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SOL (MSHA) V. YARBROUGH CONSTRUCTION
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. SE 92-27-M A.C. No. 09-00113-05503 EYU
v.	:	Burns Brick Mine
YARBROUGH CONSTRUCTION COMPANY, Respondent	: : :	

DECISION

Appearances: Michael K. Hagan, Esq., Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner;
Charles N. Yarbrough, Yarbrough Construction, Incorporated, Lizella, Georgia, for Respondent.

Before: Judge Barbour

THE PROCEEDING

This case is before me upon the petition of the Secretary of Labor ("Secretary") for the assessment of civil penalties pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977 ("Act" or "Mine Act"). The petition alleges that Yarbrough Construction Company ("the Company") was responsible for three violations of various mandatory safety standards for surface metal and non-metal mines found in Part 56, Volume 30, Code of Federal Regulations. The Company answered, in some instances denying its responsibility for the violations and pointing to factors it believed warranted mitigation of the penalties proposed by the Secretary.

A hearing on the merits was held in Macon, Georgia at which Michael K. Hagan represented the Secretary and Charles N. Yarbrough represented the Company. The sole witness for the Secretary was Federal Mine Safety and Health Administration ("MSHA") Inspector Donald Collier. The Company relied upon cross examination of Collier and upon statements by Yarbrough.

At the commencement of the hearing Yarbrough raised an additional objection to the imposition of civil penalties by challenging MSHA's authority to cite the Company for violations of the Mine Act. Yarbrough asserted that the activities of the Company were not conducted at a "coal or other mine" in that the Company simply moved material that had already been mined by another company. Tr. 3-4.

At the hearing's close, the parties elected not to brief the issues, standing upon the closing statements of counsel and Yarbrough.

JURISDICTION

THE FACTS

Yarbrough described the Company as "a home-owned business," taking in an average of approximately $5,000 to $6,000 per month. Tr. 81-82. The Company engages in two kinds of work: moving clay and site preparation for things such as commercial sites, parking lots and roads. Tr. 82. During the past two years the biggest part of the business has been that involving clay. Tr. 82.

According to Yarbrough, the clay is extracted from a riverside site. Tr. 39. Once clay has been extracted from the earth, it is transported by truck to a stockpile. The stockpile is approximately seven tenths of a mile from the place where the clay is extracted. Tr. 39. The area containing the stockpile is surrounded by a levy. Yarbrough explained that the clay is enclosed by the levy so that "when [the nearby river] floods . . . the water doesn't come into the levy and saturate the material." Tr. 27. The levy is large -- approximately 26 feet high and l5 feet across at the top. Yarbrough guessed that the levy encompasses approximately 25 - 50 acres. Tr. 39.

Once the clay has been stockpiled, a company employee operating a scraper transports the clay from the stockpile to a hopper. Tr. 28. The employee drives the scraper to the top of the hopper, opens the bottom of the scraper and the clay falls into the hopper. The distance the clay is transported by the scraper varies with the position of the stockpile. At a minimum it is 600 feet and at a maximum 3,000 feet. Id.

Occasionally, in order to dry out the clay, the scraper operator is also required to use a farm harrow and to pull the harrow with a tractor over the stockpiled clay to loosen the clay. Tr. 62, 68. Unless this is done the clay will stick in the hopper. Tr. 68.

The clay is used for the manufacture of bricks by Burns Brick, a brick making company. Yarbrough described what happens after the clay reaches the hopper:

> Burns Brick people are working underneath the hopper, and when the material falls in the hopper they have a tram system that's similar to a ski lift with buckets instead of seats, and the tram system brings the buckets underneath the hopper and the material goes into the hopper [and into the buckets] and is carried three and a half miles up the cable to the plant.

Tr. 28. At the end of the tram the clay is dumped into another stockpile from whence it is removed by Burns Brick for manufacture. Tr. 69.

Once the scraper operator has dumped the clay into the hopper the operator drives the empty scraper back to the stockpile via a circular route. Tr. 28, 31. (Yarbrough described the Company's transportation of the clay "a continuous circle, not a back-and-forth operation." Tr. 3l.) The Company usually keeps one scraper only at the job site because the work done there is "a one-man operation." Tr. 30. The Company has transported clay for Burns Brick for "probably 10 maybe 15 years." Tr. 33. During 1991 it moved approximately 80,000 to 90,000 tons of clay to the hopper. Tr. 83-84.

Yarbrough stated that Burns Brick owns the clay. In August 1991 (the date of the subject violations), the clay was extracted by Tom Sealy, a person not connected with the Company. Once the clay was taken from the ground, Sealy had it trucked to the stockpile. Tr. 31. However, commencing in September 1991 and continuing until November of that same year, the Company, under an agreement with Burns Brick, extracted the clay and moved it by truck to the stockpile. Tr. 32, 41. Yarbrough did not dispute that during September and November 1991 the Company had engaged in mining.(Footnote 1) Yarbrough testified that when the Company is excavating clay it employs more than one person. Tr. 32, 35. However, Yarbrough adamantly contended that when the Company was cited for the subject violations it was "only moving clay that someone else had mined and put in a stockpile, and [the Company] was moving it from the stockpile to the hopper." Tr. 33. According to Yarbrough, this was not mining. In addition, Yarbrough explained that when the Company was cited for the subject violations it was only billing Burns Brick for moving clay from the stockpile to the hopper. However, when the Company was conducting mining operations, it had billed Burns Brick for mining the clay and for moving it from the mine (i.e., the

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1 Yarbrough testified that he hoped the company again would reach an understanding with Burns Brick to extract clay in the future. Tr. 37.

extraction site) to the stockpile. Tr. 47. At the time when the Company changed its activity from extracting the clay and trucking it to the stockpile, to moving the clay from the stockpile to the hopper only, it did not notify MSHA. Nonetheless, Yarbrough maintained that an MSHA inspector could tell whether or not the Company was mining (i.e., extracting the clay and trucking it to the stockpile) or whether it was not mining (i.e., taking clay from the stockpile to the hopper) simply by observing. Tr. 48. Or, the inspector could ask.
Tr. 49. Yarbrough also stated that inspectors from the Secretary's Occupational Health and Safety Administration ("OSHA") did not inspect the stockpile area. Tr. 95-96.

Yarbrough was uncertain regarding ownership of the property on which the Company was working. He did not know whether Burns Brick owned it or leased it. Tr. 30. He also indicated that another brick company, Cherokee, obtained its clay from a adjacent property and that it was difficult to tell where Burns Brick's clay ended and Cherokee's began. Tr.44. Yarbrough also questioned whether "brick clay" was a mineral within the meaning of the act. Tr. 34.

PARTIES' ARGUMENTS

Counsel for the Secretary asked that judicial notice be taken of the fact that clay is a mineral extracted from the land. Tr. 85-86. Counsel then asserted that the "mine" in this instance includes the area where the clay was extracted and the area where it was stockpiled and trucked to the hopper. These areas are basically contiguous. Tr. 87. Further, counsel pointed to the MSHA-OSHA Interagency Agreement, 44 FR 22827 (April 17, 1979), 48 FR 7521 (February 22, 1983) ("Agreement"), and noted that it specifically provides that at brick plants OSHA authority "commences after arrival of the raw materials at the plant stockpile." Exh. P-5 at 4, Tr. 88. Counsel argued that the "plant stockpile" was the stockpile at the brick plant, three and one half miles away from the hopper, i.e, the stockpile at the other end of the tramway. Tr. 88-89.

Counsel cited the "most troubling aspect" of the case as being the fact that if the Company's argument were accepted, when the Company was in a "non-mining" phase of operation, that is when it was only removing clay from the stockpile and taking it to the hopper, company workers would be in a regulatory
Never-Never Land, protected by neither MSHA nor OSHA. Tr. 89.

In sum, Counsel argued that under the circumstances of this case the Company was an independent contractor performing services at a mine and thus was properly subject to the jurisdiction of the Act and to resulting inspection by MSHA.

Yarbrough, argued that while the area from which the clay was extracted was clearly a mine, the mine was divided by the levy from the area where the stockpile was located and the stockpile side of the levy was not a mine. Tr. 91-92. Thus, MSHA was without jurisdiction to inspect the Company's operations inside the levy. Nonetheless, the Company's workers are fully protected. The Company was insured and the insurance company sent inspectors to inspect company equipment. Indeed, according to Yarbrough, the insurance inspectors came twice as often as the MSHA inspectors. Tr. 92.

JURISDICTIONAL FINDINGS AND CONCLUSIONS

While, as the U.S. Court of Appeals for the Fourth Circuit has noted, the Mine Act does not apply to every company whose business brings it into contact with minerals, I have no doubt that in this instance the Company comes within the parameters of the Act. See Donovan v. Carolina Stalite Co., 734 F.2d 1547 (4th Cir. 1984).

Section 4 of the Mine Act states that "[e]ach coal or other mine, the products of which enter commerce . . . and each operator or such mine . . . shall be subject to the provisions of this Act." 30 U.S.C. 803. Section 3(h)(1), 30 U.S.C. 802(h)(1), defines "coal or other mine" in part as

> (A)an area of land from which minerals are extracted in nonliquid form . . . (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools and other property . . . used in or to be used in, or resulting from the work of extracting such minerals . . . or used in or to be used in the milling of such minerals, or the work of preparing coal or other minerals.

Section 3(d) 30 U.S.C. 802(d) defines "operator" as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine."

In order to determine whether the Company is working at a "mine" and if so whether it is an "operator" of that mine the first question is whether the material involved is a "mineral?"

The pertinent material is clay that has been extracted in non-liquid form. I note the definition of "clay" and I find that the material is a mineral within the meaning of the Act.(Footnote 2)

The next question is whether the mineral is being "extracted," "milled" or "prepared?" If so then the land from which it is extracted or the lands, structures, etc., used in or to be used in its milling or preparation constitute a mine.

Here, the Company was moving the clay from the place it was stockpiled to the conveyor that transported it to the place it was to be used as a raw material for the manufacture of bricks. This transportation was not associated with a milling or preparation process -- processes which, generally speaking, are associated with the treating of mined minerals for market. See Carolina Stalite, 734 F2d at 1551. However, the record is not totally silent regarding whether or not the clay was subject to any such treatment once it had been extracted. Yarbrough stated that the Company occasionally had to harrow the stockpiled clay in order to dry it so it could be trammed to the brick plant. Since this aeration of the clay was a treating process incident to the shipment of the clay to its ultimate market, it was mineral preparation within the meaning of the Act, and I so find.

In addition, I reject Yarbrough's, proposed distinction between the extraction and (apparently) the initial stockpiling of the clay and transportation of the clay to the point where the mineral was conveyed to the user/manufacturer.(Footnote 3) I note, as I must, that the legislative history of the Act makes clear that Mine Act coverage is to be favored and that "what is considered to be a mine and to be regulated . . . be given the broadest possibl[e] interpretation." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act or 1977, at 602

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2 "Clay" is defined as:

> A fine-grained, natural, earthy material composed primarily of hydrous aluminum silicates. It may be a mixture of clay minerals and small amounts of nonclay materials or it may be predominantly one clay mineral. The type of clay is determined by the predominant clay mineral present.
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> U.S. Department of the Interior, (1968) A Dictionary of Mining, Mineral and Related Terms 214.

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3 I state "apparently" because during his testimony Yarbrough seemed to imply that both extraction of the clay and its initial stockpiling inside the levy constituted mining activity subject to the Act, whereas in his closing statement he seemed to take a more restrictive view and to argue that only extraction was covered. See Tr. 33, 91-92.

(1978). While it is true that when cited for the violations here at issue, the Company was primarily engaged in transporting the clay that others extracted and stockpiled to the hopper from whence it would be conveyed to the brick plant, I conclude that the transportation to the hopper was so closely related to the extraction process that it indeed was an essential ingredient of that process. Without transportation to the hopper extraction would have been a meaningless exercise in that the clay would never have entered the stream of commerce. I therefore conclude that the area of the stockpile and the route to the hopper is indeed a "mine" within the meaning of the Act. See Bulk Transportation Services, Inc., l2 FMSHRC 772, 792-793 (April 1990) (ALJ Koutras), aff'd 13 FMSHRC 1354 (September 1991).

I am further persuaded that the subject area was a "mine" by the very fact that the Secretary chose to exercise his jurisdiction over the area pursuant to the Act. The Secretary enforces both the Mine Act and the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., and has discretion in determining which of his two enforcement agencies, MSHA or OSHA, should exercise jurisdiction over a given facility or activity. The Secretary's choice is entitled to deference provided it is exercised reasonably. Here, where the alleged violations were cited in an area virtually continuous to the extraction site and in an area well within that which the Secretary regards as falling under the Mine Act -- as counsel for the Secretary noted, under the Agreement the Secretary claims Mine Act jurisdiction up until the arrival of the clay at the plant stockpile -- I conclude that the Secretary's choice of MSHA as the appropriate inspection authority was reasonable.

The question remains whether the Company was an "operator" within the meaning of the Act? Yarbrough was uncertain who owned the land upon which the Company was working, nor did the Secretary introduce evidence regarding ownership of the mine site. Also, the record is not entirely clear regarding the extent of the Company's control or supervision at the site, although there is certainly no suggestion that at the time the subject violations were cited any entity other than the Company was exercising control or supervision at the site. What is apparent is that the Company occasionally aerates the clay and transports the clay for Burns Brick and charges Burns Brick on a per unit basis of approximately $9 per load. Tr. 29. Thus, regardless of whether the Company was an "operator" by virtue of its control and supervision of the area involved, certainly it was an independent contractor performing a service at the mine.

For these reasons, I conclude that the Company was properly subject to Mine Act jurisdiction.

THE VIOLATIONS

Section 104(a) Citation No. 3605398, 8/8/91, 30 C.F.R. 56.14132

The citation states:

> The warning horn on the Dresser 412 B pan scraper was not operative.

Exh. P-2.(Footnote 4)

Inspector Collier stated on August 8, 1991, he observed the pan scraper in operation at the mine. He inspected the equipment and during the course of the inspection he asked the scraper operator, Riley Sanders, to sound the scraper's horn. The operator tried to do so, but the horn would not sound. Tr. 10-11. Because the scraper was a self propelled piece of equipment, Collier believed that the lack of an operable horn violated section 56.14132.

With regard to gravity, Collier stated that although at the time of the inspection no one aside from the scraper operator was in the vicinity of the scraper there were "other employees who might work in the area during the course of the shift everyday." Tr. 14, see also Tr. 15. However, because the scraper normally would not be operated in the vicinity of other employees Collier considered it "unlikely" that persons would be injured due to the violation.

With regard to negligence, Collier noted that the scraper was required to be inspected at the start of the shift, prior to it being placed in operation. Tr. 13-14, 16.

Yarbrough did not dispute the fact that the horn did not sound. He explained that for some reason -- he did not know why -- someone -- he did not know who -- had cut the horn wire. Yarbrough acknowledged this had happened before and that the Company had been cited for it. Tr. 20.

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4 30 C.F.R. 56.14132(a) states:

> Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition.

I conclude the violation existed as charged. The scraper is "self-propelled mobile equipment," and as Yarbrough acknowledged, its horn did not work. Further, I accept the inspector's testimony that an injury resulting from the violation was unlikely and I find the violation was not serious. Finally, the Company was negligent in allowing the violation to exist. The fact that the horn did not work should have been detected and corrected prior to the start of the shift and the fact that the Company previously had experienced a similar problem, further emphasizes its lack of due care.

Section 104(a) Citation No.3605399, 8/8/91, 30 C.F.R. 56.14130(i)

Citation No. 3605399 states:

> The seat belts on the Int. 1566 Tractor are not maintained in functional condition. The buckle is defective and will not stay latched. The tractor is not being used at this time but is subject to be used anytime.

Exh. P-3.(Footnote 5)

Collier testified that when he inspected the International 1566 tractor on August 8, 1991, the tractor was in the stockpile area. Tr. 55.(Footnote 6) During the course of the inspection Collier attempted to buckle the seatbelt but could not get the buckle to latch. Collier speculated that mud may have gotten into the latching mechanism. Tr. 50-51. At the time of the inspection the tractor was not tagged-out or put in an area of restricted use so it could not be operated. Tr. 52. Collier stated that Riley Sanders told him that the tractor had "broken down" but Collier denied Sanders told him the tractor lacked the batteries necessary to make it operable. Tr. 54. Collier stated that

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5 30 C.F.R. 14130(i) states:

> Seat belts shall be maintained in functional condition, and replaced when necessary to ensure proper performance.

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6 30 C.F.R. 14130(a) requires that seat belts shall be installed on tractors.

Sanders said "they'd used [the tractor] the day before," and Yarbrough observed, "He had not used it the day before, I had." Tr. 55.

Collier stated that he believed the condition of the seatbelt constituted a violation of section 56.14130. He further stated the violation was a significant and substantial contribution to a mine safety hazard in that it was reasonably likely if the seatbelt were not fixed a person could be thrown from the tractor and be crushed. Tr. 52-53. When asked why he thought it reasonably likely this could happen, Collier responded:

> Based on a recent policy memorandum. In a study of mining accidents with haulage equipment [,] of the fatalities that occurred over a ten-year period . . . 1979 to 1989, . . . the use of seat belts might have prevented half of those fatalities and . . . we're to consider non-use, not providing seat belts, or seat belts not in a functional condition . . . to be as serious.

Tr. 57. When asked whether there was anything with respect to the particular site that he considered when determining the violation was S&S, Collier replied, "[N]ot at that time." Tr. 57.

With regard to the Company's negligence, Collier was of the opinion that the condition of the seatbelt should have been detected and corrected because the tractor is required to be inspected prior to being placed in use each shift. Tr. 53.

Yarbrough stated the tractor wasn't in use the day the citation was issued, but he agreed with the inspector that it had not been tagged-out. Tr. 58. According to Yarbrough, one of the tractor's batteries had fallen off the tractor and had broken, and had been that way for two weeks. Further, Yarbrough stated he had jump started the tractor the day before the citation was issued and had moved it to the spot where the inspector found it. Tr. 59.

I find the violation existed as charged. Section 56.14130(i) requires that seat belts shall be maintained in functional condition. There is no question about the condition of seatbelt -- it did not latch. Moreover, the presence of a non-functioning seatbelt was a hazard to the tractor operator. As both Collier and Yarbrough agreed, the tractor was not removed from service or marked to prohibit its use. Further, even though it lacked a battery, the tractor could be jump started and moved, as Yarbrough demonstrated.

I cannot find this was a serious violation. I accept Yarbrough's testimony that the battery was missing and had been missing for two weeks prior to the inspection. The apparent effect was to render the tractor inoperative for commercial use. Thus, it was unlikely anyone would be exposed to the danger of the tractor while in operation unless a person had, like Yarbrough, jump started it and moved it to an area for repair. This being the case, I also cannot find there was a reasonable likelihood that the hazard contributed to -- the hazard of the tractor operator being thrown from the tractor and crushed -- would result in an event culminating in an injury.(Footnote 7) The tractor simply could not be used enough to make an accident reasonably likely. This being the case, I find the violation was not S&S.

I also am constrained to observe that the wisdom of the inspector basing a S&S finding solely upon a policy or informational memorandum and giving no consideration to the factual situation at hand is highly questionable, to say the least. The Commission has made clear that the question of whether a violation is S&S must be based upon the particular facts surrounding the violation. Texas Gulf, Inc., 10 FMSHRC 498, 501 (April 1988). While I suppose it is conceivable that the Secretary could prove facts existed warranting an S&S finding despite the inspector's failure to take them into account, I cannot imagine such proof would be easily established or come by.

Finally, I find that the condition of the seatbelt exhibits a lack of due care on the Company's part. Because the tractor had not been taken out of service, the Company was required to make certain that it complied with all applicable standards. A reasonably prudent operator would have made sure the seatbelt worked.

104(a) Citation No. 56 3605400, 8/8/91, Section 56.12025

The citation states:

> The metal frame of the fuel pump motor at the fuel storage area was not grounded to the system ground.

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7 In Mathies Coal Co., 6 FMSHRC 1, (January 1984), the Commission set forth the four elements of a "significant and substantial" violation, including the one critical here, a reasonable likelihood that the hazard contributed to will result in an injury." In U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984), the Commission amplified the meaning of the third element of the Mathies test, explaining it "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury."

Exh. P-4.(Footnote 8)

Collier stated that during his inspection on August 8, he observed a metal framed fuel pump located "pretty close to the hopper" but to one side of it. Tr. 75. The pump was electric. It was used to pump fuel from a fuel storage tank. Collier was told the pump and storage tank belonged to Burns Brick, but that the Company used the tank to store its fuel and used the fuel for its equipment. Tr. 73, 75.

Collier noticed that the frame of the pump was not grounded. However, Collier did not believe that it was likely any person would be shocked because of the failure to ground the frame.
He observed that because the pump structure was located on the ground, its electrical components were subjected to very little vibration. (Vibration could cause an electrical short-circuit by bringing conductors into contact with the frame.) Moreover, Collier observed that the pump was not used very often so that even if an ungrounded shock hazard occurred, which was unlikely, it also was unlikely persons would actually be subjected to the hazard before it could be corrected. Tr. 73.

With regard to the Company's negligence, Collier stated that grounds have to be tested once each year and that the missing ground wire should have been known to the Company. Tr. 74.

Yarbrough testified that the Company had begun using the pump and tank in its day-to-day operation after the Company paid Burns Brick for the fuel already in the tank. Tr. 78-79. Before the Company started to use the pump Yarbrough had not inspected it, and he did not know whether or not it was grounded. He stated, "I never checked." Tr. 79.

I find that the violation existed as charged. The metal pump frame enclosed electrical circuits, and the pump was not grounded. While the pump itself appears to be have been owned by Burns Brick, the Company had the full use of it and was using it, as Yarbrough stated, "in the day-to-day operations of moving the material from the stockpile to the hopper." Tr. 79. Thus, the pump was part of the equipment necessary for the Company to

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30 C.F.R. 56.12025 states:

> All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection. This requirement does not apply to battery operated equipment.

perform its duties as an independent contractor, and I imply from this that the Company was responsible for the pump and properly cited for the violation.

Collier, an electrical engineer with a degree from Virginia Polytechnical University, testified the chance of an injury resulting from the violation was unlikely. I accept his testimony and find that this was a non-serious violation.

Moreover, because the Company was using the pump and was responsible for it, due care required the Company to make sure the pump met all applicable safety standards. The Company did not and in failing to do so I find that the Company was negligent.

OTHER CIVIL PENALTY CRITERIA

Yarbrough testified and I find that the Company is small in size. See Tr. 81-82, 84. The Company's history of previous violations also is small. In the two years proceeding August 8, 1991, the Company was assessed for a total of four violation.
G. Exh. P-1, Tr. 84-85.

Finally, Yarbrough stated that the size of the penalties proposed by the Secretary for the violations here alleged would not affect the Company's ability to continue in business and I will consider this when I assessed civil penalties for the violations that I have found herein. Tr. 81.

CIVIL PENALTIES

Taking in to account all of the statutory civil penalty criteria, I conclude that assessment of the following civil penalties is appropriate:

Citation No.	Date	30 C.F.R. Section	Civil Penalty Amount
3605398	8/8/91	56.14132	$20
3605399	8/8/91	56.14130	$20
3605400	8/8/91	56.12025	$20

ORDER

The Company is ORDERED to pay the civil penalties assessed within thirty (30) days of the date of this decision. Payment is to be made to MSHA and upon receipt or payment this matter is dismissed.

The Secretary is ORDERED to MODIFY Section 104(a) Citation No. 3605399 by deleting the "S&S" finding, which is hereby VACATED.

David F. Barbour
Administrative Law Judge

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