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

FEATHERLITE BUILDING PRODUCTS CORPORATION, CONTESTANT	CONTEST PROCEEDINGS Docket No. CENT 88-113-RM Cit./Order No. 3063548; 5/19/88
v.	Docket No. CENT 88-114-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 3063549; 5/20/88 Docket No. CENT 88-115-RM Citation No. 3063550; 5/20/88
	Laura Todd Pit and Plant Mine ID 41-00267
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. CENT 89-36-M A.C. No. 41-00267-05520
v.	Laura Todd Pit and Plant
FEATHERLITE BUILDING PRODUCTS CORPORATION, RESPONDENT	

DECISION

Appearances: Steven R. McCown, Esq., Jenkins & Gilchrist, Dallas, Texas, for Contestant/Respondent; Mary E. Witherow, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Respondent/Petitioner.

Before: Judge Cetti

Statement of the Proceedings

These consolidated proceedings concern Notices of Contest filed by the Contestant, Featherlite Building Products Corporation (herein Featherlite), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), challenging the three captioned citations issued by the Federal Mine Safety and Health Administration (MSHA). The civil penalty proceedings concern proposals for assessments of civil penalties filed by MSHA seeking assessments against Featherlite for the alleged violations charged in the above-mentioned citations.

Following its investigation of a fatal massive fall-of-ground accident at the Laura Todd Pit, MSHA issued to Respondent Featherlite a number of citation/orders, some of which were accepted by Featherlite. The three citation/orders contested herein by Featherlite are as follows:

Citation/Order No. 3063548 in Docket CENT 88-113-RM alleges a violation of 30 C.F.R. 56.3131 under Sections 107(a) and 104(a) of the Act, with a proposed penalty of $5000.

Citation No. 3063549 in Docket No. CENT 88-114, as amended, alleges a violation of 30 C.F.R. 56.3401 under Section 104(d)(1) of the Act, with a proposed penalty of $1000.

Citation No. 3063550 in Docket No. CENT 88-115-RM alleges a violation of 30 C.F.R. 56.3200 under Section 104(d)(1) of the Act with a proposed penalty of $5000.

Respondent timely contested each of the three alleged violations pursuant to 29 C.F.R. 2700.20(c). The Secretary filed timely answers pursuant to 29 C.F.R. 2700.20(d). Later, the Secretary filed her complaint proposing the above-mentioned penalties, respectively, for each of the three alleged violations. Respondent filed a timely answer and the Contest Proceedings and the Penalty Proceeding were consolidated for hearing and decision.

Respondent's Answer does not deny jurisdictional facts alleged by the complaint, as permitted by 29 C.F.R. 2700.5. The Secretary correctly asserts that jurisdiction over this proceeding is proper and that the violations of the Act took place in or involve a mine which has products which enter commerce or has operations or products which affect commerce.

After notice to the parties, the matter came on for hearing on the merits before me at Dallas, Texas. Oral and documentary evidence was introduced, post-hearing briefs were filed, and the matters were submitted for decision. I have considered the arguments made on the record during the hearing in my adjudication of these matters and the post-hearing briefs filed by the parties.

ISSUES

1. Whether Featherlite violated 30 C.F.R. 56.3131 as charged in Citation No. 3063548.

2. Whether Featherlite violated 30 C.F.R. 56.3401 as charged in amended Citation No. 3063549 under 104(d)(1) of the Act.

3. Whether Featherlite violated 30 C.F.R. 56.3200 as charged in Citation No. 3063550 under 104(d)(1) of the Act.

4. Whether MSHA is estopped from asserting that Featherlite has responsibility for compliance with the provisions of 30 C.F.R. 56.3131, 56.3200, or 56.3401 at the Laura Todd Pit, which was leased by Featherlite.

5. The appropriate civil penalties, if any, to be assessed taking into consideration the statutory civil penalty criteria in section 110(i) of the Act.

STIPULATIONS

At the hearing, the parties entered the following stipulations, which I accept:

1. The correct name of the legal entity that is the contestant in the above-captioned contest cases, as well as respondent in penalty Docket No. Cent 89-36-M, is "Featherlite Building Products Corporation."

2. There was a timely abatement of all violations by the permanent closure of the Laura Todd Mine.

3. The proposed civil penalties will not affect the ability of Featherlite to continue in business.

The hearings on these consolidated matters were delayed as a result of Fifth Amendment constitutional objections by Featherlite and an independent counsel for certain individuals, who were said to be essential witnesses for Featherlite.

After MSHA completed its criminal investigation of the accident and advised that no criminal penalties would be pursued, the matter was set for hearing in Dallas, Texas. At the consolidated hearing on these matters, testimony was taken from the following witnesses:

1. M. HAROLD ROBERTSON, MSHA Inspector

2. WILLIAM WILCOX, MSHA Mining Engineer (now retired)

3. JERRY DAVIDSON, MSHA's expert in geological studies and mining techniques

4. BOB CARROLL, owner of B.C. Construction Company

5. EDWIN LUMMUS, former Featherlite Plant Manager

6. MAX HENSON, Supervisor B.C. Construction Company

Background Facts

Featherlite, at a plant in Ranger near Dallas, Texas, produces a synthetic aggregate that is used in the construction of buildings and highways. In producing the synthetic aggregate, Featherlite used shale rock mined at the Laura Todd Pit which is located approximately 1.5 miles from Featherlite's plant. Featherlite leased the Laura Todd Pit and contracted with an independent contractor, B.C. Construction Company ("B.C."), to perform the mining operations at the pit. (Government Exhibit 2). B.C. and Featherlite's contract provided that B.C. was responsible for mining the shale, loading the shale on the trucks, and delivering the shale to Featherlite's plant in Ranger, Texas. Featherlite, however, retained responsibility for stripping the overburden in the mining areas at the pit and for quality control.

The Accident

The accident which gave rise to the investigation and the issuance of the three citations may be succinctly stated as follows: A 64-year old contractor shovel operator, with 15 years experience at the Laura Todd Pit, was fatally injured when the power shovel he was operating was covered by a massive fall of ground. Truck operation problems were occurring at the pit due to an accumulation of mud and water. The shovel was moved to another nearby location at the pit where the trucks could operate without getting stuck. This move placed the shovel adjacent to a near-vertical, unstable portion of the highwall with the unprotected operator's cab on the highbank side close to the toe. After loading a truck, the victim moved the shovel back about four to five feet and stopped. At this time, the highwall failed and engulfed the cab of the shovel and the operator.

Following an attempted rescue operation, Federal Mine Inspector William Wilcox and other MSHA personnel investigated the accident. The investigation report received in evidence as Secretary's Exhibit No. 2 states:

> Grady Lee Daughty, an employee of B.C. Construction, was fatally injured at approximately 1:50 p.m. on May 18, 1988, when the power shovel he was operating was covered by a massive fall-of-ground from a 60-foot highwall at the mine site leased and operated by the Featherlite Building Products Corporation.

Citation No. 3063548

Federal Coal Mine Safety and Health Inspector W.R. Wilcox, after his investigation and inspection of Featherlite's Laura Todd Pit and Plant charged Featherlite with the violation of 30 C.F.R. 56.3131, which provides as follows:

> 56.3131 Pit or quarry wall perimeter.
>
> In places where persons work or travel in performing their assigned tasks, loose or unconsolidated material shall be sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit or quarry wall. Other conditions at or near the perimeter of the pit or quarry wall which create a fall-of-material hazard to persons shall be corrected.

Inspector Wilcox, in Citation Order No. 3063548, described the alleged violative condition as follows:

> "The mine operator (Featherlite) was responsible for the location of the areas to be mined, the stripping of the overburden to facilitate mining of the underlying desirable shales and to insure that the overburden - loose and unconsolidated material - would be stable and not constitute a safety hazard where the contractor mined the shale and transported it from the mine-site. The overburden portion of the highwall which fell onto the contractor's power shovel and resultted in the death of the shovel operator had not been sloped to a natural angle of repose, benched or in other manner stabilized. This order is to prevent the entry of any person into the affected area unless the proposed procedures involved have been approved by MSHA in advance. This includes the recovery of any equipment, the stabilization of the high wall or the backfilling of the uncompleted shale mining cut."

On the day of the massive fall-of-ground accident, employees of B.C. Construction were in the "west" cut, which was approximately 80

feet wide digging east. Max Henson, B.C. Construction supervisor, testified that he had been at the site on the day of the accident. Henson stated he supervised the employees of B.C. that worked at the Laura Todd Pitt. B.C. had been working in this "west" cut for a couple of months. Prior to that time, they had been in the "east" cut digging west, but had to move due to excessive water-soaked conditions. The two cuts were separated by 25 feet of material which was to be removed. Mr. Henson testified that the decision to move from the "east" to the "west" cut was discussed with Mr. Parsons the plant manager of Featherlite. Henson stated he never "made any decisions such as to move anybody anywhere without consulting someone first." Parsons told him, "Okay, let's move." Henson stated that Jack Beardon, Featherlite's scraper operator had stated on the morning of the accident that his plan at the pit was to "get the mud and water pushed out of" the east side of the cut "and get it covered up, and cut through and use that as a road to get to the west side of the west pit." Prior to that time, Henson believed they were going to take the shale out of the west pit. Henson observed sloughing on the south wall while in the east cut.

The south wall was the wall involved in the fatal fall-of-ground accident. This wall was approximately 60 feet high. The south wall was composed of shale, original overburden and stockpiled overburden. The shale was approximately 20-30 feet in depth. Approximately 30 more feet of clay overburden sat on top of the shale. On top of that was previously removed overburden which had been stockpiled by Featherlite on top of the natural structure.

William Wilcox, employed as an MSHA inspector for 18 years, conducted the investigation and inspection of Featherlite following the fatal accident. Mr. Wilcox has a B.S. in mining engineering from the Missouri School of Mines and had 17 years of mining experience in private industry prior to working for MSHA. Mr. Wilcox did approximately 80 to 100 MSHA inspections per year.

Mr. Wilcox testified that the south wall area cited was an area where persons worked or traveled. The testimony at trial and Exhibit G-26 clearly show that the pit's south wall was the area where the fatal massive fall-of-ground occurred.

Mr. Wilcox stated that the south wall was composed of loose or unconsolidated material, as was clearly evidenced by its failure. This conclusion is also based on the sloughing observed on the wall, the cracks parallel to the cut being developed, the water saturation of the original topsoil, the relocated stripping, and the erosion product coming down into the cut being developed.

Jerry Davidson, a geologist with MSHA for 19 years in the ground support division, was called by the Secretary as an expert witness. Mr. Davidson has a B.S. in geology from the University of North Dakota and had 10 years experience as a geologist in the mining industry prior to coming to MSHA. Mr. Davidson testified he was an expert in mining techniques and geological studies. After reviewing the photographs (Exs. G-4 through G-25), Mr. Wilcox's report (Ex.G-26), and listening to the testimony at the hearing, Mr. Davidson, under oath, gave his expert opinion on the degree of consolidation of the south wall. Mr. Davidson stated the shale was relatively consolidated, and that the overburden was relatively unconsolidated, as evidenced by the fact that it could be loaded out with a self-loading scraper, as opposed to drilling or blasting, or other such techniques. The stockpiled overburden would be loose and unconsolidated and the overburden was "structurally weak."

Mr. Wilcox stated that, although the south wall of the pit was sloped at the west entrance of the cut, it was not as the cut progressed to the accident site where the angle of the pit wall was 75 degrees or steeper. Mr. Wilcox testified that there was no benching or stripping at the accident site, although there was some in the west cut a couple hundred feet from the accident site. Mr. Henson, who had been at the sit on the morning of the accident, testified the south wall went "fairly straight up" and was almost vertical.

Melvin Harold Robertson, an MSHA inspector for 16 years with 16 years prior mining experience, also stated the wall appeared to have no slope and to go up at 90~ angle.

Mr. Wilcox stated that, based on his expertise in mining, safety, and health, the conditions at the south wall in the area of the fatal accident constituted a "very high-risk" hazard of a release of hundreds of thousands of tons of rock and dirt entrapping and burying people. He stated that there was a very definite probability of injuries occurring as a result of such hazard, and later made it clear that, in his opinion, it was "highly likely" that the hazard would result in an injury of a serious nature. He stated the types of injuries occurring would certainly be fatal. I credit the testimony of Messrs. Wilcox and Davidson and find that the violation is significant and substantial.

A violation such as we have here is properly designated significant and substantial if it contributes to a safety hazard which will reasonably likely result in a serious injury. Cement Division, National Gypsum, 3 FMSHRC 822 (1981); Mathies Coal Co., 6 FMSHRC 1 (1984).

Mr. Wilcox rated the gravity of the violation as "occurred"; the types of injuries that could occur as "fatal"; and the operation's negligence as "high."

Inspector Wilcox rated the operator's negligence as high, based on the operator's familiarity with the mining area and the benching and sloping he observed in other parts of the mine site. He also considered the custom and practice of the industry, and what a typical operator of this type of operation in this part of the country would do.

I agree with Mr. Wilcox's evaluation of the operator's negligence, the gravity of the violation, and the likelihood of serious injury. The violation contributed to a safety hazard which was reasonably likely and did, in fact, result in serious fatal injuries.

CENT 88-114-RM

Citation No. 3063549

This citation was issued by Inspector Wilcox originally for an alleged violation of 30 C.F.R. 56.18002. Later, Inspector Wilcox amended the citation by changing the standard allegedly violated from 30 C.F.R. 56.18002 to 30 C.F.R. 56.3401. Section 30 C.F.R. 56.3401 provides as follows:

> 56.3401 Examination of ground conditions.
>
> Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed prior to work commencing, after blasting, and as ground conditions warrant during the work shift. Highwalls and banks adjoining travelways shall be examined weekly or more often if changing ground conditions warrant.

Citation No. 3063549 reads as follows:

> "A power shovel operator was fatally injured when the overburden portion of a highwall fell and entrapped the miner within his machine. The mine operator

> did not examine mine work places for safety hazards at least once each shift (30 CFR 56.18002(a)) and record such examinations (30 CFR 56.18002) He had recently been cited for the latter violation (Nov. 17, 1987). The imminent danger of the unstable overburden highwall was not brought to the immediate attention of the operator and all persons were not withdrawn from the area (30 CFR 56.18002c). The accident was not prevented from happening.

Mr. Wilcox testified that, when he asked if Featherlite was complying with the requirements of the cited standards, Edwin Lummus, general manager of Featherlite stated something like, "Heck, we're not doing that yet or at this time." Based on this statement, and the existence of the obvious hazard, Mr. Wilcox concluded the mine operator was not examining and testing for loose ground. I concur in Mr. Wilcox's conclusion.

Edwin Lummus admitted on cross-examination that Featherlite was not inspecting the pit, nor was it conducting any inspections of B.C.'s operations other than quality control.

This admission was made, even though it is undisputed that Featherlite scraper operator Jack Beardon worked at the pit every day and another Featherlite employee worked at the pit in the stripping area. Further testimony indicates that Ray Parsons and Ed Lummus, Featherlite supervisors, were out at the pit occasionally. In fact, Max Henson spoke to Ray Parsons, Featherlite plant superintendent, on the day of the accident. Mr. Parsons stated he had been to the pit and left just before the accident. Mr. Parsons told Mr. Henson he "didn't hardly have time to get to the gate" before the fatal ground fall occurred.

Mr. Wilcox testified that the failure to inspect the ground conditions constituted a hazard of sloughing or ground slide. Based on his expertise as a safety professional, Mr. Wilcox stated that the injury from such a hazard was "highly likely" and that such injuries would be very serious, if not fatal. I find that the violation is significant and substantial since it contributed to a safety hazard which was reasonably likely to result in a serious injury. Cement Division, National Gypsum, supra, Mathies Coal Co., supra.

Mr. Wilcox rated the gravity as "occurred," the types of injuries as "fatal" and the operator's negligence as "high." I concur in Mr. Wilcox's evaluation.

Mr. Wilcox observed that a previous citation had been issued to Featherlite for failure to inspect work places six months prior to the fatality. Mr. Wilcox further observed that, based on the high number of citations given Featherlite at its previous inspection, and the hazardous conditions observed (and later cited) during the investigation of the fatal massive ground-fall investigation, Featherlite did not have a great regard for safety.

Mr. Davidson, MSHA geological expert, stated that, based on the evidence he had heard and read, the hazard was apparent or readily discoverable. Mr. Davidson based this opinion on the evidence of sloughing, the types of machinery used for excavation, the height of the highwall, and the placing of the operator's cab next to the highwall. Because the cab was next to the wall, the operator had less room to maneuver or escape during ground slide. It would have been safer to have the cab away from the highwall. Another important factor was the water problem caused by the rainfall. The diversion ditches dug by Featherlite personnel indicate they knew about the problem of standing water. When the earth material filled up with water, it added weight and increased pore pressure within the rock areas.

Mr. Davidson testified that the photographs (Exs. G-4 through G-25) showed tension fractures which should have been apparent. He stated it would be highly unlikely that there wouldn't have been tension fractures which were apparent or readily discoverable on top of the south wall prior to the accident. Tension fractures would be readily discoverable during an inspection of the top of the pit wall, since there was little vegetation on top of the wall. These tension fractures indicate a failure surface has developed and is propagating downward.

Mr. Davidson stated he was familiar with the custom and practice in the industry with regard to inspections of ground stability. The conditions at the pit should have mandated a careful inspection. The sloughing described indicated a need to inspect both the pit floor and the crest area.

Featherlite knew, or should have known, of the hazardous conditions. They had been previously cited for failure to inspect every workplace. They had their own employees working daily at the pit. Management officials of Featherlite were at the pit regularly and Ray Parsons had been there just prior to the accident. Featherlite knew it was not inspecting the pit and the obvious nature of the hazard mandates it should have done so.

"Unwarrantable failure" means "aggravated conduct, constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., 9 FMSHRC 1997, 2010 (1987);

Youghiogheny & Ohio Coal Co., 9 FMSHRC 2007 (1987). In this case, the evidence, summarized above, clearly shows that Featherlite's conduct in violating the provisions of 56.3401 was aggravated conduct constituting more than ordinary negligence. The violation was due to Featherlite's unwarrantable failure to comply with the cited standard.

CENT 88-115-M

Citation No. 3063550

Inspector Wilcox issued Citation/Order No. 3063550 for an alleged violation of 30 C.F.R. 56.3200, which provides as follows:

> 56.3200 Correction of hazardous conditions.
>
> Ground conditions that create a hazard to persons shall be taken down or supported before other work or travel is permitted in the affected area. Until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier shall be installed to impede unauthorized entry.

Inspector Wilcox, in the citation, described the violative conditions as follows:

> The mine operator determined the plan to be followed in the selected mining area and conducted the stripping portion of that plan prior to instructing a contractor to mine the exposed shale. He failed to correct the hazardous ground conditions to which the latter's employees would be exposed before instructing the contractor to begin shale mining. He did not post and barricade the area against entry by any person. He ordered mining to proceed and a massive fall of ground (overburden) occurred which resulted in fatal injury to the contractor's power shovel operator.

Mr. Wilcox testified that, based on the height of the wall, the condition or composition of the soil, the slope of the wall prior to the accident, the previous water condition requiring the digging of ditches on top of the south wall, and the sloughing in the east cut,

that the ground conditions of the south highwall constituted a hazard. These conditions were not taken down prior to work or travel in the area, or supported as shown by testimony concerning the slope of the wall at the time of the massive fall-of-ground. It is also clear that the area was not posted with a warning against entry or barrier.

Mr. Wilcox stated that the ground conditions of the south highwall created a hazard of falling ground. Based on his opinion as a safety professional, Mr. Wilcox rated the likelihood of injury as "very definitely." The injuries that could occur would be fatal and would be very likely to occur. I credit the testimony of Mr. Wilcox and find the violation is significant and substantial. Since the evidence established all the elements of the Mathies Coal Co., supra.

Mr. Wilcox rated the gravity as "occurred" and "highly likely. He rated the types of injuries as "fatal and the operator's neglinegligence as "great." Mr. Wilcox based the operator's negligence on the operator's experience, work history, knowledge, contractual obligation, and obviousness of the hazardous condition. He further stated that he judged the operation against the typical operator of this type of work force.

Mr. Davidson, MSHA's expert in geological studies and mining techniques, stated the ground conditions created a hazard that was apparent or readily discoverable, based upon a careful inspection that a reasonably prudent operator would have done, given these conditions. Again, Featherlite knew, or should have known, of the dangerous conditions.

As previously stated, "unwarrantable failure" means "aggravated conduct constituting more than ordinary negligence, by an operator in relation to a violation of the Act." Emery Mining Corp., supra; Youghiogheny & Ohio Coal Co., supra. Featherlite's failure to address the cited conditions constituted more than ordinary negligence. The violation of 56.3200 was due to Featherlite's unwarrantable failure to comply with the requirements of the cited standard.

All three violations could have been prevented if Featherlite had established a mining plan, removed the overburden, established benches, and made daily inspections at every shift.

Estoppel Issue

Preliminarily, it is noted that there appears to be no real dispute that the Secretary can cite the owner-operator, the independent contractor, or both, for violations committed by the independent contractor. This is supported by the language of the Act,

its history, and applicable court precedent. The Secretary has wide enforcement discretion and courts have traditionally not interfered with the exercise of that discretion. Intl. U., UMWA v. FMSHRC, supra, 840 F.2d at 83; Brock v. Cathedral Bluffs Shale Oil Co., supra, 796 F.2d at 537-538; BCOA v. Secretary, supra, 547 F.2d at 246.

Respondent asserted that the Secretary should be estopped from issuing the citations involved in this consolidated case. It is Featherlite's position that in the past MSHA had dealt with Featherlite in such a manner to justify Featherlite's belief that it was only responsible for mine safety violations at Featherlite's Ranger Plant and not for violationg involving the mining operations of its contractor B.C. at Featherlite's leased Laura Todd Pit. Although MSHA inspected the Laura Todd Pit every six months, Featherlite asserts MSHA officials never discussed the pit with Featherlite officials.

Featherlite asserts that its belief that it was not responsible for mine safety violations at the Laura Todd Pit was justified based on an MSHA inspector's prior termination of an earlier November 1987, citation. (Featherlite Ex. 2). In November of 1987, MSHA inspector, Harold Robertson, issued Featherlite a Section 56.18002(b) citation for failing to keep records of daily shift inspections. B.C. Was operating at the Laura Todd Pit when Mr. Robertson made the earlier November 1987 inspection. After receiving the citation, Featherlite had a plant engineer design a form that was exclusively devoted to recording inspections at Featherlite Ranger Plant. The form made no mention of inspections at the Laura Todd Pit. Mr. Robertson terminated the citation based upon his review of Featherlite's forms that exclusively dealt with safety inspections at the Ranger plant. Featherlite argues that Mr. Robertson's termination of the citation, based on Featherlite's compliance which indicated that Featherlite was only inspecting the Ranger plant area, justifiably reaffirmed Featherlite's belief that it was only responsible for mine safety at the Ranger plant and that B.C. was responsible for mine safety violations at the Laura Todd Pit.

Both the Secretary and Featherlite in their briefs state that a party seeking to estop the government has a very heavy burden to bear. Jones v. Dept. Health & Human Services, 843 F.2d 851 (5th Cir. 1988). The party claiming the estoppel must at least demonstrate that the traditional elements of an estoppel are present in order to prevail. Heckler v. Community Health Services of Crawford,

467 U.S. 51, 104 S.CT. 2218, 81 L. Ed.2d 42 (1984). Those elements are: 1) the party to be estopped must know the facts; 2) he must intend his conduct be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; 3) the latter must be ignorant of the true facts; and 4) he must rely on the former's conduct to his injury." Scime v. Bowen, 822 F.2d 7, 9 n.1 (2d Cir. 1987). The party "must have relied on his adversary's conduct in such a manner as to change his position for the worse . . . . " That reliance must have been reasonable in that the party claiming the estoppel did not know, nor should it have known, that its adversary's conduct was misleading." Heckler, supra, 467 U.S. at 59, 104 S.Ct. at 2223.

"Those who deal with the government are expected to know the law and may not rely on the conduct of governmental agents contrary to the law"; therefore, courts will not find reliance was present if the governmental agency did not have the authority to make the "misleading" pronouncements. Heckler, supra, 467 U.S. at 634, 104 S.Ct. at 2225. See, Long Island Radio Co. v. N.L.R.B., 841 F.2d 474 [2d Cir. 1988 (holding the NLRB may not be estopped from enforcing a deadline which the Board had no authority to extend)].

In addition, a party cannot raise an estoppel argument "without proving that he will be significantly worse off" than if he had never obtained the wrong information. Heckler, 467 U.S. at 63, 104 S.Ct. at 2225.

In addition to showing that the traditional elements of estoppel are present, the party must show "affirmative misconduct" on the part of the Government. Scime, 822 F.2d at 8-9, n.2 (2d Civ. 1987). See, I.N.S. v. Hibi, 414 U.S., 5, 8-9, 94 S.Ct. 19, 21-22, 38 L.Ed.2d 7 (1973). "This affirmative misconduct suggestion must be seen as an attempt to provide a limited measure of relief in exceptionally sensitive cases without exposing the government to openended liability for merely negligent or improper actions or omissions by its agent." Note, Equitable Estoppel of the Government, 79 Colum. Rev. 551, 560 (1976).

The Court of Appeals for the Tenth Circuit, in Emery Mining Corporation v. Secretary of Labor, 3 MSHC 1585, affirmed the Commission's decision at 5 FMSHRC 1400 (August 1983), stating at 3 MSHC 1588:

> Although the record reflects some confusion surrounding MSHA's approval of Emerv's training plan, as a general rule, "those who deal with the Government are expected to know the

> law and may not rely on the conduct of government agents contrary to law" . . . .

I have considered the evidence and record as a whole and conclude that the Secretary is not estopped from issuing the citations in question to Featherlite. Inspector Robinson in his earlier November 1987 inspection of the Featherlite Ranger Plant and Laura Todd Pit and Plant issued 52 citations. Mr. Robinson testified that Ray Parson, Featherlite plant manager, accompanied him on the walk around of the pit as well as the plant. Featherlite had employees working at the pit on the day of that inspection just as they had employees working at the pit every day. On the day of that inspection, the Featherlite road grater, water trucks, and scraper were all working at the pit in the area where B.C. employees were mining. Mr. Parsons was present when Mr. Robertson interviewed the two B.C. truck drivers. Mr. Robertson discussed the hazardous practice of mining with the shovel operator's cab next to the highwall with Mr. Parsons.

Mr. Robertson issued Citation No. 3062555 alleging a violation of 30 C.F.R. 56.18002(b) for not keeping records of inspections of each working place at least once each shift. The citation specifically states that it is issued to the Laura Todd Pit and Plant and served on Ray Parsons (Featherlite Plant Superintendent). (Ex. R-2).

Mr. Robertson discussed this citation wth Messrs. Parsons and Lummus at the closeout conference specifying that they need to inspect every workplace.

Approximately one month later, Mr. Robertson terminated the citation based upon Mr. Parsons' representation that they were inspecting and the records shown to him that inspections were being made and recorded. Petitioner asserts that Mr. Robertson did not realize until the massive fall-of-ground accident that the records shown to him were not for both the pit and the plant.

These facts do not warrant estoppel. Mr. Robertson believed, based on Mr. Parsons' representation, that Featherlite was complying with requirements of the cited safety standard. Mr. Parsons had been with Mr. Robinson on the inspection of the pit area and had been informed of Featherlite's independent contractor's violations. Featherlite had employees working at the pit daily. The citation was addressed to the Laura Todd Pit and Plant. Mr. Robertson stated he made no direct statement indicating Featherlite that it did not have to inspect the pit. I concur in Petitioner's assertion that it simply was not reasonable for Featherlite to rely on what, in the light most favorable to its position, was a mere oversight on the part of Mr. Robertson.

Moreover, when conducting the accident investigation, Mr. Wilcox pointed out to Mr. Lummus that they had been cited for the failure to inspect before. Mr. Lummus stated, "Heck, we're not doing tha yet or at this time." It is noted that Mr. Lummus did not say, "MSHA told us we did not have to inspect the pit." He merely indicated they hadn't started inspecting the pit.

The Commission in King Knob Coal Company, Inc., 3 FMSHRC 1416 (June 1981) pointed out that the Supreme Court has held that equilateral estoppel generally does not apply against the federal government. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 383-386 (1947); Utah Power & Light Co. v. United States, 243 U.S. 389, 408-411 (1917). In recent years, lower federal courts have permitted estoppel against the government in some circumstances. In King Knob Coal, supra, the Commission stated:

> Even the decisional trend which recognizes an estoppel defense refuses to apply the defense "if the government's misconduct [does not] threaten to work a serious injustice and if the public's interest would . . . be unduly damaged by the imposition of estoppel" (emphasis added). United States v. Lazy F.C. Ranch, 481 F.2d at 989. In view of the availability of penalty mitigation as an evenue of equitable relief, we would not be persuaded that finding King Knob liable--would work such a "profound and unconscionable injury" (Lazy F.C. Ranch, 481 F.2d at 989) that estoppel should be invoked.

The Supreme Court in a recent decision reversed the Court of Appeals and again denied estoppel against the government just as it has reversed every lower court decision granting estoppel that it has reviewed. (Office of Personnel Management v. Richmond, 110 S.Ct. 2465 (1990), decided June 11, 1990). Insofar as it may be pertinent to this case, the Court held that erroneous oral and written information given by a Government employee to a benefit claimant who relied, to his detriment, on the misinformation cannot estop the Government from denying benefits not otherwise permitted by law.

The court in its dicta also stated:

> It ignores reality to expect that the Government will be able to "secure perfect performance from its hundreds of

> thousands of employees scattered throughout the continent." Hansen v. Harris, 619 F.2d 942, 954 (CA2 1980) (Friendly, J., dissenting), rev'd sub nom., Schweitker v. Hansen, 450 U.S. 785, 101 S.Ct. 1468, 67 L.Ed.2d 685 (1981). To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial.

The Court, however, refused to acquiesce to the Government's request that the Court adopt a per se rule that estoppel will not lie against the Government. Thus, the Court continued to leave open the question of whether an estoppel claim could ever succeed against the Government.

CIVIL PENALTIES

In determining the amount of penalty to be assessed, Section 110(i) of the Act requires consideration of the operator's previous history of violations, the size of the operator, the negligence of the operator, the effect on the operator to continue in business, the gravity of the violation, and the good faith in attempting to achieve rapid compliance.

The Secretary entered into evidence a certified copy of the operator's assessed violation history as Exhibit G-1. This report indicates that, during the two-year period prior to the issuance of the citations in question, respondent has been cited 60 times and paid $4,251.00 in penalties. With respect to size, Respondent mined approximately 200,000 cubic yards of usable shale material a year and had approximately a total of 40 employees. Respondent stipulated at hearing that the payment of the proposed penalties would not adversely affect Featherlite's ability to continue in business.

The negligence of the operator was high. The evidence established that Respondent had been cited for failure to keep records of inspected work sites six months before the issuance of the citation/orders at bar. Further, the hazards were apparent or readily discoverable. Respondent's personnel were at the pit site every day and had a degree of control over the areas to be mined.

The gravity of the violation is serious. The injuries from a high wall failure such as this would be reasonably likely to cause serious injury or death to exposed miners.

Considering the statutory criteria in 110(i) of the Act and the availability of penalty mitigation as an avenue of equitable relief for any possible confusion that may have been caused by the way inspector Robinson abated the earlier November 1987 citation (No. 3062555), I find and assess an appropriate civil penalty for each of the violations as follows:

$3,000.00 for the violation of 30 C.F.R. 56.3131, as charged in Citation No. 3063548.

$1,000.00 for the violation of 30 C.F.R. 56.3401 as charged in Citation No. 3063549.

$3,000.00 for the violation of 30 C.F.R. 56.3200 as charged in Citation No. 3063550.

Finding of Facts

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following Findings of Fact:

1. Grady Lee Daughty, an employee of B.C. Construction, was fatally injured at approximately 1:50 p.m. on May 18, 1988, when the power shovel he was operating was covered by a massive fall-of-ground from an unstabilized 60-foot highwall at the mine site, the Laura Todd Pit, leased and operated by the Featherlite Building Products Corporation.

2. Following an attempted rescue operation, William Wilcox and other MSHA personnel conducted a thorough accident investigation.

3. Lightweight aggregate was produced at the Featherlite plant site from shale mined at the nearby pit complex, the Laura Todd Pit.

4. The 60-foot highwall involved in the fatality was composed of shale covered by approximately 30 feet of undisturbed sandy-clay overburden and stockpiled overburden. The latter material was stripped by a self-loading type scraper and stockpiled both on mined and unmined areas of the leased land by Featherlite personnel.

5. An independent contractor, the B.C. Construction Company, had been retained to mine the shale exposed by the Featherlite stripping program and to transport the shale to the plant site crusher and primary storage facility.

6. Activities at the pit were planned and administered by Featherlite management on an informal basis; no maps or similar mine planning program tools were evidenced.

7. Featherlite's stripping operation determined approximately where shale was to be mined and the width and length of the mining at hand. The depth of shale mining was detemined by the local thickness of the formation and its freedom from inclusions as the base of the formation was neared. Stripping was excluded from the contractor's responsibilities.

8. The 60-foot pit wall involved in the fatality was a place where persons worked or traveled. The wall was composed of loose or unconsolidated material, and was not sloped to the angle of repose or stripped back for at least 10 feet from the top of the pit wall. This condition posed a reasonable likelihood of injuries of a reasonably serious nature.

9. The mine operator did not designate persons experienced in examining and testing for loose ground. The mine operator did not test or examine loose ground where work was to be performed. This condition posed a reasonable likelihood of injuries of a reasonably serious nature.

Respondent knew, or should have known, of the hazardous condition. Featherlite had previously been cited for failure to inspect every workplace. It had management officials at the pit regularly and employees there every day. Sloughing, standing water, tension fractures, and the height of the wall were apparent or readily discoverable indicating the instability of the ground.

10. The ground conditions (specifically the 60-foot highwall) were hazards and the wall was not taken down or supported before work was permitted in the area. The area was not posted with a warning sign against entry or barricaded when unattended. This condition posed a reasonable likelihood of injuries of a reasonably serious nature. Respondent knew or should have known of this hazardous condition. Featherlite had management officials at the pit regularly and had one official there 10 minutes prior to the fatality. Featherlite had employees at the pit every day. The sloughing, standing water tension fractures and height of the wall were apparent or readily discoverable indicating the hazardous condition of the pit wall.

11. The violation history of respondent indicates that during the two years prior to the issuance of the citation/orders in question, respondent has been cited for 60 violations and paid $4,251.00 in penalties.

12. With respect to the size of the operator, respondent mined approximately 200,000 cubic yards per year of usable shale material and had a total of approximately 40 employees.

13. The negligence of the operator was high.

14. Respondent stipulated that the proposed penalties would not affect its ability to continue in business.

15. The gravity of the violations was serious and substantial.

16. All violations were timely abated by the permanent closure of the Laura Todd Pitt.

Conclusions of Law

Jurisdiction

1. Featherlite was at all times subject to the provisions of the Federal Mine Safety and Health Act, and I have jurisdiction over the parties and subject matter of this proceeding.

Violations

2. a. Respondent violated 30 C.F.R. 56.3131 as alleged in Citation No. 3063548.

   b. The violation is significant and substantial.

   c. A penalty of $3000 is assessed.

3. a. Respondent violated 30 C.F.R. 56.3401 as alleged in Citation No. 3063549.

   b. The violation is significant and substantial.

   c. The violation constitutes an unwarrantable failure of the operator to comply with the cited standard.

   d. A penalty of $1,000.00 is ASSESSED.

4. a. Respondent violated 30 C.F.R. 56.3200 as alleged in Citation No. 3063550.

   b. The violation is significant and substantial.

   c. The violation constitutes an unwarrantable failure of the operator to comply with the cited standard.

   d. A penalty of $3,000.00 is ASSESSED.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Citation/Order No. 3063548, including its finding that the violation was significant and substantial, is AFFIRMED. The Notice of Contest, Docket No. CENT 88-113-RM, is DISMISSED.

2. Citation No. 3063549, including its findings that the violation was significant and substantial and caused by unwarrantable failure, is AFFIRMED. The Notice of Contest, Docket No. CENT-88-114-RM, is DISMISSED.

3. Citation No. 3063550, including its findings that the violation was significant and substantial and caused by unwarrantable failure, is AFFIRMED. The Notice of Contest, Docket No. CENT 88-115-RM, is DISMISSED.

4. Respondent Featherlite Building Products Corporation shall pay to the Secretary of Labor $7,000.00, within 30 days of this Decision, as a civil penalty for the violations found herein.

August F. Cetti
Administrative Law Judge