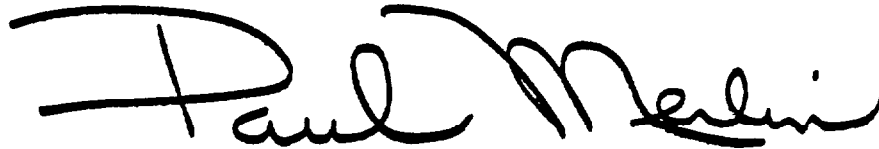
Citation Nos. 3045442, 3045444, 3045445, 3045447, 3045448
2852770, 2852771 and 2852772

It is **ORDERED** that the recommended settlements for these citations be **APPROVED**.

ORDER TO PAY

It is **ORDERED** that the operator pay the following amounts within 30 days from the date of this decision.

<u>Citation or Order No.</u>	<u>Amount</u>
3045443	\$175
3045449	\$1,800
3045442	\$150
3045444	\$147
3045445	\$74
3045447	\$168
3045448	\$20
2852770	\$68
2852771	\$157
2852772	\$178
Total	<u>\$2,937</u>



Paul Merlin
Chief Administrative Law Judge

Distribution:

Jack Strausman, **Esg.**, Office of the Solicitor, U. S. Department of Labor, 4015 Wilson Boulevard, Room 516, Arlington, VA 22203 (Certified Mail)

Ms. Lisa M. Wolff, Director of Safety/Government Affairs, A. H. Smith Associates, 9101 Railroad Avenue, Branchville, MD 20740 (Certified Mail)

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