CCASE:
SOL (MSHA) V. DILLINGHAM CONSTRUCTION INTERNATIONAL
DDATE:
19890731
TTEXT:

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 PROCEEDINGS Docket No. SE 88-59-M A.C. No. 54-00289-05503
v.	Docket No. SE 89-23-M A.C. No. 54-00289-05504
DILLINGHAM CONSTRUCTION INTERNATIONAL, RESPONDENT	Cerrillos Dam Project

DECISIONS

Appearances: William G. Staton, Esq., Office of the Solicitor, U.S. Department of Labor, New York, New York, for the Petitioner;
Anibal Irizarry, Esq., McConnell, Valdes, Kelley, Sifre, Griggs & Ruiz-Suria, San Juan, Puerto Rico, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking civil penalty assessments for nine alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed timely contests and answers, and hearings were held in San Juan, Puerto Rico. The parties filed posthearing briefs, and their respective arguments have been considered by me in the course of my adjudication of the cases. I have also considered the oral arguments made by the parties at the hearings.

Issues

The respondent takes the position that it is a construction contractor, who at the time of the MSHA inspections in question, was engaged in the process of constructing a dam pursuant to an agreement with the Government of Puerto Rico and the U.S. Corps of Engineers. Respondent denies that it operates a "mine" within the jurisdiction of the Act, and asserts that its work associated with the dam project in question is within the enforcement

jurisdiction of the Commonwealth of Puerto Rico Occupational Safety and Health Administration (hereinafter PR-OSHA).

The respondent maintains that any minerals taken and used in the construction of the dam have been "excavated" rather than "extracted," and that it does not engage in any "mining or milling" activities which would bring its construction activities within the jurisdiction of the Act, and within MSHA's mine enforcement jurisdiction. In support of its position, the respondent relies on an MSHA/OSHA Interagency Agreement, and several MSHA policy directives issued with respect to this agreement.

Assuming that the respondent is subject to the Act and to MSHA's enforcement jurisdiction, the additional issues presented are (1) whether the respondent violated the cited standards, and if so, the appropriate civil penalties which should be assessed taking into account the civil penalty assessment criteria found in section 110(i) of the Act; and (2) whether several of the alleged violations were "significant and substantial" (S&S).

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq

2. Commission Rules, 29 C.F.R. 2700.1, et seq.

3. Part 56, Title 30, Code of Federal Regulations.

Stipulations

The parties stipulated to the following:

1. The respondent's size consists of 102,559 manhours worked per annum.

2. The respondent's history of prior violations consists of 10 assessed civil penalty assessments made by MSHA in 1987.

3. Payment of the proposed civil penalty assessments for the violations in issue in these proceedings will not adversely affect the respondent's ability to continue in business.

Discussion

All of the contested section 104(a) citations in these proceedings were issued by MSHA Inspector Roberto Torres Aponte, after the completion of his inspection of the dam site in question on August 31 and September 1, 1987. Although the citations

are dated September 1, 1987, Inspector Torres confirmed that he actually wrote them on September 2, 1987, the day following his inspection, and that he served them on respondent's representative Ike Tabor during a close-out conference held that day. Mr. Torres further confirmed that during the course of his inspection he discussed each of the cited conditions with Mr. Tabor and informed him of the violations and the fact that he would issue the citations. Mr. Torres further explained that his normal procedure is to write up and serve any citations on the mine operator at the conclusion of his inspection and during the close-out conference. The citations issued by Mr. Torres are as follows:

Docket No. SE 88-59-M

Non-"S&S" Citation No. 2858999, 30 C.F.R. 57.14001. "The No. 3 feeder motor belts were not guarded, maintenance is done in the area where the equipment is shutted (sic) off."

"S&S" Citation No. 2859000, 30 C.F.R. 56.11002. "The walkway around the No. 3 feeder was not provided with hand rails around it exposing maintenance employees to fall from approx. 12 ft. to the lower level. Three employees were working in the area."

"S&S" Citation No. 2859001, 30 C.F.R. 56.14001. "The No. 5 conveyor belt counterweight pulley was not guarded. It is located near the walkway where persons walk and are exposed to become caught between the belt and pulley."

Non-"S&S" Citation No. 2859002, 30 C.F.R. 56.11002. "The No. 6 feeder platform was not provided with handrails. The area is not used on a regular basis."

Non-"S&S" Citation No. 2859003, 30 C.F.R. 57.14001. "The No. 7 conveyor belt tail pulley was not guarded. Cleaning and maintenance is done in the area when the equipment is shutted (sic) off."

"S&S" Citation No. 2859004, 30 C.F.R. 56.9007. "The No. 8 conveyor belt emergency stop cord was broken loose exposing the persons who walk in the walkway to the hazard. The walkway is used on a regular basis by employees."

Non-"S&S" Citation No. 2859005, 30 C.F.R. 56.14001. "The No. 9 conveyor belt tail pulley was not guarded. Cleaning and maintenance is done in the area when the equipment is shutted (sic) off."

Non-"S&S" Citation No. 2859006, 30 C.F.R. 56.14001. "The No. 10 conveyor belt counterweight pulley was not guarded.

Cleaning and maintenance is done in the area when the equipment is shutted (sic) off."

Docket No. SE 89-23-M

"S&S" Citation No. 2859007, 30 C.F.R. 56.15003. "Several employees were not wearing safety shoes in the rock plant, being exposed to have feet injuries or fractures."

Petitioner's Testimony and Evidence

Inspector Torres testified with respect to his training and experience, and he confirmed that he has served as an inspector for 11 years, and was previously employed at a cement plant for 8 years. He confirmed that in response to a September 22, 1986, letter from the respondent's Project Manager Lars Johansson, requesting a "CAV" or compliance assistance visit, he visited the "extraction area" at the dam construction site on November 4, 1986. Mr. Torres explained that such visits are normally made while an operator is making equipment adjustments, but before the start of any full production. During the visit in question, Mr. Torres inspected all of the equipment at the site, and discussed with mine management several violative conditions concerning equipment guarding, berms, safe access, walkways, safety shoes, and handrails, and made recommendations concerning corrective action.

Mr. Torres stated that the conditions he found during his initial CAV inspection were "Non-civil penalty violations" for which the respondent was given a reasonable time to correct before an MSHA inspector returns to the site for a regular inspection.

Mr. Torres stated that during his CAV inspection he found that limestone was being extracted by the respondent by blasting. The limestone was then trucked to the primary crusher and screening plant where it was sized or separated into smaller rock by means of two grizzles. The processed materials were then used in the construction of the dam. Mr. Torres stated that the primary crusher operation and extraction area were located approximately 1,500 feet from the actual dam construction site, and that the screening station was approximately 200 feet from the primary crusher.

Mr. Torres stated that the respondent used explosives, bulldozers, front-end loaders, haulage trucks, primary crusher and screening conveyor belts, and two grizzles during the limestone extraction and processing activity. He stated further that a conveyor belt located at the primary crusher transferred the excavated limestone and rock to the screening station where four screens were used to separate small stones from the larger ones, and that the resulting crushed rock was used in "layers" to

construct the dam. He also confirmed that some of the processed materials were used to produce concrete or sand, and that all of the materials were ultimately used for in the construction of the dam.

In addition to the excavated rock and limestone which was processed at the dam construction excavation area, Mr. Torres stated that the respondent used raw materials which it purchased from other area quarries for the construction of the dam. He described this material as "white marble-like stone" which was not excavated at the same site, and he confirmed that it was "trucked in." He determined that these other materials were brought to the site through visual observation of the material which was stockpiled at the excavation area of the dam construction site.

Mr. Torres characterized the work being performed at the excavation area in question as a milling operation, and he confirmed that according to an MSHA report which was filed by the respondent, 32 of the respondents' employees were engaged in work connected with this milling operation. He did not know the total number of employees who were working at the site.

Mr. Torres identified the bulldozers used by the respondent as Caterpillar "cats" or "dozers," and he confirmed that the other equipment which he previously identified, including the bulldozers, were all manufactured outside of Puerto Rico in "the states."

Mr. Torres stated that subsequent to his initial CAV inspection, he next visited the dam construction excavation area on February 9 and 10, 1987, to conduct a regular inspection. The first day he was alone, and the second day he was accompanied by MSHA Inspector Augusto Perez. During these visits, Mr. Torres confirmed that he observed the same milling activities, i.e., limestone extraction, crushing, and screening, and they were similar to the activities taking place during his prior CAV inspection.

Mr. Torres stated that during his inspection of February 9 and 10, 1987, he issued several citations to the respondent, and after proposed civil penalty assessments were made by MSHA for these violations, the respondent paid the assessments and the citations were terminated.

Mr. Torres stated that his next visit to the dam excavation area took place on June 29, 1987, when he went there for a "compliance follow-up inspection" to ascertain whether the prior violative conditions were corrected by the respondent. At this time only the primary crusher was in operation, but a new secondary crushing plant was being constructed by the respondent in

order to produce finer rock material to be used in the construction of the dam.

Mr. Torres stated that he next visited the dam excavation area on August 31, and September 1, 1987, when he conducted another regular inspection. He inspected the primary crusher and screening plant, and conducted noise sampling surveys on some of the equipment. Since the secondary crushing plant was still under construction, he did not inspect it. Mr. Torres confirmed that Mr. Ike Tabor, the respondent's "excavation area" manager, accompanied him during the inspection and that he discussed each of the citations which he issued with Mr. Tabor.

Mr. Torres confirmed that subsequent to his inspections of August 31, and September 1, 1987, he held a "closing conference," with Mr. Tabor, Mr. Johansson, MSHA Inspector Brian Smith, and the respondent's project safety engineer Gerald R. Fulghum, and that Mr. Fulghum advised him that the equipment guards which were the subject of Citation Nos. 2858999, 2859003, 2859005, and 2859006, had been removed in order to be repaired, but that the repair work had not been completed and the guards were not replaced. Mr. Fulghum subsequently mailed in a "note" to his office explaining the circumstances under which the guards had been removed.

Citation No. 2858999

Mr. Torres stated that the cited feeder motor belts were located at the third level of the primary screen station. The motor is used for the vibrating screens, and employees need to be there on a daily basis to clean any spillage from the floors. Access to the cited location is by means of a ladder way. Mr. Torres confirmed that he observed the condition at 8:30 a.m., on September 1, 1987, and that the plant was not in operation at that time, and the motor was shutdown. The plant was put in operation between 11:00-11:30 a.m.

Mr. Torres stated that he made a gravity finding of "unlikely" because the plant is shutdown and locked out when clean-up or maintenance work is performed. Although he observed no one at the cited location, Mr. Torres believed that at least one individual would be in the area for inspection once the plant was started up. In the event someone were to be caught in the unguarded motor belts, they could lose a finger or an arm or suffer disabling injuries.

Mr. Torres confirmed that he made a negligence finding of "moderate" because he believed that a supervisor should have been aware of the unguarded belts, and similar belts in the plant were guarded. Mr. Torres did not believe the violation was "significant and substantial" because the plant was shutdown when cleanup

or maintenance was performed. He also confirmed that the citation was terminated at a later time by another inspector.

Citation No. 2859000

Mr. Torres stated that the cited feeder walkway was located at the third level of the screening station tower, and that it was elevated approximately 12 feet above the next lower level. Mr. Torres stated that plant manager Ike Tabor, who accompanied him during his inspection, informed him that the platform where the walkway was located was constructed for the purpose of maintaining the No. 3 feeder, but that handrails were not installed.

Mr. Torres confirmed that when he observed the condition at 8:10 a.m., the plant was down and the feeder was not in operation. He observed three employees in the area performing clean-up and maintenance work, and Mr. Tabor informed him that they were employees of the respondent.

Mr. Torres confirmed that he made a gravity finding of "reasonably likely" because someone could fall off the elevated unguarded platform at any time, and if they did, they would likely suffer fatal injuries. He believed the violation was "significant and substantial" because of the high probability of an accident which could result in a fatality.

Mr. Torres confirmed that he made a negligence finding of "moderate" because similar platform areas were guarded with handrails and this should have alerted a supervisor of the need to provide the required handrails.

Citation No. 2859001

Mr. Torres stated that the cited No. 5 conveyor belt counterweight pulley was not guarded when he observed it at 8:30 a.m. The belt was used to transport material and it was elevated and located approximately 20 to 25 feet above ground. A walkway was next to the unguarded pulley, and the unguarded area was approximately 8 inches from the edge of the walkway. Employees would regularly walk by the unguarded pulley because the walkway provided an access way to the transfer point behind the pulley.

Mr. Torres confirmed that the plant was shutdown and the belt was not in operation when he observed the condition. However, once the plant is put into operation at approximately 11:00 a.m., employees would regularly be using the walkway adjacent to the unguarded pulley. Given the fact that the pulley was 36 inches long and 12 to 15 inches wide, experience has shown that accidents have occurred when employees are caught in an unguarded pulley of that size.

Mr. Torres stated that he made a gravity finding of "reasonably likely" because of the likelihood of an accident and injury once the equipment was put in operation, and at least one person who regularly travels the walkway from one side of the pulley to the other would be exposed to the hazard. Mr. Torres also confirmed that he made a finding that the violation was "significant and substantial" because someone could have been caught in the pulley, and if this occurred, a fatality would occur.

Mr. Torres stated that the plant area was "practically new," and that Mr. Tabor informed him that a guard had previously been provided for the pulley in question, but that it was removed for some reason. Mr. Torres stated that he based his "moderate" negligence finding on the fact that similar equipment parts in the area were guarded, and a supervisor should have known that the cited pulley in question needed to be guarded.

Citation No. 2859002

Mr. Torres stated that the No. 6 feeder platform located at the second level of the secondary crusher plant was not provided with handrails. The platform was approximately 10 feet above the second level floor, and it was used to provide maintenance for the shakers located on the platform. He stated that the shakers were located in the middle of the platform area, and that any employee performing maintenance on the shakers would be "far away" from the edge of the perimeter of the unguarded platform.

Mr. Torres stated that employees would not normally be on the platform on a regular basis, and although the platform was located in a new plant area which had not been totally completed, the cited area was located in a plant area which was in production.

Mr. Torres confirmed that he made a gravity finding of "unlikely" because of the low probability of an accident. He explained that any maintenance work on the feeder would be performed in the middle of the platform where the feeder was located, and that the feeder was approximately 10 feet from the edge of the platform. The only reason for anyone going to the platform would be to perform maintenance work, and even if someone were to fall from the platform, they would fall into the "soft" material below and would not likely be injured.

Mr. Torres believed that the violation was not "significant and substantial" because it was not probable that anyone performing maintenance work on the platform would fall off, and it was unlikely that an accident or injury would occur. He confirmed that he made a negligence finding of "moderate" because similar platform areas were provided with handrails.

Citation No. 2859003

Mr. Torres stated that the No. 7 conveyor belt tail pulley located at the secondary crusher plant was not guarded. He explained that the pulley was located approximately 1 foot from the floor level and under the No. 6 feeder which discharged material on the No. 7 belt conveyor. A guard had previously been provided, but it had been removed and not replaced. The plant was shutdown when he observed the condition, and he confirmed that employees are not regularly in the area, except when the belt is shutdown for maintenance work such as alignment or greasing.

Mr. Torres stated that he based his gravity finding of "unlikely" on the fact that the plant equipment is shutdown when maintenance or cleaning work is performed. However, if someone were to be caught in the unguarded pulley, which was 36 inches long and 10 to 12 inches in diameter, they would suffer fatal injuries, and past experience with similar unguarded pulleys attest to this fact. He believed that "sooner or later" someone would have to go to the area while the equipment is running, and they would be exposed to a hazard of being caught in the pulley. One maintenance person would be exposed to the hazard.

Mr. Torres confirmed that the violation was not "significant and substantial," and that he based his negligence finding of "moderate" on the fact that a supervisor should have noticed the unguarded pulley during the preshift examination.

Citation No. 2859004

Mr. Torres stated that the broken No. 8 conveyor belt stop cord was located at the secondary plant. There were two conveyor belts at the cited location, the No. 7 and No. 8, and the No. 8 belt was on the left side. The stop cord was approximately 100 feet long, and it was broken in the middle and lying on the walkway which was adjacent and parallel to the belt. Both the belt and walkway were inclined, and the walkway was regularly used by employees to go from ground level to the crusher.

Mr. Torres stated that the belt was in operation when he observed the broken stop cord, but that no employees were in the area. However, he believed that prior to the start of the operation, one person had walked by the cited area while going to the cone crusher.

Mr. Torres stated that he based his gravity finding of "reasonably likely" on the fact that the walkway was used regularly when the plant was in operation and the broken stop cord would not allow the conveyor belt to be shutdown in the event of an emergency or breakdown. If this were to occur, employees would be exposed to a hazard from the materials on the belt.

Mr. Torres believed the violation was "significant and substantial" because of the likelihood of an accident resulting from the inability to stop the conveyor because of the broken cord. Employees would normally use the walkway to check on the equipment.

Mr. Torres confirmed that he based his negligence finding of "moderate" on the fact that the supervisor should have been aware of the broken stop cord, and as he previously stated, someone walked by the area prior to the start of the operation.

Citation No. 2859005

Inspector Torres stated that the cited unguarded No. 9 conveyor belt tail pulley was located at the secondary crusher plant. The belt was under the cone crusher at ground level, and Mr. Tabor advised him that a guard had been in place but that it had been removed.

Mr. Torres confirmed that employees would be in the area for clean-up and maintenance work, but that the belt would be shutdown when this work was being done. He observed no employees in the area, and never observed any maintenance or clean-up work being performed.

Mr. Torres described the pulley as 24 inches long and 10 to 12 inches in diameter. He did not believe that the violation was "significant and substantial" because the equipment was shutdown, and he made a gravity finding of "unlikely" because maintenance and clean-up work is performed only when the plant and equipment is shutdown.

Mr. Torres confirmed that he made a negligence finding of "moderate" because he believed that a supervisor should have been aware of the fact that the belt pulley was not guarded. Mr. Torres also indicated that past experience has shown that fatalities have occurred when anyone is caught in such an unguarded pulley.

Citation No. 2859006

Mr. Torres stated that the cited unguarded No. 10 conveyor belt counterweight pulley was located at the secondary plant and that the belt travelled from the feeder hopper to the washing and screening station. There was a walkway next to the belt and employees would use it while performing maintenance work.

Mr. Torres stated that the equipment was shutdown when he observed the condition, and that it is shutdown when clean-up or maintenance work is performed. Mr. Torres stated that he made a gravity finding of "unlikely" because the equipment is shutdown when work is being performed, and the walkway is not used on a

regular basis. He also indicated that if anyone were caught in such an unguarded belt pulley, a fatality could occur. Mr. Torres did not believe the violation was "significant and substantial," and he based his "moderate" negligence finding on the fact that similar equipment was guarded.

Citation No. 2859007

Mr. Torres stated that he issued the citation after observing that three employees at the primary rock plant screening tower, and three employees at the secondary plant, were not wearing hard-toed safety shoes. Mr. Torres stated that one employee was wearing tennis shoes, but he did not inspect the shoes, nor did he speak to any of the employees. He confirmed that the employees were wearing hard hats, and that he observed three employees cleaning up under the screening tower. Mr. Torres also stated that Mr. Tabor informed him that the respondent required its employees to wear safety shoes, but that they did not wear them. Mr. Torres was of the opinion that the cited standard required all plant employees to wear safety shoes and that this is the policy interpretation of the standard which is followed in his office.

Mr. Torres stated that he based his gravity finding of "reasonably likely" on his belief that an employee could be struck on the foot by falling rock or material while cleaning up, or by a tool or other equipment while he was performing maintenance work.

On cross-examination, and in response to further questions concerning guarding Citation Nos. 2859001, 2859003, 2859005, and 2859006, Mr. Torres confirmed that at the time he observed the conditions, the equipment was shutdown and not in operation, and he observed no employees who were exposed to any hazards at that particular time. Mr. Torres also confirmed that the plant is shutdown for maintenance at 8:30 a.m., and that production begins at approximately 11:00 a.m. Although the main plant generator was deenergized at the time of his inspection, Mr. Torres did not believe that all of the equipment motors were locked out.

With regard to guarding Citation No. 2858999, Mr. Torres confirmed that he saw no employees in the area. He could not name the employees who were not wearing safety shoes, or the employees who he observed on the walkway of the No. 3 feeder, but he stated that Mr. Tabor informed him that they were employees of the respondent. Mr. Torres also stated that three of the employees without safety shoes were cleaning up, and that the other three were maintenance personnel.

Mr. Torres conceded that the cited standard does not contain the words "safety shoes," and that he assumed that the phrase "suitable protective footwear" means "safety shoes." He also

confirmed that his inspector's manual interpretation of the standard provides that safety shoes means "hard toe shoes" (Tr. 96-97).

With regard to guarding Citation Nos. 2859001, 2859003, 2859005, and 2859006, Inspector Torres confirmed that the plant was not in operation when he viewed the conditions, and he observed no employees in the area of the unguarded equipment. He also confirmed that he did not return to those areas after the plant began operating at 11:00 a.m. (Tr. 106-107).

Mr. Torres confirmed that Plant Manager Tabor informed him that the generator supplying power to the plant was shutdown so that the equipment could not be energized. Mr. Torres also confirmed that the equipment breakers were not locked out (Tr. 121).

With regard to Citation No. 2858999, Mr. Torres confirmed that he observed no employee exposed to any hazard, and he explained that the "persons affected" by the citation were those employee cleaning or performing maintenance, and that "maybe" one of them "could go to that area and injured there" (Tr. 122). Mr. Torres conceded that except for Citation Nos. 2859000 and 2859007, he did not actually observe any employees exposed to any hazards at the time of his inspection, and while he did not know the identity of any of the employees, Mr. Tabor advised him that they were employed by the respondent (Tr. 125-126). Mr. Torres confirmed that all maintenance is performed when the equipment is shut off (Tr. 127), but he believed that safety shoes were still required because employees handle tools and work with heavy machinery, and it could fall on their feet (Tr. 127). He confirmed that Mr. Tabor advised him that the respondent's policy required its employees to wear safety shoes, but that Mr. Tabor did not specify the type of shoes, but did confirm that the shoes the employees in question were wearing were not in compliance with company policy (Tr. 154).

Mr. Torres confirmed that during his close-out conference of September 2, Mr. Johansson and Mr. Tabor did not mention that the equipment guards were being repaired, and would be replaced. Mr. Torres stated that this information came from Mr. Fulghum after the meeting by means of a note which he sent to his office (Tr. 158-161).

MSHA Supervisory Inspector Juan Perez, confirmed that he supervises the MSHA office in Puerto Rico, including all mine inspectors assigned to his office. He stated that he visited the dam site in question as a follow-up to an inspection conducted by Mr. Torres on February 5, 1988, to determine whether the cited conditions were corrected. Mr. Perez further stated that the site was not in operation because of an impending expansion, and

the abatement periods for the citations were extended to May 1, 1988, the date that he was informed the operation would again start. Mr. Perez stated that he next returned to the site on April 21, 1988, and found that most of the citations, except for the safety shoes, were abated. He also confirmed that he had visited the site in September, 1987 (Tr. 177-182).

Mr. Perez stated that during his visits to the site he observed two crusher operations or "plants," one of which he identified as the primary crusher, and one of which he identified as the secondary crusher. In addition to the crushers, he observed a screen, vibrator, and conveyor, and indicated that the secondary plant could be fed by a front-end loader or a conveyor which connected both operations. He also observed materials which had been brought in from other quarries, and these materials were stockpiled between the two plants. He identified the material as a "fixer" which was washed, and ground to produce different sizes, and stated that some of the material was used for the concrete plant (Tr. 184).

Mr. Perez stated that shortly after Mr. Torres' inspection of September 1, 1987, he had a conference with Mr. Fulghum on September 8, at his MSHA office. He stated that Mr. Fulghum questioned the issuance of the citations when the plant was not in operation, and also questioned MSHA's jurisdiction to inspect the dam project (Tr. 185). Referring to his conference report, Mr. Perez stated that Mr. Fulghum agreed with all of the citations except for those pertaining to the lack of guards, and that he stated that the guards were in the machine shop for repairs (Tr. 187).

Mr. Perez stated that he later met with respondent's counsel Irizarry, Mr. Fulghum, and the director of the local OSHA office, Filiberto Cruz, on February 8, 1988. The question of enforcement jurisdiction was discussed at this meeting, and Mr. Perez stated that he placed a phone call to his supervisor, Mr. Claude Narramore, MSHA District Manager in Birmingham, Alabama, and that Mr. Narramore spoke with Mr. Irizarry and informed him that he agreed with Mr. Perez' position that MSHA did in fact have enforcement jurisdiction at the respondent's dam construction site. Mr. Perez stated that he suggested that the respondent put its jurisdictional position in writing in order to submit it to Mr. Narramore, but that this was not done (Tr. 188-194).

Mr. Perez alluded to a call that he received from the Corps of Engineers when the dam project was started inquiring whether or not MSHA had jurisdiction. Mr. Perez stated that he gave an opinion that if the project entailed construction only, MSHA would not have jurisdiction, but if involved milling, it would have jurisdiction (Tr. 194).

Mr. Perez stated that he provided Mr. Irizarry and Mr. Cruz with copies of MSHA Policy Memorandum No. 87-2N-MSHA-OSHA Interagency Agreement, and that he also discussed the memorandum with Mr. Narramore. He confirmed that he advised Mr. Narramore that the respondent was crushing material and buying it from other plants, and that both he and Mr. Narramore agreed that MSHA had jurisdiction in the matter (Tr. 196). Mr. Perez explained Mr. Narramore's position as follows at (Tr. 197):

> Q. Now, did he explain to you, you know according to this memo what would fall under MSHA's jurisdiction and what would not fall under MSHA's jurisdiction?
>
> A. Yes.
>
> Q. And do you recall what he told you about that?
>
> A. Well, in general, we were discussing and he presented an example, like a tunnel, when they building a tunnel, they take the material and they dispose of that material, you know; we don't have any jurisdiction on that. A dam is similar too, if they take the material, the material they have to remove and they dispose of that material, we don't have jurisdiction on that.
>
> Q. OK, now did he explain situations like that where MSHA would have jurisdiction?
>
> A. Yes, he said anything that falls on VH1, milling, it's our jurisdiction.

Mr. Perez confirmed that after the aforesaid meeting, he received nothing further from the respondent regarding the jurisdictional question, and it was not further discussed in his office. He confirmed that his office initially exercised its enforcement jurisdiction after the respondent filed for a mine legal identity number on February 9, 1986, and that he assigned the number to the respondent. The "courtesy inspection" conducted by Mr. Torres followed after the request was received from the respondent (Tr. 202).

Mr. Perez confirmed that his inspectors do not inspect "key cuts," and that the inspectors only inspect the crushing and milling areas. He explained further as follows (Tr. 204):

> A. That is our jurisdiction. I think that in the CAV Roberto went to the extraction area, but the extraction area was in a different place and it was not . . . , extracted from the key cut, that was our information, that it was off side to the area. That was the key and then we have jurisdiction but due to the definition of

> key cut, we're supposed to inspect only the primary crusher and down to the final product.

Mr. Perez stated further that on the morning of the hearing in this case he contacted the local OSHA office in Ponce, and spoke with the director, a Mr. Artmayer, who informed him that his office does not inspect the dam project, but that it has visited the site in response to complaints. Mr. Perez stated that Mr. Artmayer informed him that his office does not inspect the respondent's crushers. Mr. Perez produced a copy of his notes with respect to his conversation with Mr. Artmayer, and respondent's counsel Irizzary produced copies of OSHA citations served on the respondent by the Ponce OSHA office (Tr. 207-208).

On cross-examination, Mr. Perez confirmed that MSHA's contact with the dam project resulted from a telephone call in 1985 from the Corps of Engineers inquiring as to MSHA's jurisdiction. Mr. Perez stated that he informed the Corps that MSHA only had jurisdiction over milling, and that after the project began, he determined that MSHA had jurisdiction and suggested that the respondent file for a mine ID number (Tr. 214).

Mr. Perez stated that while on an inspection at the respondent's new Number 2 plant, he observed materials brought from other areas being processed at the plant. He confirmed that this "process" involved "washing, classifying and they were grinding too" (Tr. 215). Mr. Perez stated that the respondent was a responsible employer in terms of safety, and has reasonably complied with the safety regulations and maintained a safe place for employees (Tr. 221).

Respondent's Testimony and Evidence

Gerald R. Fulghum, respondent's Project Safety Engineer, Cerrillos Dam Project, Ponce, Puerto Rico, testified with respect to his education and mining experience, and he confirmed that the respondent was engaged to construct the Cerrillos Dam Project in accordance with the specifications and requirements of the U.S. Army Corps of Engineers. He confirmed that he holds a degree in mining engineering, and stated that the project is a seven million cubic yard dam with a coffer dam and spillway excavation, and he explained the scope of the project by reference to several documents, including the dam contract specifications. He confirmed that the dam in question is part of the Portugues and Bucana Flood Control Plan authorized pursuant to section 201 of the Flood Control Act of 1970, Public Law 91611 (Tr. 229-235).

Mr. Fulghum stated that in the process of constructing the dam in question, the respondent is engaged in the excavation of limestone, rather than extraction, and that the two terms specifically differ in their respective definitions. He explained that

"extraction" is a mining term, and includes "extracting a particular constituent in preference over other," or "a mining process in which you're separating one material from another, from a host." "Extraction," on the other hand, takes place "when the limestone, the principal purpose of the excavation is to procure limestone" (Tr. 235-236).

Mr. Fulghum confirmed that the situs of the dam was determined by the location of the Cerrillos River and the topographical features of the location, which included several varieties of limestone which is used in bulk to form the dam. He stated that all of the limestone materials which are found at the dam site are totally excavated, and there is no stripping of overburden, and no selection process takes place. He further confirmed that the excavated material goes through the plant in its entirety to be used as dam embankment material, and that the respondent is not interested in any mineralization, and that the overriding criteria in the construction of dams is the particle size stability of the material (Tr. 237-239).

Mr. Fulghum stated that the only stripping which takes place is done to remove loose dirt and vegetable matter which causes problems in the final product stability as it is used for the dam construction. Referring to the dam spillway design specifications, Mr. Fulghum made reference to "the blasting of material excavated from the spillway to insure breakage of fractured rock into stable particle sizes." He also stated that the limestone rock can also be ripped with a D-9 ripper, and that any materials used must meet the particle stability criteria for an earth filled dam. He also stated that "a grizzly will be used to process all rockfill and separate it into oversize rock, 3-inch to 20-inch rock and minus 3-inch rock sizes" (Tr. 240).

Mr. Fulghum stated that the respondent must follow the Corps of Engineers instructions and criteria for the construction of the dam, and he confirmed that previously excavated materials has been stockpiled "to be run through our plant." Although the spillway is the major source for the materials used to construct the dam, other associated excavations are used to satisfy the bulk and particle stability sizes for the dam (Tr. 242).

Mr. Fulghum further explained the dam construction criteria, including the "stripping of intensely weathered rock from the surface," and the blasting, excavation, and grizzling of other rock materials (Tr. 242). He stated that materials excavated from the spillway are processed through both of the plant facilities, and while it changes form, "we make no selection process" (Tr. 243).

Mr. Fulghum further explained the criteria for processing coarse filter fill, which he described as "crushed firm and/or sound limestone," and he explained that the processed limestone

must meet the sieve analysis requirements established by the Corps of Engineers contract specifications (Tr. 245). Mr. Fulghum confirmed that all of the firm limestone rock excavated from the spillway must be processed to maintain its particle stability at the sizes in which a core filter or a fine filter is manufactured (Tr. 246).

Mr. Fulghum stated that due to diminishing sources of on-site limestone, the respondent found it necessary to bring in additional materials from off-site. Aggregates such as sand, quarter-inch, half-inch, three-quarter-inch, and 3-inch aggregates is brought to the site, and used to produce concrete for use in the construction of the dam (Tr. 247).

Mr. Fulghum characterized the respondent's plant as "a fill processing plant" and denied that it was a "rock plant," although "in all appearances, shapes and forms it looks like a rock plant" (Tr. 247). He further explained as follows at (Tr. 248, 250):

> The Corps of Engineers, finding that they're running out of limestone rapidly and that two diamond drill studies were not sufficient, says "We would like you to go out to the local quarries and we want you to process their product," and we went to local quarries and said, "We would like to buy your three inch minus," which is a common request of a quarry. "We want . . . ," and I . . . , more than 50,000 yards, I can't remember the specific amount. This material is brought on-site and further processed by our filter plant which is also called the terciary plant to make filter.
> Once again, everything that goes in that plant, even though it came from outside sources, when it goes into that plant, there is no separation. What goes in the end, comes out the back in one way or another.

Mr. Fulghum stated that the dam site consists of a spillway, a rock plant, and the main dam embankment (Tr. 251). He contended that the respondent is engaged in excavating and processing limestone material which is incidental to the construction of the dam, rather than the dam being incidental to the excavation and processing activity (Tr. 252).

Mr. Fulghum confirmed that MSHA's position is that "because our plant looks like a rock plant it is" (Tr. 254). He agreed that the respondent is excavating the materials to construct the dam, but before using the materials as part of the dam construction, the materials are processed to meet the Corps of Engineers specifications, and he stated further as follows at (Tr. 255-258):

JUDGE KOUTRAS: The application seems to be here, at least from MSHA's point of view, is that you're excavating this material to build the dam, but before you take it from pit to dam, you do something with it.

WITNESS: Yes, sir.

JUDGE KOUTRAS: And you do what you do to it, is you do what the Corps of Engineers tells you to do with it. You . . . , you subject it to some kind of a process to get these specifications, don't you?

WITNESS: Yes, sir, but Your Honor, in the act itself and in the . . . , the memorandums of understanding, just because we're processing rock doesn't make us a miner, doesn't make us a miller. There are exceptions to that, Gypsum. Gypsum is milled at a plant in which Gypsum board is fabricated. Is that a mill? No, they've already found that that's not a mill, Your Honor. We process material. Because we process material from the earth does not necessarily mean that we're milling. You could . . . , you could make that argument but I think we have to rely on the definitions as we have them before us.

* * * * * * *

JUDGE KOUTRAS: But then when you look over here at milling it's clearly said that MSHA has authority if following, there is a list of general definitions of milling, to which MSHA has authority to regulate, and it says "crushing, sizing," among other things.

WITNESS: Your Honor, we would agree that in order to mill something you must do one of those processes.

JUDGE KOUTRAS: Don't you crush and size?

WITNESS: You crush, size, wash, float, center, benification, solvent extraction, retorting, those are all milling processes, Your Honor. But there's one essential element to milling, milling by technical and legal definition, Your Honor.

JUDGE KOUTRAS: It's what?

WITNESS: You must be separating something valuable from something that's not valuable, and we do not do that.

JUDGE KOUTRAS: But . . . ,

WITNESS: Isn't that what it says, Your Honor? Isn't it essential . . .

JUDGE KOUTRAS: What do you mean of value? You know, when you do . . . , when you get a specification that says that the rock for rockfill shall be rock well graded from 100 percent passing a 20-inch-square screen to not more than 5 percent passing a 3-inch screen, aren't you . . . , isn't that the value that you . . . , isn't that what you're getting out of it? You're just not up there ripping stuff out of the earth and piling it against the dam, you're doing something to that under these specifics . . . .

WITNESS: We're screening and sizing, Your Honor.

JUDGE KOUTRAS: That's what I'm saying. Does this . . .

WITNESS: But screening and sizing is a . . . , is a milling operation.

JUDGE KOUTRAS: Then if it's a milling operation, according to this, it's subject to MSHA's jurisdiction?

WITNESS: No, but that . . . , just because this milling does . . . , just because there's sizing it does not make it a milling operation. Just because you're grinding it doesn't make it a milling operation. Those are elements that are required to be a mill. But, if I could refer and the best definition, I totally concur with the definition in the inter-agency agreement, which I don't have the Federal Register copy, but "milling is the art of treating the crude crust of the earth to produce therefrom a primary consumer derivative. The essential operation in all such processes is a separation of one or more valuable considered constituents of the crude from the undesired contaminants from which it is associated."

Referring to topographical photographs of the dam facilities, Mr. Fulghum identified the location of the "rock plant" used for the processing of dam embankment material, and the "terciary plant" used to produce dam filer material, and he confirmed that these are the two plants described by Inspector Torres during his testimony (Tr. 260-261). He confirmed that the excavated materials which are "run through our processing facility" end up in the dam, and that the processed rock is further processed when it is crushed further by passing through a 45-ton

vibratory roller in order to insure stable particle size (Tr. 262).

In response to his interpretation as to what constitutes milling and mining under the Act, and the definition of the term "mill" as found in 30 C.F.R. 56.2, Mr. Fulghum responded as follows at (Tr. 264-266):

> JUDGE KOUTRAS: Well, let me ask you this, if you look at Section 56.2 of the regulations, you know, in Title 30, the definition of a mill here, that's all on page 305, Mr. Irizarry, I see you've got the green book, it's 56.2.
>
> WITNESS: Uhum?
>
> JUDGE KOUTRAS: 56.2, definitions, I'll give you a minute to find "milling."
>
> WITNESS: I think I need this. Thank you. Definitions, yes Your Honor?
>
> JUDGE KOUTRAS: Yes, look up a mill.
>
> WITNESS: Includes any ore mill . . .
>
> JUDGE KOUTRAS: Yes, let me highlight this for you, "Mill includes any crushing, grinding or screening plant used in connection with excavation." Let's skip all the other words. "Mill includes any crushing, grinding or screening plant used in connection with an excavation."
>
> WITNESS: OK, Your Honor.
>
> JUDGE KOUTRAS: Is that . . . , does that fit anything that you're doing?
>
> WITNESS: That would fit anybody subject to this Act, yes, Your Honor.
>
> JUDGE KOUTRAS: Would it fit what you're doing at the . . . , leave the question of being subject. You have a screening plant, don't you?
>
> WITNESS: Yes, Your Honor.
>
> JUDGE KOUTRAS: You have a crushing plant, don't you?
>
> WITNESS: Yes, Your Honor.

JUDGE KOUTRAS: And you . . . , you have an excavation going on, don't you?

WITNESS: Yes, Your Honor.

JUDGE KOUTRAS: Does that fit the definition of mill?

WITNESS: As I'm reading . . . .

JUDGE KOUTRAS: In and of itself?

WITNESS: As I'm reading it from here, yes Your Honor. But this is not a complete definition, no. For miller.

JUDGE KOUTRAS: But it's a definition, it's in 56.2?

WITNESS: It is a definition, that's contained in 56.2, yes Your Honor.

JUDGE KOUTRAS: OK.

WITNESS: I don't believe it's applicable.

JUDGE KOUTRAS: OK.

WITNESS: But we do . . . , we do have the same characteristic similarities which we don't deny.

Mr. Fulghum took the position that the respondent does not extract minerals, but is simply excavating rock (Tr. 267). In his opinion, the respondent's dam construction site is not a mine, and the respondent has never developed a mine and has no intentions of doing so (Tr. 268).

Mr. Fulghum characterized the respondent as a "worldwide recognized constructor of dams," and he alluded to an analogous dam construction project at the respondent's Warm Springs Dam project which is located within the enforcement jurisdiction of MSHA's Alameda, California Field Office. He also alluded to several other dam projects where the respondent excavated similar materials used in dam construction, and stated that when inquiries were made of MSHA with respect to its jurisdiction over these activities, no responses were forthcoming (Tr. 269).

Mr. Fulghum stated that the CAL-OSHA Office has issued citations at the aforementioned dam projects, but that MSHA has never inspected those sites or recognized those operations as mines or milling operations (Tr. 270). Mr. Fulghum was of the opinion that the language contained in the April 17, 1989, MSHA-OSHA Agreement excludes the respondent's Cerrillos Dam Construction activities from coverage under the Mine Act (Tr. 271). He believes that the definition of milling, and MSHA's

authority with respect to milling operations, as discussed in the memorandum, are general definitions, but conceded that "sizing and crushing" does define a milling process which is subject to MSHA's jurisdiction (Tr. 275).

Mr. Fulghum confirmed that the dam spillway is part of the dam, and that a "spillway" is a "water diversion" within the meaning of the October 23, 1986, MSHA Memorandum clarifying "key cuts and dam construction" (Tr. 276). He stated that a "key cut" of a dam is an excavation that's necessarily a component of the dam (Tr. 276).

Mr. Fulghum confirmed that the respondent's dam construction operations have been inspected by the local Puerto Rico OSHA Office, which has issued citations. Copies of some of these citations were received for the record, and Mr. Fulghum reviewed and explained them (Tr. 283-289; exhibits R-2 and R-3).

Mr. Fulghum testified with respect to the guarding citations issued pursuant to mandatory standard section 56.14001, Citation Nos. 2558999 through 2559007, September 1, 1987, and he confirmed that they were discussed with Inspector Torres during his inspection closing conference. Mr. Fulghum took the position that it was necessary to remove the equipment guards in order to do maintenance work on the equipment. He explained that the respondent's operation at the dam project was a 7-day a week, 24-hour a day operation, and that production ceases at given times in order to perform maintenance. He took the position that the cited standard only applies when there are moving machine parts which may be contacted and subsequently lead to an injury (Tr. 292-293).

Mr. Fulghum stated that the equipment guards require fabrication and repairs at the shop facility, and once the plant was locked out and shutdown for regular scheduled maintenance, the guards were "removed and improved upon." He stated that he explained this to Inspector Torres and that he responded "if it's not there, regardless, it's a citation" (Tr. 294).

Mr. Fulghum was of the opinion that the cited guards could be removed, and that pursuant to section 56.14006, guards are required to be in place while the equipment is running, unless they are removed to test the equipment. He also pointed out that in order to stay in compliance with section 56.14007, which requires that guards be substantially constructed and maintained, the most common and expeditious manner of doing this is to remove them during the shutdown procedure (Tr. 294-295). Mr. Fulghum further pointed out that the respondent complied with section 56.14029, and that at the time Mr. Torres observed that the guards were missing from the equipment, the power was off and no moving machine parts existed since the equipment was not in fact moving (Tr. 296).

Mr. Fulghum confirmed that the respondent had an established equipment lock-out and tag-out procedure in effect at the time the citations were issued, and that pursuant to the contractual stipulations with the Corps of Engineers, it has submitted Job Hazard Analysis reports for the rock, terciary, and test plants (Tr. 296-298).

Mr. Fulghum confirmed that there is a scheduled time period for equipment maintenance, and that at the time of the inspection by Mr. Torres, the plant was not in operation and was down for maintenance. He confirmed that the production shift began at 11:30 a.m., and that when Mr. Torres was there at 8:00 to 8:30 a.m., everything was shutdown, and it had been shutdown since 4:00 a.m. (Tr. 299-300).

Mr. Fulghum stated that the missing guards were in the shop for repairs at the time Mr. Torres inspected the plant, and that the shift superintendent informed him that they were replaced at 11:30 a.m. He was also informed that they were removed that same morning and reinstalled, and that Mr. Tabor explained this to Inspector Torres during the closing conference (Tr. 300-302). Mr. Fulghum stated that if Mr. Torres had returned at 11:00 a.m., when the plant was in production, he would have seen that the guards were replaced (Tr. 305).

With regard to the walkway Citation No. 2859000, Mr. Fulghum stated that Mr. Tabor informed him during the closing conference that the three individuals exposed to the hazard were employees of MES Services, and not rock plant or terciary plant employees. Mr. Fulghum confirmed that he was not present when the citation was issued and that the cited walkway or platform was part of the Number 3 feeder which is part of the respondent's plant (Tr. 306). Mr. Fulghum did not deny that persons were on the walkway or platform, nor did he deny that it was unguarded (Tr. 308).

With regard to Citation No. 2859002, concerning the lack of handrail's on the No. 6 feeder platform, Mr. Fulghum did not deny that it lacked handrails, and he pointed out that the area was not used on a regular basis. He also pointed out that a gate which had been provided at the cited location was removed because the material would not pass through the plant as quickly as required and that he removed the gate and separated it, and could not find it (Tr. 311).

With regard to the broken conveyor emergency stop cord Citation No. 2859004, Mr. Fulghum conceded that the cord was broken, but he pointed out that the plant was locked down and that in the course of routine maintenance someone would have found the condition and repaired the cord before production was started. Mr. Fulghum stated that Mr. Tabor informed him that he

knew about the broken cord and that it was repaired before production began (Tr. 312).

With regard to the safety shoes Citation No. 2859007, Mr. Fulghum stated that the respondent provides steel protective footwear to its employees at no cost, and that adequate supplies of "dock stoppers" which slip over the feet to protect them in the toe and metatarsal areas are also available for the employees. Mr. Fulghum believed that the cited standard does not require steel toe caps, and that leather boots are "suitable footwear" within the meaning of the standard (Tr. 318).

Mr. Fulghum conceded that some employees do not always wear steel toed boots because they work in the field and are not always assigned to the plant, but he reiterated that employees are supplied with "dock stoppers" and that the respondent subsidizes the purchase of steel toed shoes for its employees (Tr. 319).

Mr. Fulghum stated that the respondent has a strict and aggressive safety and loss control program, and that it complies with all MSHA, OSHA, MSCE, NFPA, and Corp of Engineers Safety requirements (Tr. 324-325). He also confirmed that the respondent complies with the annual training and retraining requirements of the law (Tr. 327).

On cross-examination, Mr. Fulghum stated that one of the criteria used for the selection of the location of the dam in question was the availability of the limestone materials that were present in that location (Tr. 331, 335). He confirmed that there are several excavation areas at the dam site, and that all of the excavated materials that are suitable and meet the dam construction criteria are used in the construction of the dam (Tr. 340). Some of the excavated materials which may not be suitable for the construction of the dam are used in other areas, such as access roads, and large boulders and oversized materials are stockpiled as riprap (Tr. 343).

Mr. Fulghum described the materials used for the construction of the dam as "highly altered fibroplastic metal, semimetal, marine metisetal," commonly referred to as limestone, siltstone, fractured limestone, and hard and soft dirt and rock. He confirmed that all of these materials, with the exception of clay core and riprap, is processed in either the primary or secondary rock plant. As a general rule, all of the material is processed through the primary plant, and he described the nature of the process as follows (Tr. 348-350):

> Q. What determines whether something is sent to the primary plant as opposed to the secondary plant?

A. Everything goes through the primary plant, with the exception of the material I've mentioned earlier, that we brought in from outside. Everything has to go through the rock plant.

Q. OK. And does it all start at the primary plant or is some of it only processed at the secondary plant?

A. I believe they all go through the primary plant. There may be exceptions, but as a general rule they all go through the primary plant.

Q. And in the primary plant, what is the nature of the process?

A. The material is . . . , is taken from the designated spillway excavation, it's brought down in triple seven, hauled in trucks, down hydraulic drove, they reverse into a dump station which contains a radio gate and grizzler. There is a feed apron, with grizzlies and oversized material that's too large to handle is crushed at the general crusher. This material then goes to a screening court where it's segregated according to size, in different sizes.

The product of the screening decks are basically drove through and some oversized returns to a cone crusher, back up to the screening deck to get the right proportion of the sizes together to make a dam. It then leaves that area and it goes along the product belts. Two of the products really have nothing done, the rock product, the 20-inch product, it comes . . . , as soon as it comes off the grizzly and goes through the first selection, it's sent out into a dump pile as a rock zone. The second is a product called transition and that's just everything else in between. But it is screened and it is crushed. But not to the specifications of a normal aggregate.

Q. Not to what?

A. The specifications of a normal aggregate.

Q. OK.

A. In fact, you couldn't sell this aggregate to anybody as an aggregate or in its current form.

Q. And after these materials come out of the primary plant, is there any further processing or are they eventually used . . . .

A. No, sir, those are in place materials.

Q. So they . . . , they come out . . . .

A. Well, they do have another process which affects the size, it's anticipatory in the design engineer's mind that one of the criteria is not only the particular size, but they have to have a pack, in other words, we take big rollers to make sure that they meet maximum density and there is an anticipated further crushing action by these large rollers that roll back that is also taken in the design criteria. So that would be the last of the process, it's when it's rolled in place on the embankment. But other than that, as far as going through the plant, those two products, transition and rock, come right off the plant. And the stockpiles, these stockpiles you see around the photographs are that rock.

Q. OK and what is the end product used for?

A. The end product is used for embankment material on the dam.

Mr. Fulghum described the process which takes place at the secondary crusher or rock plant as follows (Tr. 350-352):

Q. In terms of the secondary crusher or rock plant, what process is performed there?

A. That takes material either out of the transition stockpile and as I said in the past, well, it would be the same process. We had to reset our entire plant. Well, let's . . . , let me take it one step at a time. Let us assume that it comes from the excavations that are required on the project, that material will be taken out of the transition stockpile. It would go into a feed hopper with the primary feed. Then it goes through a screen deck, a wet screen deck. And this is filtered, it has to be free of all dirt.

It goes through the screen deck and the product comes out and it goes through I believe two giratory crushers there. We also have a large hydrocone there. These break it down into particle sizes and the proportions of the particles we need to make in the filter blanket. They then go up into a replane, to a second screen deck which, most of this . . . , this is not the original plant, but as the plant is being modified in its current state, to match the material, we now have the screen deck with the second screen plane that goes out.

Currently and I doubt if it's completed today, we also have the third process in which to break it down into size and where we're going to use a hammerlock, an impact, an impact crusher is what you call it. That product is either refined or coarse. The coarse goes to the coarse filter, the fine goes to the fine filter.

> Q. And in terms of the product that is processed in the secondary plant, what is that used for?
>
> A. That is the product, sir, that is the filter.
>
> Q. For the filter?
>
> A. Yes, sir.
>
> Q. What is a filter?
>
> A. In order for a dam to maintain a stability, it has to have someway for the water to relieve itself without becoming a massive herd as I mentioned earlier in the morning. * * * We put the clay down and the filter lays against the clay in order that we don't get a massive saturation in which the rock fill dam cannot drain as quick as the water level comes down and that's the function of the filer, sir.

Mr. Fulghum confirmed that the respondent purchased limestone aggregate from outside sources, and that it was processed through the filer plant. He also confirmed that aggregate, sand, and cement was purchased and used to batch or make concrete in the batch plant (Tr. 353-355). The only outside purchased material processed in the primary or secondary plant was the 3-inch minus product used in a pilot test program processed for the Corps of Engineers (Tr. 356).

Mr. Fulghum confirmed that the prior OSHA inspection's resulted from employee complaints and two fatalities which occurred at the dam embankment, and he had no knowledge as to whether or not OSHA inspected the project as part of any general inspection (Tr. 358-360).

Mr. Fulghum confirmed that all of the equipment used in the rock plant facilities originated from sources outside of Puerto Rico, and that it was brought in from the Warm Springs Dam located near San Luis, California (Tr. 361).

Mr. Fulghum stated that he was not present at the project on August 31, 1987, during the first inspection conducted by Mr. Torres (Tr. 362). He was present late in the evening of September 1, 1987, but had no direct knowledge of any statements

that Mr. Tabor may have made to Mr. Torres with respect to his inspection (Tr. 363). He also confirmed that he had no personal knowledge concerning the missing guards cited on August 31 or September 1, and that records concerning guards removed for maintenance are not made because "we do it every day." He assumed that the plant or lead foreman would have knowledge of those matters (Tr. 370).

Mr. Fulghum confirmed that he had no personal knowledge that the guards which were removed and not in place on September 1, were replaced before the plant went into production at 11:00 a.m., or 11:30 a.m., and that his knowledge of this was based on what he was told by Mr. Tabor and Mr. Johansson (Tr. 374-375). However, Mr. Fulghum stated that he saw the guards in place later in the evening at approximately 5:00 p.m. when the plant was in operation (Tr. 376).

Mr. Fulghum stated that the employees cited for not wearing suitable protective footwear were engaged in shovelling and cleaning up under the plant screen tower, and that the only type of "sneaker" that an employee may wear is one that has steel shank inserts (Tr. 376, 380).

Mr. Fulghum stated that the rock plants are mobile, and he described their locations at this project site by reference to certain photographs (Tr. 394-396).

Inspector Torres was recalled as the court's witness, and he denied that Mr. Tabor ever informed him on August 31 or September 1, 1987, that the cited guards had been removed from the equipment to be repaired. He also stated that with respect to two of the guarding citations, Mr. Tabor informed him that the guards had been on the equipment but were removed, but that he did not offer any reason for their removal (Tr. 399-400).

Mr. Torres confirmed that even if Mr. Tabor had informed him that the equipment was locked out and the guards removed for maintenance, he would still have issued the citations because there would have been insufficient time to replace all of the cited guards before the plant went into production (Tr. 400-401).

With regard to the safety shoe citation, Mr. Torres confirmed that he simply observed one employee wearing ordinary tennis shoes and did not speak to him or examine the shoes. Mr. Torres confirmed that the employee was cleaning material from under the screening station and he was concerned that 4 or 5 inch rock materials would fall from the upper levels of the plant, and if he were a maintenance employee, a heavy tool could fall on his foot. Mr. Torres also confirmed that the cleaning took place while the equipment was shutdown (Tr. 401-403).

Mr. Torres confirmed that according to his interpretation of the safety shoe standard, all employees working in the plant need to wear safety shoes, and that according to his inspector's manual, safety shoes are considered to be hard-toe shoes.

Mr. Torres stated that if anyone had informed him that the guards had been replaced prior to leaving the plant site at 2:00 p.m., on September 1, he would have gone back and checked them and terminated the citations. He stated further that the replacement of the guards was only mentioned during the close-out conference (Tr. 407). He also confirmed that Mr. Fulghum never informed him that the guards had been removed for maintenance or repairs, but that Mr. Tabor informed him that this was the case at the end of the close-out conference (Tr. 412-413).

An MSHA Mine Identification Form filed by the respondent's project manager Lars Johansson on February 19, 1986, contains the following information (Exhibit ALJ-2):

1. The assigned MSHA Mine ID for the respondent's Cerrillos Dam Project is shown as 54-00289, and the facility is identified as a "Rock Quarry-Surface."

2. The mine location address is shown as Dillingham Construction, Inc., P.O. Box 7430, Ponce, Puerto Rico 00732.

3. The respondent's corporate name is shown as Dillingham Construction International, Inc., a State of Nevada Corporation.

4. The corporation identified in item #3 above is identified as a subsidiary of Dillingham Construction Corporation, 7100 Johnson Drive, Pleasaton, California 94565, the parent corporation.

A copy of an MSHA computerized "Mine Inspection and Violation History" for the period January, 1986 through October, 1987, reflects the following information:

1. The Cerrillos Dam Project is identified as a "Sand & Grav" operation employing 36 individuals.

2. Two "regular" MSHA inspections were conducted at the facility during the periods August 31 to September 2, 1987, and February 9, 1987 to February 10, 1987. One MSHA compliance (CFI) inspection was conducted on June 29, 1987.

> One MSHA "Compliance Assistance visit" (CAV) inspection was conducted during the period November 3 to November 4, 1986.
>
> 3. During the period November 3, 1986, through September 1, 1987, the respondent was issued a total of 52 citations for alleged violations of various mandatory safety and health standards found in Part 56, Title 30, Code of Federal Regulations.
>
> Twenty-eight (28) of the total violations noted were issued during a CAV inspection conducted on November 3 and 4, 1986.
>
> Fifteen (15) of the total violations noted were issued during a regular inspection conducted on February 9 and 10, 1987.
>
> Nine (9) of the total violations noted were issued during a regular inspection conducted on September 1, 1987, and they are the contested citations in issue in the instant proceedings.

Findings and Conclusions

The Jurisdictional Question

Section 4 of the 1977 Mine Act, 30 U.S.C. 803, provides that "Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce . . . shall be subject to the provisions of this Act."

Section 3(h)(1) of the Act, 30 U.S.C. 802(h)(1)(c), defines "coal or other mine" in pertinent part as "an area of land from which minerals are extracted . . . and lands, excavations, . . . facilities, equipment, machines, . . . used in, or to be used in, the milling of such minerals . . . . "

The definition of "coal or other mine" is further clarified by the Legislative History of the Act. The Senate Report No. 95-181 (May 16, 1977) provides that:

> Finally, the structures on the surface to be used in or resulting from the preparation of the extracted minerals are included in the definition of "mine." . . . [B]ut it is the Committee's intention that what is considered to be a mine and to be regulated under the Act be given the broadest possibly (sic) interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep, No. 181, 95th Cong., 1st Sess. 602, reprinted in [1977] U.S. CODE CONG. 7 ADMIN. NEWS 3401, 3414.

MSHA's Part 56 mandatory safety and health standards for surface metal or nonmetal mines, define the term "Mill" as including, inter alia, "any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine."

The term "mill" is defined by the Dictionary of Mining, Mineral, and Related Terms, U.S. Department of the Interior, 1968, in pertinent part as follows at page 706:

> [T]he whole mineral treatment plant in which crushing, wet grinding, and further treatment of the ore is conducted.
>
> In mineral processing, one machine, or a group, used in comminution. This older limitation of the term has today been broadened to cover the whole mineral treatment plant in which crushing, wet grinding, and further treatment of the ore is conducted. By common usage, any establishment for reducing ores by other means than smelting. More strictly, a place or a machine in which ore or rock is crushed.

The term "milling" is defined in part at page 707 as "The grinding or crushing of ore. The term may include the operation of removing valueless or harmful constituents and preparation for market."

The thrust of the respondent's jurisdictional argument, as expressed through the testimony of its Project Safety Engineer, Gerald Fulghum, is that it "excavates" limestone and siltstone materials and does not engage in an "extraction" of these materials, or in any activities associated with the extraction of such materials. The respondent further relies on Mr. Fulghum's assertion that the term "milling" involves the separation of a valuable ore from undesirable contaminants, and that since the respondent performs no such separation, it cannot be considered to be engaged in a milling operation. In support of his arguments, Mr. Fulghum relies on an MSHA/OSHA Interagency Agreement, published in the Federal Register on April 17, 1979, 44 Fed. Reg. 22827-22830 (Exhibit ALJ-1), and in particular, the definitions of "Mining and Milling" found in Appendix A to the agreement, at page 22828, which defines these terms as follows:

> Mining has been defined as the science, technique, and business of mineral discovery and exploitation. It entails such work as directed to the severence of minerals from the natural deposits by methods of underground excavations, opencast work, quarrying, hydraulicking and alluvial dredging. Minerals so

> excavated usually require upgrading processes to effect a separation of the valuable minerals from the gangue constituents of the material mined. This latter process is usually termed "milling" and is made up of numerous procedures which are accomplished with and through many types of equipment and techniques.
>
> Milling is the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives. The essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.

The respondent further argues that its principal business is that of dam construction, and that it is not engaged in the normal business of mining as a means of selling any of its excavated materials on the open market. Respondent maintains that the processing of any excavated limestone is incidental to its dam construction activities, and it suggests that if jurisdiction attaches under the Act, the enforcement of its activities should lie with OSHA, and not with MSHA. In support of this argument, the respondent relies on MSHA Policy Memorandum No. 88-2M, dated October 23, 1986, which "clarified" the MSHA/OSHA Agreement, and it states in pertinent part as follows (Exhibit ALJ-1):

> Recently, several inquiries regarding questions of jurisdiction indicate the apparent need to further clarify the Interagency Agreement between the Mine Safety and Health Administration (MSHA) and Occupational Safety and Health Administration (OSHA). Especially of concern are those areas in which a mineral is extracted for purposes other than its intrinsic value as a commodity. The operations listed below delineate some of these types of facilities but are not limited to the following:
>
> > (a) key cuts in dam construction (not on mining property or used in mining);
>
> * * * * * * *
>
> The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed. The mineral extracted incidental to the primary purpose of the activity may be processed and disposed of however the operator may choose. At these types of operations, MSHA would not have jurisdiction since they would not be functioning solely for the purpose of producing a mineral.

The respondent further relies on an MSHA Program Policy Manual provision published on July 1, 1988, Release I-1, Volume I, Section 4, page 3, concerning the MSHA/OSHA Agreement, which states in pertinent part as follows:

> MSHA and OSHA have entered into an agreement to delineate certain areas of inspection responsibility, to provide a procedure for determining general jurisdictional questions, and to provide for coordination between the two agencies in areas of mutual interest. MSHA has jurisdiction over operations whose purpose is to extract or to produce a mineral.
>
> MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity. Under this circumstance, a mineral may be processed and disposed of, and MSHA will not have jurisdiction since the company is not functioning for the purpose of producing a mineral. Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following:
>
> 1. Key cuts in dam construction (not on mining property or used in mining);
>
> * * * * * * *
>
> The question of jurisdiction in these and similar types of operations is contingent on the purpose and intent for which the facility is being developed.

Finally, the respondent asserts that its dam project in Ponce, Puerto Rico, is within the jurisdiction of the local Puerto Rico Occupational Safety and Health Administration which has exercised its mandate for the health and safety oversight of the respondent's employees under rules and regulations promulgated by the OSHA Act of 1970, and that neither MSHA or the Commission has jurisdiction in these matters.

In Marshall v. Stoudt's Ferry Preparation Company, 602 F.2d 589 (3d Cir. 1979), cert. denied, No. 79-614 (January 7, 1980), the State of Pennsylvania dredged a river and deposited the material into a nearby basin. The operator purchased this material, and through the use of a front-end loader and conveyor belts transported the material to its plant where, through a sink-and-float process, a low-grade fuel was separated from the sand and gravel. The court held that the operator was engaged in the preparation of minerals within the jurisdiction of the Mine Act, and that the work of preparing minerals is included with the Act whether or not extraction is also being performed by the operator. The court stated as follows at 602 F.2d 592:

> Although it may seem incongruous to apply the label "mine" to the kind of plant operated by Stoudt's Ferry, the statute makes clear that the concept that was to be conveyed by the word is much more encompassing than the usual meaning attributed to it--the word means what the statute says it means.

Donovan v. Carolina Stalite Company, 734 F.2d 1547 (Ct. App. D.C. Cir.), decided May 15, 1984, concerned a slate gravel processing facility operated by Stalite adjacent to a stone quarry independently owned and operated by another company. Approximately 30 percent of the stone quarried at this operation was delivered to Stalite by a conveyor system, and Stalite "bloated" the slate in a rotary kiln with intense heat, and produced a light-weight material called "stalite" which was crushed and sized and sold to be used in making concrete masonry blocks. Addressing the question as to whether Stalite was engaged in mineral milling and preparation, subjecting it to MSHA jurisdiction, or whether its operation was "primarily manufacturing in nature," subjecting it to OSHA jurisdiction, a Commission Judge found that Stalite was engaged in milling subject to MSHA's jurisdiction. In view of the fact that mineral milling and preparation are not specifically covered in the Act, the judge relied on three of the specific examples found in Appendix A to the interagency agreement - heat expansion, crushing, and sizing--in concluding that Stalite was engaged in milling subject to MSHA's jurisdiction.

On appeal of the judge's decision, the Commission took a narrow view of the term "milling" to include only facilities that engage in the "extraction, milling, and preparation of minerals," and concluded that Stalite did not engage in mining "in its classic sense." Relying on the fact that Stalite did not do the actual extraction of the slate and that its only contact with the mineral occurred after it had been extracted and crushed at the quarry, the Commission considered Stalite's treatment of the mineral to be "a manufacturing process" that results in a product, rather than a "milling" process under the Act, and reversed the judge's decision. The Commission gave no weight to the judge's reliance on the interagency agreement, and ruled that the question of MSHA's regulatory authority is to be determined by the scope of the Mine Act's coverage, and not by the agreement.

The court reversed the Commission, and relying on the statutory definition of a mine and the legislative history of the Act reflecting an intent by Congress that the Act be broadly construed, it held that Stalite was subject to the Act. Although agreeing that the interagency agreement "suffers from a degree of internal inconsistency," the court found the examples of milling processes detailed in the agreement to be of particular relevance, 734, F.2d 1552-1553. The court also took note of the

agreement by other circuit courts with its interpretation of the Act, and the "sweeping definition" of the definition of a mine found in section 3(h) of the Act. Marshall v. Stoudt's Ferry Preparation Co., supra; Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116 (9th Cir. 1981); Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981).

Erie Blacktop, Inc., 3 FMSHRC 135 (January 1981), concerned an operator who was engaged in a road paving and blacktopping operation which was not subject to MSHA's enforcement jurisdiction. However, the operator simultaneously utilized front-end loaders, a secondary crusher, and other equipment while engaged in a limestone mining operation which mined, crushed, and processed limestone, some of which was sold to and used by the Corps of Engineers for certain lake erosion projects, as well as for road and paving projects. I found that the respondent's limestone operation constituted a mining operation subject to the Act, as well as to MSHA's enforcement jurisdiction and the mandatory safety and health standards found in Part 56 of Title 30, Code of Federal Regulations.

San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980), concerned an open pit limestone quarry which extracted limestone for use in the production of cement. The limestone was crushed to produce a finely ground power used in the finished product, and the judge held that this was a crushed stone operation subject to the requirements of Part 56 of Title 30, Code of Federal Regulations.

Nevada Mineral Processing, Docket No. WEST 88-273-M, decided by Judge Lasher on May 24, 1989, concerned a small gold and silver milling operation which did not extract the minerals, but did process and assay them using conveyors, a crusher, and a pulverizer. Judge Lasher concluded that the facilities and equipment were used in the work or milling or preparing the minerals, and that the operation clearly fell within the definition of a mine found in section 3(h)(1) of the Act, and was subject to the standards found in 30 C.F.R., Part 56.

In National Cement Company, Inc., 3 FMSHRC 1951 (August 1981), I rejected an operator's contentions that it was not operating a "mine" within the meaning of the Act, or conducting a "milling operation" within MSHA's jurisdiction. The plant in question was located 7 miles from a quarry where limestone was mined and transported by trucks to the plant for screening and crushing. Another quarry located closer to the plant supplied limestone by means of conveyor belts. I found that the plant constituted a mining operation within the statutory definition found in section 3(h)(1) of the Act, and I stated as follows at 3 FMSHRC:

> It seems clear to me that the statutory definition of a mine establishes that it was Congress' intent that MSHA regulate any milling activity which is an integral part of a mine, since mines fall within the specialized jurisdiction of MSHA and since mine employees typically operate such facilities. On the facts of this case, it also seems amply clear to me that the respondent's cement plant, even if it can be classified as a milling operation, is still an integral part of its limestone mining operation. Without the raw mineral material (limestone) respondent could not produce cement. Therefore, it seems further clear to me that respondent's operations, whether they be characterized as a crushed stone operation or a milling operation, are both subject to the Act as well as to MSHA's enforcement jurisdiction, and my conclusions in this regard are based on the statutory aforementioned definition of the term "mine" as well as the MSHA-OSHA memorandum of understanding.

The facts in the instant proceedings establish that MSHA has exercised its enforcement jurisdiction and authority over the respondent's rock plants since November, 1986, when it first visited the site at the respondent's invitation to conduct a CAV consultation visit which resulted in the issuance of non-penalty notices of violations. Regular inspections followed which resulted in the issuance of several non-compliance violations. All of these inspection activities have been limited to the respondent's rock plants, and did not include the actual dam construction work.

The local Puerto Rico OSHA (PROSHA) has also conducted inspections at the worksite, but apparently only pursuant to specific complaints. After the issuance of the contested citations in these proceedings, respondent's safety engineer Fulghum asserted that MSHA lacked jurisdiction over the rock plants, and a subsequent meeting between MSHA and local PROSHA representatives did not result in any agreement to consolidate jurisdiction with one agency. I take note of the fact that although the interagency agreement in question provides that where questions of jurisdiction cannot be resolved at the local level, they shall be submitted to the National Offices of the agencies and, if still unresolved, to the Secretary of Labor, the respondent has not sought such advise or rulings from these National Offices, and raised the jurisdictional issue after the inspection which resulted in the contested citations.

With regard to the interagency agreement, the respondent has obviously seized on the definition of "milling" and has focused on that definition to support its argument that it is not engaged in a mining activity. However, respondent has conveniently

overlooked the fact that its limestone rock crushing and processing activities fall precisely within the examples cited in the agreement of identical mineral and mining operations which MSHA has authority to regulate. The court in the Carolina Stalite Company case, supra, found these examples to be of particular relevance in finding that Stalite's activities were subject to the Act and MSHA's regulatory authority.

The respondent's narrow view that milling is limited to the separation of valuable ore from undesirable contaminants for its intrinsic value for sale or use in the general market place is rejected. I believe the term milling, as used in the Mine Act, has a broader definition which is in keeping with the intent of Congress that the Act be broadly construed with respect to any regulatory enforcement, and that any jurisdictional doubts be resolved in favor of including a facility within the coverage of the Act. While it may be true that any typical milling operation may involve some separation of the valuable ore from the contaminants, I find no such requirement in the Act or MSHA's regulatory standards, and I agree with the petitioner's argument that the interagency agreement cannot supercede the language found in the Act.

The respondent's reliance on the language found in the MSHA policy manual of July 1, 1988, which states that MSHA has jurisdiction only over operations whose purpose is to extract or to produce a mineral, and does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity is rejected. In the first place, such policy memorandums are not binding on the Commission and may not supercede the plain jurisdictional language found in the Act, and the controlling case precedents. Brock v. Cathedral Bluffs Shale Oil Co., BNA 4 MSHC 1033 (D.C. Cir. 1986). Further, as correctly pointed out by the petitioner, the limestone material extracted by the respondent is extracted for its intrinsic value as a commodity, and then processed and used in the construction of the dam (Tr. 279, brief, at pg. 9). Further, as noted earlier, the dam was located at the site in question because of the availability of the limestone, and when the on-site deposits were being depleted, the respondent had to look to other sources to continue with the project. In short, the availability, extraction, processing, and use of the limestone is a critical part of the dam construction activity.

The credible testimony and evidence reflects that the location of the dam site was selected because of the projected availability of calciferous rock, mostly limestone and siltstone, which is desirable for producing coarse and fine filter material for the dam embankment. The limestone is blasted and/or excavated by a D-9 ripper from the dam spillway area and it is processed at the primary and/or secondary rock plants where it is crushed, screened, sized, and stockpiled for use in the dam

construction. The processing includes the sizing of the rock materials to meet the rock size and stability criteria established by the Corps of Engineers. While it is true that the respondent does not extract any particular mineral from the excavated rock, the excavated material which is processed at these rock plants is used in some phase of the construction project. Limestone materials purchased from nearby quarries are bought on-site and are processed at the respondent's filter or terciary plant, and they are also used for the project, including the production of cement for use in the dam construction.

Inspector Torres confirmed that he has observed the extraction and processing of limestone at the site, and that this included the use of explosives, bulldozers, front-end loaders, haulage trucks, grizzles, screens, and primary and secondary crushers and conveyor belts. Inspector Perez confirmed that he has observed materials being processed at the plant, and that it included "washing, classifying, and grinding."

The respondent agrees that the term "Mill," as defined in 30 C.F.R. 56.2, includes the excavation of minerals, including limestone, and any crushing, grinding, or screening plant used in connection with such excavation, and concedes that its activities have these same similarities and characteristics, and fall within the definition of "Mill" as stated in section 56.2. The respondent acknowledged that it engaged in excavation work, and operates a screening and crushing plant that fall within this definition (Tr. 265-266). It also conceded that the sizing and crushing of limestone defines a milling process which is subject to MSHA's jurisdiction (Tr. 275).

In view of the foregoing findings and conclusions, and after careful consideration of all the arguments and evidence adduced in these proceedings, I agree with the petitioner's position in this case, and I conclude and find that the respondent's rock processing plants constitute a "mine" within the meaning of section 3(h)(1) of the Act, and that its facilities, equipment, and machines in these plants are used for mineral milling within the meaning of the Act and MSHA's definition of "mill" found in 30 C.F.R. 56.2. I further conclude and find that MSHA has inspection and enforcement jurisdiction and authority over these rock processing activities. The respondent's arguments to the contrary ARE REJECTED.

Interstate Commerce Issue

> Section 4 of the Act provides as follows:
>
> Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine and

> every miner in such mine shall be subject to the provisions of this Act.
>
> "Commerce" is defined in section 3(b) of the Act as follows:
>
> Trade, traffic, commerce, transportation or communication among the several states, or between a place in a state and any place outside thereof, or within the District of Columbia, or a possession of the United States, or between points within the same state but through a point outside thereof.

The use of the phrase "which affects commerce" in Section 4 of the Act, indicates the intent of Congress to exercise the full reach of its constitutional authority under the commerce clause. See: Brennan v. OSHA, 492 F.2d 1027 (2nd Cir. 1974); U.S. v. Dye Construction Co., 510 F.2d (10th Cir. 1975); Polish National Alliance v. NLRB 332 U.S. 643 (1977); Godwin v. OSHRC, F.2d 1013 (9th Cir. 1976).

Perez v. United States, 402 U.S. 146 (1971), held that Congress may make a finding as to what activity affects interstate commerce, and by doing so it obviates the necessity for demonstrating jurisdiction under the commerce clause in individual cases. Thus, it is not necessary to prove that any particular intrastate activity affects commerce if the activity is included in a class of activities which Congress intended to regulate because that class affects commerce.

Mining is among those classes of activities which are covered by the Commerce Clause of the United States Constitution and thus is among those classes which are subject to the broadest reaches of Federal regulation because the activities affect interstate commerce. Marshall v. Kraynak, 457 F. Supp. 907, (W.D. Pa. 1978), aff'd, 604 F.2d 231 (3d Cir. 1979), cert. denied, 444 U.S. 1014 (1980). Further, the legislative history of the Act, and court decisions, encourage a liberal reading of the definition of a mine found in the Act in order to achieve the Act's purpose of protecting the safety of miners. Westmoreland Coal Company v. Federal Mine Safety and Health Review Commission, 606 F.2d 417 (4th Cir. 1979). See also: Godwin v. Occupational Safety and Health Review commission, 540 F.2d 1012 (9th Cir. 1976), where the court held that unsafe working conditions of one operation, even if in initial and preparatory stages, influences all other operations similarly situated, and consequently affect interstate commerce.

The courts have consistently held that mining activities which may be conducted intrastate affect commerce sufficiently to subject the mines to Federal control. See: Marshall v. Kilgore, 478 F. Supp. 4 (E.D. Tenn. 1979); Secretary of the Interior v. Shingara, 418 F. Supp. 693 (M.D. Pa. 1976); Marshall v. Bosack,

463 F. Supp. 800, 801 (E.D. Pa. 1978). Likewise, Commission judges have held that intrastate mining activities are covered by the Act because they affect interstate commerce. See: Secretary of Labor v. Rockite Gravel Company, 2 FMSHRC 3543 (December 1980); Secretary of Labor v. Klippstein and Pickett, 5 FMSHRC 1424 (August 1983); Secretary of Labor v. Haviland Brothers Coal Company, 3 FMSHRC 1574 (June 1981); Secretary of Labor v. Mellott Trucking Company, 10 FMSHRC 409 (March 1988).

A state highway department operating an intrastate open pit limestone mine, the product of which is crushed, broken and used to maintain county roads was held to be subject to the Act. Ogle County Highway Department, 1 FMSHRC 205 (January 1981).

A crushed stone mine operation that had an MSHA "Mine ID" number and was inspected by MSHA was held to be subject to the Act because the sales of rock products, as well as the use of equipment manufactured out of state, affected commerce within the meaning of the Act's jurisdictional language. Tide Creek Rock Products, 4 FMSHRC 2241 (December 1982). See also: Southway Construction Co., 6 FMSHRC 174 (January 1984).

A gravel mine operator conducting activities solely within a state was held to be subject to the Act because its local mining activity had an impact on interstate market. Rockite Gravel Co., 2 FMSHRC 2543 (December 1980), Commission Review Denied January 13, 1981; Scoria Products Branch, Ultro, Inc., 6 FMSHRC 788 (March 1984); Southway Construction Co., supra.

N.Y.S. Department of Transportation, 2 FMSHRC 1749 (July 1980); Island County Highway Department, 2 FMSHRC 3227 (November 1980); and County of Ouray, Colorado, 9 FMSHRC 1205 (July 1987), all held that products affect commerce where they have an intrinsic value as a commodity which would have to be purchased elsewhere if not produced by the operator.

In the instant case, Inspector torres confirmed that most of the respondent's equipment, such as the Caterpillar haulage trucks, and bulldozers, crushers, etc., were shipped to Puerto Rico from the states (Tr. 165-166). Mr. Fulghum confirmed this and stated that all of the equipment used at the rock plant facilities in question originated from sources outside of Puerto Rico and was brought in from another dam site located in California (Tr. 361). He also confirmed that the respondent's parent company, Dillingham Construction International, is a Nevada Corporation, that the Cerrillos Dam Project is one conducted by Dillingham Construction, a Delaware Corporation, and that Dillingham North America, which has constructed dams in California, is a California corporation (Tr. 219-220). Use of equipment that has moved in interstate commerce affects commerce. See United States v. Dye Construction Co., 510 F.2d 78 (10th Cir. 1975). In addition, although it may be true that the limestone

excavated and processed by the respondent at the dam site was used intrastate, given the broad interpretation and coverage of the Act as intended by Congress, and as construed by the courts, it may reasonably be inferred that such use of the mined product would necessarily impact upon interstate commerce. See Fry v. United States, 421 U.S. 542, 547 (1975).

I conclude and find that the respondent's limestone rock processing activities and plants, including the facilities, equipment, and machines used in the processing of the limestone for use in the construction of the dam, which I have concluded constitutes a mining operation covered by the Act, affect commerce within the meaning of the Act, and that the respondent is within its reach.

Federal Pre-Emption

The respondent's assertion that since the enforcement of its dam construction activities has been delegated to the local Puerto Rico OSHA department, MSHA's regulation of these activities at the site is improper, is rejected. The same argument has been raised in cases in which Commission judges have consistently held that state and federal OSHA statutes do not preempt the 1977 Mine Act. See: Brubaker-Mann, Inc., 2 FMSHRC 227 (January 1980); Valley Rock and Sand Corporation, 4 FMSHRC 113 (January 1982); Black River Sand and Gravel, Inc., 4 FMSHRC 743 (April 1982); San Juan Cement Company, Inc., 2 FMSHRC 2602 (September 1980); Sierra Aggregate Co., 9 FMSHRC 426 (March 1987). I agree with these holdings, and take note of the fact that section 506 of the 1977 Mine Act permits concurrent state and federal regulation, and that under the federal supremacy doctrine, a state statute is void to the extent that it conflicts with a valid federal statute. Dixie Lee Ray v. Atlantic Richfield Company, 435 U.S. 151, 55 L.Ed.2d 179 (1978); Bradley v. Belva Coal Company, 4 FMSHRC 982, 986, (June 1982).

Fact of Violations

The respondent is charged with five violations of the equipment guarding requirements of 30 C.F.R. 56.14001, which provides as follows:

> Gears, sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons, shall be guarded.

In Secretary of Labor v. Thompson Brothers Coal Company, Inc., 6 FMSHRC 2094, (September 24, 1984), a case involving the guarding requirements of section 77.400(a), a surface mining standard containing language identical to section 56.14001, Judge

Broderick rejected an operator's contention that it was virtually impossible for a person not suicidally inclined to contact the unguarded moving parts in question. In affirming the violation, Judge Broderick accepted the testimony of the inspector that the unguarded parts were accessible and might be contacted by persons examining or working on the equipment. In affirming Judge Broderick's decision, the Commission interpreted the application of the guarding standard as follows at 6 FMSHRC 2097:

> The standard requires the guarding of machine parts only when they "may be contacted" and "may cause injury." Use of the word "may" in these key phrases introduces considerations of the likelihood of the contact and injury, and requires us to give meaning to the nature of the possibility intended. We find that the most logical construction of the standard is that it imports the concepts of reasonable possibility of contact and injury, including contact stemming from inadvertent stumbling or falling, momentary inattention, or ordinary human carelessness. In related contexts, we have emphasized that the constructions of mandatory safety standards involving miners' behavior cannot ignore the vagaries of human conduct. See, e.g., Great Western Electric, 5 FMSHRC 840, 842 (May 1983); Lone Star Industries, Inc., 3 FMSHRC 2526, 2531 (November 1981). Applying this test requires taking into consideration all relevant exposure and injury variables, e.g., accessibility of the machine parts, work areas, ingress and egress, work duties, and as noted the vagaries of human conduct. Under this approach, citations for inadequate guarding will be resolved on a case-by-basis.

The reliable and probative unrebutted testimony of the inspector establishes that guards were not provided or in place on the cited equipment in question. With respect to four of the citations, the inspector confirmed that maintenance is only performed when the equipment is shutdown, and this obviously served as the basis for his non-S&S findings as to those citations. In my view, the fact that the equipment was not in operation at the time of the inspection, or the fact that it is shutdown when serviced, may serve to mitigate the gravity or seriousness of the violation, but may not serve as an absolute defense to the requirement of the standard that the equipment components detailed therein be guarded. The intent of the standard is that exposed moving machine parts which may be contacted by persons in the normal course of mining activity and in the normal course of their work duties in or around such equipment be guarded to prevent contact, either inadvertently, or from inattention or carelessness. As stated in the Thompson Brothers case, any determination as to whether or not a reasonable possibility of contact with unguarded machine parts will occur

must be considered in the context of the criteria stated in that decision, including the fact that once normal plant production operations begin, miners may be exposed to hazards resulting from unguarded equipment.

With regard to the lack of guarding on the feeder motor belts, the inspector stated that employees would be in the area on a daily basis to clean spillage, and that at least one person would be present for inspection once the plant started up. He believed that anyone caught in the unguarded motor belts could lose a finger or an arm, or suffer disabling injuries. Access was provided to the plant third level primary screening station where the unguarded equipment was located by means of a ladderway.

With regard to the unguarded conveyor belt counterweight pulley, although it was located 20 to 25 feet above ground level, the inspector confirmed that it was located next to a walkway and that the unguarded area was approximately 8 inches from the walkway. He stated that the walkway provided an access way to the transfer point behind the pulley, and that employees would regularly walk by the unguarded pulley. Given the size of the pulley, and his past experience that accidents have occurred by employees being caught by an unguarded pulley of this size, he believed that anyone caught in the unguarded pulley in question would suffer fatal injuries.

With respect to the unguarded belt tail pulley at the secondary crusher plant, the inspector confirmed that it was located approximately 1 foot from the floor level, and while a guard had previously been provided, it had been removed and not replaced. This pulley was about the same size as the previously cited counterweight pulley, and the inspector believed that at least one maintenance man would be exposed to the hazard of being caught in the unguarded pulley.

With regard to the unguarded belt tail pulley located in the secondary crusher plant at ground level under the cone crusher, the inspector stated that he was advised that a guard had been provided, but had been removed. He confirmed that employees would in the area for clean-up and maintenance work, and would be exposed to a hazard.

The respondent's testimony and evidence does not rebut the inspector's findings that at the time of his inspection and observation of the equipment, guards were not provided or in place on the cited equipment in question. The respondent's defense is that no employees were exposed to any hazard because the plant was not in operation at the time of the inspection and that the equipment was shutdown and locked out for maintenance. Mr. Fulghum, the only witness presented by the respondent, was

not with the inspector at the time of his inspection and observations, and he maintained that section 56.14001, only applies when the equipment is in operation and there are moving parts which may be contacted and result in injuries. Mr. Fulghum asserted that he was informed by the shift superintendent Ike Tabor, that the guards had been removed on the morning of the inspection and were in the shop for repairs, and had been replaced by the time the plant had started up later that same day. Mr. Fulghum further asserted that Mr. Tabor explained this to the inspector at the time of the close-out conference on the day following the inspection.

Inspector Torres testified that when he left the site no one said anything to him about the guards being replaced before the plant started operation, and if they had, he would have gone back to terminate the citations (Tr. 407). He also confirmed that no one called him back to terminate the citations, and that during the close-out conference, Mr. Fulghum arrived late at the end of the conference, and said nothing to him about the guards being removed for repair (Tr. 409-410). Mr. Torres stated that Mr. Fulghum advised him that he would take the matter up with his supervisor, and that after Mr. Fulghum met privately with Mr. Tabor at the end of the conference, Mr. Tabor informed him for the first time that the guards had been removed and were in the shop for repairs. Mr. Torres believed that it would have been impossible to reinstall all of the missing guards prior to the time production resumed on the day of his inspection (Tr. 401).

Mr. Tabor was not called to testify in this case, and I find Mr. Fulghum's testimony as to what Mr. Tabor purportedly told him with respect to the removal and replacement of the guards in question to be less than credible. I find Mr. Torres to be a credible witness and I believe his version of the events in question.

Mr. Fulghum also defended the violations on the ground that section 56.14006, permits the removal of equipment guards when the equipment is being tested, and that in order to comply with section 56.14007, which requires that guards be of substantial construction and properly maintained, the most common way of doing this is to remove them during the shutdown procedure. These defenses are rejected. I find no credible evidence that the equipment in question was being tested at the time of the inspection, nor do I find any credible evidence that the guards were removed for maintenance or repair. With respect to Mr. Fulghum's argument that the respondent was in compliance with section 56.14029, because the equipment was shutdown when maintenance was performed, while this may true, I find it irrelevant. The respondent is not charged with violations of any of these other standards. It is charged with failing to provide guards on the cited equipment as required by section 56.14001.

I conclude and find that the credible testimony of the inspector establishes that the cited unguarded equipment constituted violations within the meaning and intent of section 56.14001, and that it supports each of the violations. Accordingly, the citations ARE AFFIRMED.

Citation No. 285900 - 30 C.F.R. 56.11002

The respondent is charged with a violation of section 56.11002, which provides as follows:

> Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

The inspector's unrebutted credible testimony establishes that the feeder walkway or platform located at the third level of the screening plant which was elevated approximately 12 feet from the next lower level was not provided with handrails. The elevated walkway was constructed and maintained to provide access to the number three feeder which was in the process of being modified. I conclude and find that the intent of the cited standard is to provide handrails at such locations in order to provide employees performing work with some means of protection against potential falls.

Respondent's witness Fulghum confirmed that the cited platform or walkway was part of the respondent's plant, and he did not deny the absence of handrails. Mr. Fulghum took the position that the three employees observed by the inspector on the elevated platform cleaning up and performing maintenance work were not employees of the respondent, but were employed by a contractor. Mr. Fulghum had no personal knowledge of this, and simply stated that Mr. Tabor told him during the closing conference that the employees worked for a contractor. Mr. Tabor did not testify in this case, and the inspector testified that Mr. Tabor confirmed to him that the employees worked for the respondent.

The respondent's defense is rejected. I accept the inspector's testimony as credible, and find that the three employees who were working on the platform in the respondent's plant and which was used to access the feeder owned by the respondent were exposed to a hazard of falling, and that the respondent is properly accountable for the violation. I conclude and find that the failure by the respondent to provide the required handrails constitutes a violation of section 56.11002, and the citation IS AFFIRMED.

Citation No. 2859002 - 30 C.F.R. 56.11002

The respondent is also charged with a second violation of section 56.11002, for failure to provide handrails on the No. 6 feeder platform located at the second level of the secondary crusher plant. The inspector's credible testimony establishes that the platform was located approximately 10 feet above the second level floor and that it was used to provide maintenance for the shakers located on the platform. The inspector's unrebutted testimony also establishes that no handrails were provided, and Mr. Fulghum did not deny the absence of the handrails. Under the circumstances, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2859004 - 30 C.F.R. 56.9007

The respondent is charged with a violation of section 56.9007, which provides that "Unguarded conveyors with walkways shall be equipped with emergency stop devices or cords along their full length." The inspector's unrebutted testimony establishes that the cited No. 8 belt conveyor located in the secondary plant had an adjacent walkway which was parallel to the belt, and that the belt and walkway were inclined. The inspector confirmed that the walkway was regularly used by employees as a means of access from ground level to the crusher, and that the emergency stop cord, which was approximately 100 feet long, was broken in the middle and lying on the walkway.

Mr. Fulghum conceded that the stop cord in question was broken, and his defense is that the plant was shutdown and locked out, and that in the course of routine maintenance, someone would have found the broken cord and repaired it before production began. He confirmed that Mr. Tabor informed him that he was aware of the broken cord, and that it was repaired before production began. This defense is rejected. I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2859007 - 30 C.F.R. 56.15003

The respondent is charged with a violation of section 56.15003, which states that "All persons shall wear suitable protective footwear when in or around an area of a mine or plant where a hazard exists which may cause an injury to the feet." The inspector's belief that the standard requires employees to wear "steel-toed safety shoes" is incorrect. The standard only requires the wearing of "suitable protective footwear" without further elaboration. What may be suitable in one instance may not be suitable in another, and each situation must be addressed on a case-by-case basis.

In this case, Mr. Fulghum's credible testimony establishes that the respondent supplies steel protective footwear for its

employees, and he believed that leather boots are "suitable footwear" within the meaning of the standard. While this may be true, the credible testimony of the inspector reflects that one of the individuals who he observed cleaning up under the plant screening station was wearing ordinary tennis shoes of the "basketball variety." The inspector believed that this employee was exposed to a hazard of being struck on the foot by large rocks falling from the belt or from some of the upper levels of the plant. With regard to the other individuals, the inspector could offer no credible testimony or evidence as to the kinds of shoes they were wearing, and he did not speak to any of these individuals, nor did he inspect their footwear. Under the circumstances, I conclude and find that the one individual who was wearing tennis shoes did not comply with the cited standard in that ordinary tennis shoes are not "suitable" within the meaning and intent of the standard, and to this extent, a violation has been established. With respect to the other individuals, I conclude and find that there is insufficient evidence to establish any violation on their part. Under the circumstances, with respect to the employee who was wearing tennis shoes, the citation is limited to that one individual, and it IS AFFIRMED.

Significant and Substantial Violations

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the 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 its interpretation of the term "significant and substantial" as follows:

> 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.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further 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). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Citation No. 285900, 30 C.F.R. 56.11002

Based on the credible testimony of the inspector, I conclude and find that the violation concerning the lack of handrails on the walkway around the No. 3 feeder located on the third level of the screening station tower was significant and substantial. Three employees were observed performing clean-up and maintenance work on the walkway which was elevated some 12 feet above the next lower level. In the event of a fall, I conclude and find that the employees would likely suffer injuries of a reasonable serious nature. Under the circumstances, the inspector's S&S finding IS AFFIRMED.

Citation No. 2859001, 30 C.F.R. 56.14001

With regard to the violation concerning the unguarded No. 5 conveyor belt counterweight pulley, I agree with the inspector's S&S finding. The evidence establishes that the guard usually provided for this large pulley had been removed and that the unguarded pulley area was approximately 8 inches from the edge of the adjacent walkway which was regularly used by employees as an access way to the transfer point behind the pulley. I conclude and find that in the event of a stumble or other inadvertent contact with the exposed and unguarded pulley while the belt was in operation, one would likely sustain injuries of a reasonably serious nature. Accordingly, the inspector's S&S finding IS AFFIRMED.

Citation No. 2859004, 30 C.F.R. 56.9007

With regard to the violation concerning the broken conveyor belt emergency stop-cord, the inspector confirmed that the belt, which was used to convey stone materials from the ground level up the inclined belt to the stone crusher, was running at the time of his inspection. Although the inspector observed no one on the walkway adjacent to the belt at the time of his inspection, he confirmed that the walkway was used on a regular basis by employees who would walk along the walkway from ground level up to the cone crushers at the top level, and in the event someone were to fall into the moving conveyor, the inspector believed that he would likely suffer injuries and the belt could not be stopped because the emergency stop cord was broken. However, there is no evidence or testimony from the inspector from which one can conclude that it was reasonably likely that someone walking along the walkway adjacent to the belt would fall into or onto the moving conveyor belt. There is no evidence that employees ride the belt, nor is there any evidence with respect to whether the belt was elevated above the walkway, or whether it was recessed below the walkway in such a manner as to allow someone to readily fall into it. In short, I find no credible evidentiary support for the inspector's belief that someone simply walking along the walkway would likely fall into or onto the belt, or be exposed to any hazard from the materials on the belt. Under the circumstances, I cannot conclude that the evidence advanced by the petitioner in this instance supports the inspector's S&S finding. Accordingly, his finding IS VACATED, and the citation is modified to a non-S&S citation.

Citation No. 2859007, 30 C.F.R. 56.15003

With regard to the violation concerning the employee who was wearing tennis shoes, the inspector conceded that he was wearing a hard hat, that the equipment was shutdown while the individual was cleaning up around it, and that cleaning and maintenance work is only performed when the equipment is shutdown. Although the inspector believed that someone could sustain a foot injury by rock falling off the conveyor belt (Tr. 95), I have difficulty comprehending how this would occur if the conveyors are shutdown while clean-up is being performed. Further, although the inspector also believed that an injury could occur if a heavy tool or equipment fell on someone's foot, there is no evidence that the employee wearing tennis shoes used any such tools or handled any heavy equipment which would likely fall and strike him on the feet. As for the inspector's belief that the employee could have been struck from a rock falling from an unspecified location above where he was working, I find his testimony to be speculative at best, and lacking in credible and probative value. Under the circumstances, I cannot conclude that the evidence advanced

by the petitioner supports the inspector's S&S finding. Accordingly, IT IS VACATED, and the citation is modified to a non-S&S citation.

Size of Business and Effect of Civil Penalty Assessments on the Respondent's Ability to Continue in Business

The evidence establishes that approximately 32 to 36 employees out of a total employment compliment of 332 employees working in the dam project in question were engaged in the respondent's limestone processing operations (Tr. 148, 156). While there is no direct evidence as to the amount of limestone materials actually processed by the respondent, the information which appears in MSHA's proposed civil penalty assessments pleadings with respect to the respondent's size reflects an annual production tonnage or manhours worked as 102,559, and the parties stipulated that this was the case. I conclude and find that the respondent is a small operator. I also conclude and find that the civil penalty assessments for the violations which have been affirmed will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent's history of prior assessed violations consists of ten (10) civil penalty assessments made by MSHA in 1987. I cannot conclude that the respondent's history of prior violations is such as to warrant any additional increases in the civil penalty assessments which I have made for the violations in question in these proceedings.

Good Faith Compliance

The record establishes that on February 5, 1988, MSHA extended all of the abatement times until May 1, 1988, because the respondent's plant facilities were non-operational due to an expansion. All of the citations which are the subject of Docket No. SE 88-59-M, were terminated on April 21, 1988, and the citation in issue in Docket No. SE 89-23-M, was terminated on September 7, 1988. All of the terminations were based on the fact that the respondent corrected the cited conditions, and Inspector Perez confirmed that all of the citations were terminated on schedule (Tr. 181). Further, the parties agreed that all of the citations were timely abated in good faith by the respondent. Under the circumstances, I conclude and find that the respondent timely abated all of the violations in good faith.

Negligence

The inspector's moderate negligence findings as to each of the violations ARE AFFIRMED, and I conclude and find that all of

the violations resulted from the failure by the respondent to exercise reasonable care.

Gravity

On the basis of the inspector's testimony and findings with respect to each of the violations, including my findings and modifications with respect to the inspector's S&S findings, I conclude and find that Citation Nos. 2859000 and 2859001 are serious, and that the remaining citations are non-serious.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude and find that the following civil penalty assessments for the violations which have been affirmed are reasonable and appropriate in the circumstances of these proceedings:

Docket No. SE 88-59-M

Citation No.	Date	30 C.F.R. Section	Assessment
2858999	09/01/87	56.14001	$ 20
2859000	09/01/87	56.11002	$350
2859001	09/01/87	56.14001	$250
2859002	09/01/87	56.11002	$ 20
2859003	09/01/87	56.14001	$ 20
2859004	09/01/87	56.9007	$ 20
2859005	09/01/87	56.14001	$ 20
2859006	09/01/87	56.14001	$ 20

Docket No. SE 89-23-M

Citation No.	Date	30 C.F.R. Section	Assessment
2859007	09/01/87	56.15003	$ 20

ORDER

The respondent IS ORDERED to pay civil penalty assessments in the amounts shown above within thirty (30) days of the date of these decisions, and upon receipt of payment by the petitioner, these proceedings are dismissed.

George A. Koutras
Administrative Law Judge