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SOL (MSHA) V. MOUNTAIN PARKWAY STONE
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. KENT 89-26-M A. C. No. 15-15676-05510
v.	Docket No. KENT 89-27-M A. C. No. 15-15676-05511
MOUNTAIN PARKWAY STONE, INCORPORATED RESPONDENT	Staton Mine

DECISION

Appearances: Michael L. Roden, Office of the Solicitor, U. S. Department of Labor, Nashville, Tennessee, for the Secretary;
Jeffrey T. Staton, Vice President, Mountain Parkway Stone, Incorporated, Stanton, Kentucky, for Respondent.

Before: Judge Weisberger

Statement of the Case

In the above captioned cases, the Secretary (Petitioner) seeks Civil Penalties for alleged violations by the Operator (Respondent) of various safety standards set forth in Volume 30 of the Code of Federal Regulations. Pursuant to notice, these cases were heard in Lexington, Kentucky, on May 16 - 17, 1989. Eric Shanholtz and Vernon Denton testified for Petitioner, and Charles Williams, Teddy Combs, Vernon Denton, and Jeffrey T. Staton testified for Respondent. Both Parties waved their right to present closing oral arguments or to submit Post-hearing Briefs and Proposed Findings of Fact.

Stipulations

The following stipulations were agreed to by both Parties:

1. Mountain Parkway Stone, Incorporated, is a Kentucky corporation which produces limestone for resale in interstate commerce and thus is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its administrative law judges.

2. As of June 1988, Mountain Parkway Stone, Incorporated produced approximately 172 tons of limestone per day (45,000 annually) at its sole underground mine site, the Staton Mine in Powell County, Kentucky, and employed six full time employees in June 1988. At the date of the Hearing Respondent had five employees.

3. J. T. Staton is, and was in June through August 1988, the President of Mountain Parkway Stone, Incorporated, and the supervisor of the Staton Mine.

Findings of Fact and Discussion

Docket No. KENT 89-26-M.

Citation No. 3253127.

Eric Shanholtz, an MSHA Inspector, essentially testified that on June 16, 1988, when he inspected Respondent's mine, he measured the level of noise while standing below the level of the bin and to the front of Respondent's primary crusher. He said that he measured the noise for 2 and 1/2 hours until the crusher broke down. He indicated that there was an over exposure of 135 percent to the employee in the control booth. He issued a section 104(a) Citation asserting a violation of 30 C.F.R. 57.5050(b).

30 C.F.R. 57.5050(a) as pertinent, provides that noise level measurements "shall" be made using a meter ". . . meeting specifications for Type 2 Meters contained in American National Standards Institute (ANSI) Standard S1.4-1971 general purpose sound level meters." The record does not contain any evidence as to the type of meter, if any, used by Shanholtz. Further, section 57.5050, supra, sets forth various permissible dBA levels relating to duration per day of hours of exposure. Aside from the conclusional statement of Shanholtz that the levels resulted in an over exposure of 135 percent, the record does not contain any evidence of any dBA level.

Also, section 57.5050(b), supra, provides, in essence, that if there is a noise level exposure which has not been reduced by administrative or engineering controls, ". . . personal protection equipment shall be provided and used to reduce sound level to within the levels of this table. According to Shanholtz, the primary crusher operator was wearing ear plugs, but would still be subject to a permanent disability. There is no evidence that the ear plugs did not reduce the sound levels for the wearer, within the levels set forth in subsection a, supra.

Accordingly, it is concluded that the evidence fails to establish that the Respondent herein violated section 57.5050, supra. Accordingly, Citation 3253127 shall be dismissed. In light of this Decision, it is further concluded that the subsequently issued Citation No. 2861249, alleging a violation of section 104(b) of the Act, was improperly issued and shall be dismissed.

Citation 3253323.

Shanholtz testified that on July 20, 1988, he was told by some of Respondent's employees that an employee had been off from work with a pulled muscle in his back, which had been sustained on the mine property on June 27. Shanholtz indicated that Staton told him that Respondent did not have any MSHA Accident Report Forms, and these were subsequently provided to him by Shanholtz. Shanholtz further indicated that the accident was not reported to MSHA on its forms although the accident was reported in Respondent's records. A Citation was issued alleging a violation of 30 C.F.R. 50.20.

Section 50.20, supra, provides, in essence, that an operator shall maintain a supply of MSHA Mine Accident Report Forms, and shall report accidents on such forms to be submitted to MSHA. Inasmuch as the uncontroverted evidence indicates that at the time of the accident in question, Respondent did not have any of the proper MSHA Forms, and did not report this accident to MSHA on its forms, a violation of section 50.20 has occurred as alleged. Taking into account the fact that this accident was recorded by Respondent in its records, and there was no evidence that this accident was caused by Respondent's negligence or caused by any instrument, property or condition under its control, it is concluded that a penalty herein of $20 is appropriate.

Citation 3253324.

Shanholtz testified that on July 21, 1988, he observed one of Respondent's employees lying under an axle of a dump truck with his shoulder on the ground, using a sledge hammer to knock tires off the vehicle. He indicated that the axle and the truck were above the employee and that the truck was "suspended" by a front-end loader bucket (Tr. 160). He said that the supporting unit was being used beyond its capacity, as its hydraulic system was less than adequate for what it was being used. Accordingly, Shanholtz issued a citation under sections 107(a) and 104(a) of the Act alleging a violation of 40 C.F.R. 57.16009.

Section 57.16009, supra, provides that "Persons shall stay clear of suspended loads." (Emphasis added.) Webster's New Collegiate Dictionary (1979 edition) defines suspend, as pertinent, as ". . . a: HANG; esp: to hang so as to be free on all sides except at the point of support . . . b: to keep from falling or sinking by some invisible support . . . . " Although Shanholtz

testified that the truck, under which the employee was observed working, was "suspended" by a front-end loader bucket, (Tr. 160), there is no evidence that the truck, under which the employee was working, was in any way hanging from or free on all sides except for a point of support. It appears from Shanholtz' testimony that the truck was raised off the ground by the front-end loader bucket, but there was not any evidence that it was hanging free from the bucket except for the point of support. Accordingly, it is concluded that there was no violation herein of section 57.16009, supra, and the Citation must be dismissed.

Citation No. 2861250.

In essence, Shanholtz testified that on August 17, 1988, he observed Respondent's haulage road which he indicated as being approximately half a mile long, and at a 12 degree slope. He indicated that the outer edge of the roadway was exposed. He said that some of the berm had deteriorated "over a period of time" and that "the berms in this area probably washed away and weathered" (Tr. 481). (sic.) He issued a section 104(a) Citation alleging a violation of 30 C.F.R. 57.9022.

Section 57.9022 provides that "Berms or guards shall be provided on the outer bank of elevated roadways." On cross-examination Shanholtz revealed that he had not measured the berm, and that only some areas did not have a berm. According to 30 C.F.R. 57.2 a berm is defined as ". . . a pile or mound of material capable of restraining a vehicle." The record does not contain any evidence of the type of berm in question, or its detailed description. Nor is there in the record any measurement of the areas of the roadway that allegedly did not have a berm. Thus, it is concluded that it has not been established by the weight of the evidence that the roadway did not have a berm capable of restraining a vehicle. Accordingly, it is concluded that it has not been established that Respondent herein violated section 57.9022, and accordingly, Citation 2861250 must be dismissed.

Docket No. KENT 89-27-M.

Citation No. 3253179.

Shanholtz testified, in essence, that on June 16, 1988, he observed smoke and exhaust fumes coming out of the portal of Respondent's mine. He said that he went approximately 600 to 700 feet underground using a drager pump and a sorbet tube. He said that the testing device has a scale which can be read, and the results indicated "extreme high" levels of nitric oxide and nitrogen dioxide, and "high" levels of carbon monoxide (Tr 33). He said that the nitrogen dioxide was an extremely dangerous contaminant, and blackened the tubes so that it could not be measured. He indicated that nitrogen oxide has a threshold level of 25 parts per million, and carbon monoxide has a threshold level of 50 parts per million. He indicated that nitrogen dioxide has a

ceiling level of 5 parts per million. Shanholtz issued a section 107(a) Withdrawal Order and a 104(a) Citation alleging a violation of 30 C.F.R. 57.5001(a).

Section 57.5001, supra, in essence, provides that exposure to airborne contaminants shall not exceed ". . . on the basis of a time weighted average, the threshold limit values adopted by the American Conference of Governmental Industrial Hygienists and contained in the 1973 edition of its publication entitled "TLV'S Threshold Limit Values for Chemical Substances in Workroom Air Adopted by AGGIH for 1973,' . . . . " Shanholtz indicated that the "contaminants" blackened the tube and could not be measured (Tr. 35). However, he offered no explanation as to the manner in which the testing device operated. Thus, I do not have any evidentiary basis to evaluate the observation that the tube was blackened. Similarly, Shanholtz' comments that the contaminants could not be measured in the tube was not explained, and hence I can not evaluate its significance. Further, the best evidence, of threshold limit values for various substances, as required by section 75.5001, supra, is the publication of the American Conference of Governmental Industrial Hygienists, referred to above. Neither that publication, nor any part thereof, was offered in evidence. Nor did Shanholtz make reference to that publication as the basis for his testimony as to various threshold values. Further, there is no evidence in the record that any contaminants in question exceed any threshold values ". . . on the basis of a time weighted average." (Section 57.5001, supra.) Indeed, no evidence was presented as to any time weighted average. Thus, I conclude that the Petitioner has not adduced sufficient evidence to establish that the Respondent herein violated section 57.5001, supra. Accordingly, Citation No. 3253179 is dismissed.

Citation No. 3253131.

Shanholtz indicated that on June 17, 1988, he observed sparks, which he described as hot carbon sparks, coming out of the exhaust of a diesel engine which was located on the rear of a boom truck. He indicated that the sparks were hitting the rear of the boom truck or the hydraulic reservoir. He further indicated that the situation was dangerous, as there was leakage and spillage from the hydraulic reservoir, and also the "presence" of ammonia nitrate, which he described as a blasting agent, and explosives being loaded (Tr. 113). He issued a section 107(a) Withdrawal Order and a section 104(a) Citation citing a violation of 30 C.F.R. 57.6250.

Section 57.6250 indicates, as pertinent, that "Smoking and open flames, . . . shall not be permitted within 50 feet as measured by the line of sight of explosives, blasting agents, ... " The sparks coming out of the diesel engine exhaust, on a "continuous" basis as described by Shanholtz (Tr. 126), would not appear to be within the purview of section 57.6250, which prohibits smoking and open flames. The record does not contain any evidence of the distance between the sparks and the ammonia

nitrate, referred to as the blasting agent, or between the sparks and explosives. Also, there is no evidence of the distance between the sparks and the hydraulic leakage or spillage observed by Shanholtz. It is clear that there has not been a violation of section 57.6250, which prohibits flames "within 50 feet" of explosives and blasting agents. Further, aside from the opinion of Shanholtz that the hydraulic fluid was combustible, there is no evidence that such was either an explosive or a blasting agent. For these reasons, I find that Petitioner has failed to establish that the conditions observed constitute a violation of section 57.6250. Therefore, Citation 3253131 is dismissed.

Citation No. 3253336.

Shanholtz indicated that on August 17, 1988, he pumped the brake pedal of an idle boom truck "several times" (Tr. 200) without starting the engine. He said that the brake pedal went to the floor. Also, he indicated that the hydraulic reserves were empty and dry, and that there was evidence of leakage at the wheels. He also indicated that two of Respondent's employees told him that the truck did not have brakes, and that Gary Parks told him that he stopped the truck by running it into a large rock rib or muck pile. Charles Williams, a mechanic working for Respondent, indicated that he had operated the truck in question, stopped it with the brakes, and he had not seen other employees stop it by running it into something. He also indicated that the truck is equipped with vacuum hydraulic brakes, and the engine has to run in order to apply the brakes so that the booster can work.

I do not accord much probative value to the testimony of Williams with regard to his experience operating the truck and being able to stop it, as his testimony did not establish that he actually had driven the truck on the day it was tested by Shanholtz, nor at any time in reasonable proximity to Shanholtz' inspection. Based on Shanholtz' testimony that the brake pedal went all the way to the floor and, importantly, that the hydraulic reserves were empty and dry with evidence of hydraulic leakage at the wheels, I find sufficient evidence to conclude that the vehicle in question did not have "adequate brakes." Accordingly, I conclude that Respondent did violate 30 C.F.R. 57.9003.

The only evidence with regard to the likelihood of the occurrence of a reasonably serious injury, consists of Shanholtz' testimony that it is "MSHA's experience," (Tr. 188) that operating a vehicle without brakes will result in a fatality. I find this conclusion insufficient to establish a finding that there was any imminent danger involved. Further, considering the unrebutted testimony of Williams that the vehicle had two braking systems, and considering the lack of detailed testimony concerning the terrain in which the vehicle operated, i.e., whether the area

was level, and whether there were drop-offs or obstacles in the vicinity, it must be concluded that it has not been established that there was any reasonable likelihood of an occurrence of a reasonably serious injury. Accordingly, I conclude that it has not been established that the violation herein was significant and substantial (Mathies Coal Co., 6 FMSHRC 1, (January 1984)).

Although Williams indicated, in essence, that he did not have any difficulty stopping the vehicle in question, his testimony does not establish when he last was able to drive the truck and stop it. According to Shanholtz, the brake pedal went down to the floor, and it would appear that this condition would be obvious to any one driving the truck. Further, Shanholtz testified that two employees told him that the vehicle did not have brakes and it was stopped by driving into an obstruction. Thus, I find that the negligence of Respondent herein was relatively high. Further, I find that Respondent has not adduced any evidence to establish that its operation would be adversely affected by the imposition by any fine herein. As noted above, I find that the record does not establish a description of the terrain in which the vehicle in question was operated. As such, I conclude that it has not been established that the gravity of the violation herein was of a high degree. I have taken into account the remainder of the statutory factors of section 110 of the Act, as stipulated to by the Parties, as well as the history of violation as indicated by Exhibit 1. Taking into account all these factors, I conclude that a penalty herein of $200 is appropriate for the violation found herein.

Citation No. 325338.

Shanholtz testified that he observed various safety defects with regard to a boom truck. He indicated that there was no stability jacks to support the truck when the boom was in the air, and therefore there was a possibility of the truck overturning if it was used in the wrong capacity. He said he also observed hydraulic leaks at the cylinder, which created a danger of a fire or a slipping hazard. He also indicated that the doors were missing, there were no lights, and there was a rag in the gas tank which acted as a wick for the gas, causing a danger of ignition. Shanholtz issued a 104(a) Citation alleging a violation of 30 C.F.R. 57.9002.

Section 57.9002, supra, provides that "Equipment defects affecting safety shall be corrected before the equipment is used." The record does not establish that the truck in question was being used. Inasmuch as section 57.9002, requires safety defects to be corrected as a condition precedent to the use of the equipment, it is clear that there is no violation in the absence of evidence of the equipment being used. Since there is no evidence that the truck in question was being used, the Citation herein is dismissed.

Citation No. 3253340.

Shanholtz indicated that on October 17, 1988, one of Respondent's employees, Raymond Patton, told him that the previous day he had to throw rocks under the wheel of a compressor truck in order to stop it, as the brakes did not hold. He also indicated that another employee had told him that he had trouble with brakes the day before. Shanholtz said that he did not start the truck, but applied the brake with his foot and there was no resistance as the pedal went to the floor. He said he checked for hydraulic fluid, but did not find any.

Teddy Combs testified on behalf of Respondent and indicated that he operated the truck in question and stopped it by applying the brakes.

I do not place much weight on Combs' testimony, as his testimony did not establish that he was able to stop the truck the same date as Shanholtz' inspection, or at some time in close proximity to that day. Based on the testimony of Shanholtz, I conclude that the brakes on the truck in question were not adequate, and as such Respondent violated 30 C.F.R. 57.9003.

According to Shanholtz, the violation herein was significant and substantial based on the experience of MSHA that operating a vehicle without brakes is highly likely to result in a fatality or serious injury. In the absence of specific testimony with regard to the specific terrain on which the vehicle in question traveled, and the circumstances under which it was operated, I find the testimony of Shanholtz insufficient to support a conclusion that the violation herein was significant and substantial.

According to the uncontradicted testimony of Shanholtz, he was told by two employees that they had driven the truck in question the previous day and the brakes did not work. Further it is clear that one operating the truck would have noticed that the brake pedal did not have any resistance. Hence I find the Respondent herein acted with a relatively high degree of negligence in not having the brakes repaired. Taking this into account, as well as the remaining statutory factors, I find that a penalty herein of $200 is appropriate for the violation herein.

Citation No. 2861242.

Shanholtz indicated that on August 17, 1988, he inspected an "old" truck which had a mobile drill placed on it (Tr. 277). He said that the foot brake pedal went to the floor, and that although the truck had an air braking system, there still should have been some resistance to the brake pedal. He indicated that he did not start the truck, but the brake lines were "deteriorated," bent and broken, and "nonfunctional" (Tr. 280). He indicated that although there was a parking brake handle which he

applied, he looked and to the best of his knowledge there was no cable. He also indicated that Respondent's employees told him that they had to drive the truck into a stock pile or rib to stop it whenever they used it.

Combs indicated that he had operated the drill prior to August 17, and that the brakes did operate. He said that the engine must operate before the hydraulic system can function. He also said that the parking brake worked. Williams indicated that he used the truck once or twice and the parking brake did work.

I do not place much weight on the testimony of Combs and Williams with regard to the functioning of the brakes on the subject truck, as Williams indicated that he used it only once or twice and did not indicate the time period in which he used it, and how close that period was to the inspection by Shanholtz. Combs indicated that he last ran the truck 3 weeks to a month prior to the inspection. I find this too remote in time to be probative of the condition of the brakes at the date of inspection.

Based on the testimony of Shanholtz, I find that the truck did not have adequate brakes. The truck clearly is a power mobile piece of equipment, in spite of the fact that at the time of the inspection it had flat tires. As such, I find that there has been a violation herein of section 57.9003, supra, as cited by Shanholtz. The testimony of Shanholtz and the balance of the evidence with regard to the issue of significant and substantial, is essentially the same as was presented in Citation No. 3253340. For the reason that I discussed, infra, P. 6, I find that it has not been established that the violation herein was significant and substantial. I find that a penalty herein of $200 is appropriate, based on the same reason set forth in Citation Nos. 3253336 and 3253340, infra, P. 6, 7.

Citation No. 2861244.

Shanholtz, in essence, indicated that on August 17, 1988, he observed a lot of large overhanging trees (Tr. 330) which he described as an extremely dangerous situation. He also said "There was loose ground there. It was obvious, large slabs." (Tr. 331). According to notes he had made on August 17, 1988, he indicated that the material he observed was above and to both sides of the portal. Shanholtz issued a citation alleging violation of 30 C.F.R. 57.3200, which, as pertinent, provides that "Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area."

Respondent presented testimony from Denton and Williams. I do not place much weight on their testimony with regard to the conditions in question as neither of them observed the conditions on the date in question, and their testimony was limited to interpreting photographs (Exhibits 26, 28, 29, and 37).

Based on Shanhotz' testimony I find that on the date of the Citation there were certain conditions that created a hazard. However, on the date in question, there is no evidence that there was any work or travel in any area affected by the observed conditions. Denton and Williams preferred their opinions, based solely on their examinations of the photographs, Exhibits 26, 28, 29, and 37, as to the time sequence of various shots. I do not find any of this testimony helpful in resolving the issues herein. I find that Petitioner has failed in its burden in establishing by competent evidence that any work or travel was permitted by Respondent in any area affected by the conditions he observed that he termed to be dangerous. Indeed, there is no evidence whatsoever which delineates the "affected area." (Section 57.3200, supra). Hence I must conclude that it has not been established that there has been any violation of section 57.3200, supra. Accordingly, I find that Citation No. 2861244 shall be dismissed.

Citation No. 20612147.

Shanholtz indicated that on August 17, 1988, he observed a front-end loader operating in "uneven terrain" (Tr. 406). He said that Raymond Parks was operating it and that he (Shanholtz) noticed that Parks was using the reverse gear to stop the loader when it was going forward, and using the forward gear to stop it when it was going backwards. Shanholtz said that he asked Parks to back it up and stop it, and Parks backed the vehicle up at 5 to 10 miles an hour, put the brake on, pumped the brakes three times and it traveled approximately 100 feet before it stopped. He said that the vehicle stopped when Parks dropped the bucket. Shanholtz said that he asked Parks if there were problems with the brakes, and Parks said that he "didn't have any" (Tr. 408). Shanholtz indicated that he did not check the hydraulic system reservoir, and said that the backup system can only be used 4 or 5 times. Shanholtz issued a Citation alleging a violation of 30 C.F.R. 57.9003.

Williams testified that at approximately 6 a.m. on the day of the inspection, August 17, he loaded the above vehicle and it stopped "real fast" (Tr. 425). He said that after the inspection the booster system was checked with a gauge, and it read 300 pounds which meant it was not depleted. He indicated that to abate the Citation a hydraulic system pump was replaced, but that the old one was "operating good" (Tr. 431). In essence, he indicated that the reason why the pump was replaced was "because he had to try and fix it whatever was wrong with it" (Tr. 428).

Although the brakes may have operated satisfactorily when Williams drove the vehicle in question at 6 a.m., I find nothing in the record to contradict the observations of Shanholtz at approximately 2:30 p.m., with regard to Parks' inability to stop the vehicle in question. I find Shanholtz' testimony with regard to his observations sufficient to establish a violation of

section 57.9003, supra, which, in essence, requires mobile equipment to have "adequate brakes." Shanholtz' testimony with regard to the issue of significant and substantial was essentially the same as presented in Citation Nos. 3253336, 3253340, and 2861242, infra. Aside from Shanholtz' indication that the vehicle was being operated over uneven terrain, there was insufficient evidence presented as to the speed at which the vehicle was operated, the presence of dangerous obstructions or drop-offs, nor was there presented any detailed description of the terrain. Further, I note that Shanholtz did not check the brake reservoir, and Williams testified that after the Citation the booster system still contained 300 pounds, which indicates that it was not depleted. This testimony has not been contradicted. Hence, I must conclude that it has not been established that a reasonably serious injury was reasonably likely to occur as a consequence of the impaired braking of the vehicle in question. Accordingly, it has not been established that the violation herein was significant and substantial. Essentially for the reasons I discussed in Citation Nos. 3253336, 3253340, and 2861242, I find that a penalty herein of $200 is appropriate.

Citation No. 2861248.

Shanholtz indicated that access to a clutch on the crusher used to energize a diesel drive, was only by crawling under a V-belt which would subject one to being immediately killed, or coming behind the crusher where one would be exposed to unsure footing and V-belts. Shanholtz indicated that, on August 17, 1988, two employees were present, one whose first name was identified as Arnold, and Parks. Shanholtz indicated that Arnold demonstrated for him access to the clutch by crawling under the belt, and that Parks demonstrated access by going behind the crusher. Neither Shanholtz, nor Denton, who was present, recalled seeing any steps going up to the platform where the clutch was located. Denton indicated that, on August 17, he was on the platform. He indicated he did not go up any steps to reach it and did not recall seeing any steps. He indicated he got off the platform by jumping off. Shanholtz issued a Citation alleging a violation of 30 C.F.R. 11081 which provides that "Safe access shall be provided and maintained to all working places."

Exhibit B, which, according to Respondent's Vice President Jeffrey T. Staton, indicates the crusher in question, clearly depicts steps going up to the platform on which the clutch was located. According to Staton's testimony the crusher was installed in 1984, and always had steps on it. Staton indicated that Exhibit B depicts steps the same way they were located on August 17, 1988.

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Based on observations of Staton's demeanor, I find, that as depicted on Exhibit B, there were steps on August 17,1988, leading to the platform on which a clutch was located. There is no evidence that this means of access was not safe. Accordingly, I find that it has not been established that there has been a violation herein of section 57.11001, supra. For these reasons Citation No. 2861248 should be dismissed.

ORDER

It is ORDERED that Citation Nos. 3253179, 3253131, 3253338, 2861244, 2861248, 3253127, 2861249, 3253324, and 2861250 be DISMISSED. It is further ORDERED that Citations 3553336, 3253340, 2861242, and 20612147 shall be amended to reflect the fact that the violations cited therein are not significant and substantial. It is further ORDERED that, within 30 days of this Decision, Respondent pay $820 as a civil penalty for the violations found herein.

Avram Weisberger
Administrative Law Judge