CCASE:
SOL (MSHA) V. WALLACE
DDATE:
19940831
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
(303) 844-5267/FAX (303) 844-5268

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEST 92-435-M
	:	A.C. No. 45-03085-05507
	:	
	:	Docket No. WEST 92-734-M
v.	:	A.C. No. 45-03085-05508
	:	
	:	Docket No. WEST 93-24-M
	:	A.C. No. 45-03085-05509
WALLACE BROTHERS, INC., Respondent	:	
	:	Docket No. WEST 93-594-M
	:	A.C. No. 45-03085-05510
	:	
	:	Wallace Portable Crusher #1

DECISION

Appearances: Jay A. Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, Seattle, Washington, for Petitioner;
James A. Nelson, Esq., Toledo, Washington, for Respondent.

Before: Judge Morris

The Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges Respondent Wallace Brothers, Incorporated ("Wallace") with violating safety regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801, et seq. (the "Act").

A hearing was held in Seattle, Washington. The parties filed post-trial briefs.

JURISDICTIONAL

Threshold Issues

Wallace owns and operates a portable crusher. Wallace also owns a rock pit located along the Cowlitz River, a few miles south of Toledo, Washington. Crushing operations take place at this pit intermittently, and may last for one or two weeks, or

may extend up to two or three months, depending upon whether they are stockpiling the crushed rock or crushing for a specific job. The majority of the crushing operations take place at various rock pits owned by the Federal Government, the state of Washington, individual counties, or private individuals. Wallace bids on contracts, either as a prime contractor or sub-contractor, on contracts where rock is needed to build logging roads on government property, both federal and state; on timber company property; state and local road construction projects; and various other jobs where crushed rock is needed. The length of time Wallace spends at each location depends upon the amount and type of rock produced, and varies from two or three days to several months. The size of the crew used in operating the crusher is normally three men.

In this case, Wallace raises the issue of whether its portable crusher is a mine within the meaning of Section 3(h)(1)(c) of the Act. The equipment crushes the rock taken from the pit. After being crushed, the rock is then taken several hundred yards to an asphalt plant to be further processed.

DISCUSSION

Section 3(h)(1) of the Act defines a "coal or other mine" as

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground; (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and working structures, facilities, equipment, machines, tools, or other property, including impoundments, retention dams, and tailing ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal facilities.

The definition is not limited to an area of land from which minerals are extracted but, as is noted, it also includes facilities, equipment, machines, tools, and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals. See, e.g., Donovan v. Carolina Stalite Co., 734 F.2d 1547 (D.C. Cir. 1984); Oliver M. Elam, Jr. Co., 4 FMSHRC 5 (January 1982). In determining cover-

age, we must give effect to Congress's clear intention in the Mine Act, discerned from "text, structure, and legislative history." Coal Employment Project v. Dole, 889 F.2d 1127, 1131 (D.C. Cir. 1989). Congress determined to regulate all mining activity. The Senate Committee stated that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possible interpretation, and ... doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978).

This broad interpretation has been adopted by the courts. See, e.g., Carolina Stalite Co., supra at 1554. The definition of "coal or other mine" has been applied to a broad variety of facilities that are not "an area of land from which minerals are extracted." See, e.g., Harman Mining Corp. v. FMSHRC, 671 F.2d 794 (4th Cir. 1981) (operator loaded previously extracted and prepared coal onto railroad cars for transportation); Stoudt's Ferry, 602 F.2d 589 (3d Cir. 1979) (operator separated sand and gravel from material that has been dredged from a river by the Commonwealth of Pennsylvania); Carolina Stalite, supra at 1547 (D.C. Cir. 1984) (operator heated previously mined slate in a rotary kiln to create a lightweight material used in making concrete blocks.

In a recent case, Commission Judge August F. Cetti held that the portable crusher cited by MSHA and used to crush rock into smaller usable sizes "is properly characterized as the "work of preparing coal or other minerals. Fred Knobel, 15 FMSHRC 742, 744 (April 1993).

The fact that the rock, after being crushed, is removed to an asphalt plant several hundred yards away to be further processed does not avoid the initial coverage of the Mine Act.

Wallace's objections to MSHA's jurisdiction are REJECTED.

Docket No. WEST 93-24-M

Citation No. 3924000

This citation alleges a non-S&S violation of 30 C.F.R. 56.18002. The citation reads

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

FOOTNOTE 1

The regulation provides:

> 56.18002 Examination of working places.
>
> (a) A competent person designated by the operator shall examine each working place at least once each shift for conditions which may adversely affect safety and health. The operator shall promptly initiate appropriate

action to correct such conditions.

(b) A record that such examinations were conducted shall be kept by the operator for a period of one year, and shall be made available for review by the Secretary or his authorized representative.

(c) In addition, conditions that may present an imminent danger which are noted by the person conducting the examination shall be brought to the immediate attention of the operator who shall withdraw all persons from the area affected (except persons referred to in section 104(c) of the Federal Mine Safety and Health Act of 1977) until the danger is abated.

> A person designated by the operator was not examining each working place at least once a shift for conditions which may adversely affect safety or health. A record of such examinations was not kept at the plant.

The Evidence

When MSHA Inspector Pederson initiated his inspection on July 21, he requested to see the records relating to an examination of working places kept by the operator pursuant to 56.18002. (Tr. 129, 134). Foreman Dan Fischer said the area had been examined and records kept but such records were at home or in his truck. (Tr. 130).

The Inspector gave the operator the chance to produce the records until the time he ended the inspection. When the records were not produced, Inspector Pederson issued a citation. (Tr. 131, 132, 354-355). The Inspector also informed the foreman that if the records were produced at a later date, he would vacate the citation. (Tr. 132). The foreman did not recall this offer but I credit the Inspector's version since his recollection is confirmed by his notes. (Tr. 534, 552). In any event, the records were never produced even at the time of the hearing. (Tr. 132, 550, 552).

Discussion

I find that Respondent's crusher foreman Dan Fisher, a competent person designated by the operator, examined the working places. (Tr. 515, 546-547).

However, Section 56.18002(b) requires that the record of such examinations be made available for review by the Inspector. Since the records were not available for review, Citation No. 3924000 should be affirmed and a penalty assessed.

Docket No. WEST 93-435-M

Citation No. 3640530

This citation alleges a non-S&S violation of 30 C.F.R. 56.1000. The citation reads

> The mine operator failed to notify MSHA field office of the opening and closing and the location of their portable crushing operation. The operator in the past has moved to several locations and never informed MSHA of the approximate opening and closing dates or the location as required by the standard. (Ex. P-3).

ÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄÄ

FOOTNOTE 2

The regulation provides:

> 56.1000 Notification of commencement of operations and closing of mines.
>
> The owner, operator, or person in charge of any metal and nonmetal mine shall notify the nearest Mine Safety and Health Administration and Metal and Nonmetal Mine Safety and Health Subdistrict Office before starting operations, of the approximate or actual date mine operation will commence. The notification shall include the mine name, location, the company name, mailing address, person in charge, and whether operations will be continuous or intermittent.
>
> When any mine is closed, the person in charge shall notify the nearest subdistrict office as provided above and indicate whether the closure is temporary or permanent.

With respect to this citation, Wallace renews its objections previously considered under "Threshold Issues." The same rulings apply.

Wallace also asserts that which constitutes a "mine opening" and "mine closing" is a matter left to the owner, operator, or person in charge of a metal and nonmetal mine.

I disagree. Section 56.1000 requires that MSHA be notified "before starting operations." Further, MSHA shall be notified "when any mine is closed."

In reply to Wallace's questions: The regulations are explicit. A portable crusher such as the Wallace crusher is required to report to the nearest MSHA office each time it moves from one open pit (mine) to another open pit (mine). This is true regardless of the number of times the crusher moves each year.

On the merits, Wallace urges there is ample evidence to prove that its Crusher No. 1 did report to MSHA whenever it moved from one pit to another. I disagree. The citation in issue here was issued pursuant to an audit initiated on April 25, 1991, and concluded on May 1, 1991. An audit conducted by MSHA reviews various forms required to be kept by an operator subject to the Mine Act. (Tr. 29-30, 54).

Inspector Pederson testified in detail as to how notifications are handled in the MSHA field office. (Tr. 39-40, 204, 363-363).

The Secretary argues that since the notification form is not in the permanent file or the Inspector's file of the MSHA (Bellevue) office, then no such notification was sent.

Discussion

In resolving these issues, I conclude Wallace did not file the requisite notices with the MSHA office. Mr. Wallace, in a discussion with the Inspector, stated that "he did not have time to go making out all kinds of paperwork." He just did "not want to bother with it." (Tr. 33). Mr. Wallace testified at length in the hearing but no evidence was offered to rebut his statements.

It is further apparent from even a casual reading of the transcript that Mr. Wallace relies to a large degree on his accountants. It is accordingly significant that when counsel for the company searched the accounting records, he found no notification to MSHA. (Tr. 249). In addition, no one protested on behalf of the company when the citation was originally issued. (Tr. 33, 492-493).

Finally, the company accountant, Mr. Cournyer, agrees the MSHA forms (Ex. R-2, R-3,and R-4) were not used until after the May 1, 1991, audit. (Tr. 249-250).

Notification required by MSHA can be important as it may relate to safety matters as well as termination of outstanding violations.

In sum, Citation No. 3640530 should be affirmed and a penalty assessed.

Docket No. WEST 93-594-M

Citation No. 3923999

This citation alleges a non-S&S violation of 30 C.F.R. 56.12028. The citation reads

> The operator did not have a continuity and resistance of the grounding system tested and a record kept of such a test. This test would assure that a ground path for fault current was intact.

The Evidence

Inspector Pederson requested a copy of the operator's electrical testing records from Foreman Dan Fisher. Specifically, he requested a copy of the continuity and resistance of the plant's electrical system. (Tr. 135, 136).

The purpose of these tests is to assure the operator and any of his employees that the integrity of his electrical cables, the

ÄÄ

FOOTNOTE 3

The regulation provides:

> 56.12028 Testing grounding systems.
>
> Continuity and resistance of grounding systems shall be tested immediately after installation, repair, and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.

wiring connections, and the power system itself, is safely installed. If a fault occurred, a full current would have a place to return to the generator via the equipment ground conductor. (Tr. 136; Ex. P-15).

Mr. Fischer said he did not have any records at all.

Inspector Pederson found nothing hazardous with the system when he tested it. (Tr. 138).

Discussion

Wallace, in its brief, raises the defense that it actually conducted the systems tests and merely failed to maintain a record of the most recent tests.

Wallace's argument lacks merit. The regulation provides that a "record of the most recent tests shall be made available on a request by the Secretary or his duly authorized representative." Since the record was not made available, this citation should be affirmed.

An appropriate penalty will be discussed hereafter.

Docket No. WEST 93-594-M

Citation No.4127301

This citation alleges a non-S&S violation of 30 C.F.R. 56.14107(a). The citation reads
ÄÄ
FOOTNOTE 4
The regulation provides:

56.14107 Moving machine parts.

(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury.

(b) Guards shall not be required where the exposed moving parts are at least seven feet away from walking or working surfaces.

> Two idler pulleys on the transfer conveyor return belt, between the shaker screen and conveyer to load out bunker and one side of the self-cleaning tail pulley opening, did not have guards installed to prevent incidental contact. No foot-traffic was observed within area during operations.

Discussion

The issue presented here by Respondent is whether the exposed moving parts were within seven feet of the working surfaces.

I am persuaded here by Inspector Pederson's detailed description of the unguarded tail pulley and idler rollers. These were not guarded on the open side where a person could be exposed. Further, the tail pulley was about a foot off the ground. There were also additional unguarded parts 3.5 to 4 feet off the ground. (Tr. 141-149). Exhibit P-16 is a drawing (not to scale) illustrating the conveyor.

On the other hand, Mr. Wallace did not know which pulleys the Inspector was testifying about. (Tr. 505). In addition, he did not know if the tail pulley had a guard on it. (Tr. 506-507).

As a result of the above evidence, I am not persuaded by Mr. Wallace's testimony that the return roller on the belt was "right close to seven or maybe over a little bit [above]." (Tr. 446).

Citation No. 4127301 should be affirmed and penalty assessed.

Docket No. WEST 93-594-M

Citation No. 4127302

This citation alleges an S&S violation of 30 C.F.R. 56.11027. Prior to the hearing, the Secretary modified th

ÄÄ

FOOTNOTE 5

The regulation provides:

> 56.11027 Scaffolds and working platforms.
>
> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

citation to allege a violation of 30 C.F.R. 56.11002, which provides:

> 56.11002 Handrails and toeboards.
>
> 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.

Discussion

Leave to amend "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182, 82 S. Ct. 227.9 L.Ed 2d 222 (1962). Rule 15(a) FRCP; Cyprus Empire, 12 FMSHRC 911, 916 (May 1990).

On the record here it is clear that a portion of the railing was missing from the side of the dragline. It is uncontroverted that the walkway was used by the operator of the dragline to go to the engine compartment of the crane. (See Ex. R-5 through R-10). The walkway itself was 15 feet long and 6 feet of it lacked a railing. The walkway was five to seven feet above the ground. If a person were to fall, he was on the exposed side and could fall to the ground. (Tr. 155-158, 322, 337, 435-455, 508-509). (See Exhibit R-5 marked to show missing rail.)

The principal focus of Respondent's argument (Brief, pp. 26, 27) is that no violation of 30 C.F.R. 56.11002 has been established.

Wallace argues the dragline violation does not come within 56.11002. Contrary to this view, 56.11002 is explicable if the facts fall within the prohibition of the regulation. In this case, the dragline operator used the walkway to service the engine. In this situation, he was exposed to the hazard.

Wallace also argues the walkway located at least five feet above the ground is not "elevated" within the meaning of 30 C.F.R. 56.11002.

The Code of Federal Regulations does not define "elevated." Accordingly, it is appropriate to consider the dictionary definition:

> "Elevated" 1. raise up above the ground or other surface [an highway]. Webster's New Collegiate Dictionary, 1979 at 365.

Wallace further argues that the section of the missing guardrail was not along the path used by the dragline operator to reach to the engine compartment. (Tr. 451-451). Rather, it is argued that Mr. Wallace correctly stated the evidence when he testified "and, when you got the door open, the door covers the end of it where you can't fall off it either." (Tr. 454).

I reject this argument. Exhibit R-5 shows the portion of the rail that was missing. A door could not cover such an area.

Wallace further argues any violation of Citation 4127302 is not "significant and substantial."

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:

> 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:

~1900

> 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). (Emphasis in original.)

The question of whether any particular violation is S&S must be based on the particular facts surrounding the violation. Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny and Ohio Coal Company, 9 FMSHRC 2007 (December 1987). In addition, any determination of the significant nature of a violation must be made in the context of continued normal mining operations. National Gypsum, supra, at 329. Halfway, Inc., 9 FMSHRC 8, 12 (January 1986); U.S. Steel Mining Co., 7 FMSHRC supra, at 1130 (August 1985).

Concerning the S&S designation: it is clear that there was an underlying violation of 30 C.F.R. 56.11002. A measure of danger, i.e., the violation contributed to the discrete hazard of falling off the walkway to the ground below, a distance of five to seven feet. (Tr. 157-158). The unrebutted testimony of Inspector Pederson that the injuries reasonably likely to occur, were there to be a fall, would be a broken ankle, broken leg, broken back, sprains or bruises - all reasonably serious injuries. (Tr. 164-165).

Finally, the remaining issue is the third paragraph of the Mathies formulation.

Inspector Pederson observed that handrails prevent a person from falling off the platform where a worker could lose his balance and fall. (Tr. 160-161). Given the fact that there was a six-foot length of walkway lacking a handrail worsens this potential since if a worker stumbled, there would be nothing he could reach to prevent the fall. (Tr. 161, 164). In addition, there was no planking along the entire route. The lack of planking increases the likelihood of falling. The dragline was being operated near water. Material or water on the walkway could make normal usage slippery. (Tr. 325-326).

The evidence establishes the walkway is used each day the mine is in operation. (Tr. 160, 459, 508).

The record establishes that there was a reasonable likelihood of an injury when viewed in the context of continued mining operations.

For the above reasons, the citation and the S&S designation should be affirmed.

Docket No. WEST 93-734-M

Citation No. 3640554

This citation alleges a non-S&S violation of 30 C.F.R. 56.5050(b). The citation reads

On day shift 5/29/91, the primary crusher

operator's exposure to mixed noise levels exceeded unity (100%) by 1.6776 times

ÄÄ

FOOTNOTE 6

The regulation provides:

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA slow response
8....................................	90
6....................................	92
4....................................	95

PERMISSIBLE NOISE EXPOSURES--CONTINUED

Duration per day, hours of exposure	Sound level dBA slow response
3....................................	97
1....................................	100
1 1/2................................	102
1....................................	105
1/2..................................	110
1/4 or less..........................	115

56.5050 Exposure limits for noise.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels within the the levels of the table.

> (167.76%) as measured with a Quest dosimeter. This is equivalent to an 8-hour exposure to 92.8 dBA. Personal hearing protection was being worn. Feasible engineering or administrative controls were not being utilized to eliminate the need for hearing protection.

The Evidence

On May 29, 1991, MSHA's Inspector Pederson measured the noise level on Respondent's portable crusher while it was processing sand and gravel. (Tr. 68-70, 368-371).

The Inspector placed the microphone of the dosimeter on the lapel of the crusher operator in a manner consistent with his training as provided by MSHA and the ANSI standards. (Tr. 75, 374-375).

The dosimeter had been properly calibrated as of March 27, 1991. (Tr. 76-79, 301-303, 375). The calibrator used by the Inspector had also been properly calibrated. (Tr. 85; Ex. P-8). After the inspection, the calibration was rechecked and found to be accurate. (Tr. 91).

The crusher operator wore the dosimeter from approximately 7:30 a.m. until 4:30 p.m.. (Tr. 93). This time period included two hours when the crusher was not operating. (Tr. 92, 94-95, 300).

The noise level on Charles Warner, the crusher operator, measured 173.41 percent. (Ex. P-6). This level of exposure exceeded permissible levels in 30 C.F.R. 56.5050 despite the two hours of down time. (Tr. 97). In addition, the reading was consistent with the spot readings obtained from the sound level meter. (Tr. 97-98).

Discussion

Wallace offered no contrary evidence as to the noise levels. However, Respondent argues it satisfies the requirements of the regulation by having the operator wear personal hearing protection even if feasible administrative or engineering controls exist which are not utilized by the operator.

Wallace's arguments lack merit. The plain wording of Section 56.5050(b) requires that when exposure to employees exceeds permissible limits, feasible administrative or engineering controls shall be utilized. In addition, if such controls are inadequate, then personal protective equipment is the option.

Wallace also claims the above ruling denies equal protection of the law since, in effect, it cannot use personal protective equipment ahead of feasible administrative or engineering controls as provided in 30 C.F.R. 71.805 relating to coal mines.

I am not persuaded by the operator's claim. Section 71.805(2)(ii) [relating to coal mines] merely directs that personal protective devices shall be made available to miners. When the coal operator files a plan with MSHA, Section 71.805(2)(iv) requires that MSHA be advised of "administrative and engineering controls that it [the operator] has instituted to assure compliance with the standard."

I believe the parallel regulations basically set the same requirements.

Wallace also raises the issue of whether feasible engineering controls exist which could be used to reduce the noise exposure to the operator of the primary crusher to within permissible limits. In Callahan Industries, Inc., 5 FMSHRC 1900 (November 1983), a leading Commission decision, it was held that economic as well as technological factors must be taken into account in determining whether a noise control is "feasible" under the standard. However, the Commission specifically rejected a "cost-benefit analysis" in determining whether noise control is required.

The evidence here shows that Inspector Pederson, an MSHA Inspector for 17 years, has inspected hundreds of portable crushers. The Inspector identified the main source of noise as that coming from the jaw crusher. (Tr. 101).

MSHA found that the most effective and frequently used noise control for employees operating such a crusher is an acoustically treated control booth. (Ex. P-9). In the Inspector's opinion, the noise level experienced by the operator could easily have been reduced 10 decibels in this case. (Tr. 113-114). The Inspector estimated the cost of building such a booth to be about $2,000.00.

Wallace's own witnesses indicated there was a reduction of almost eight decibels through the use of a booth. The cost estimated by the witness was $2,410.00. (Tr. 116, 411-412).

The evidence clearly establishes that economically and technologically feasible controls exist that would bring the noise exposure of the crusher operator to levels below the maximum specified in 30 C.F.R. 56.5050.

Citation No. 3640554 should be AFFIRMED.

Civil Penalties

Section 110(i) of the Act, 30 U.S.C. 820(i), mandates several criteria to be used in assessing civil penalties.

Wallace appears to be a small operator. In addition, there is no evidence concerning the operator's financial condition. In the absence of any facts to the contrary, I find that the payment of penalties will not cause the operator to discontinue its business. Asphalt, Incorporated, 15 FMSHRC 2206 (October 1993); Associated Drilling, Inc., 3 IBMA 164 (1974); Buffalo Mining Co., 2 IBMA 226 (1973).

The operator has an excellent prior history with a total of only six violations from May 29, 1989. (Exs. P-12, P-13).

The operator was negligent since it should have known of its obligation to comply with the various regulations.

While the gravity for the single S&S violation is high, the gravity is low for the reporting violations. I further consider the moving machine parts violation (No. 4127301) to be "moderate."

Wallace demonstrated statutory good faith in attempting to achieve prompt abatement of the violative conditions.

Considering all of the statutory criteria, I believe the penalties set forth in the order of this decision are appropriate.

Accordingly, I enter the following:

ORDER

1. Citation No. 3924000 is AFFIRMED and a civil penalty of $50.00 is ASSESSED.

2. Citation No. 3640530 is AFFIRMED and a civil penalty of $20.00 is ASSESSED.

3. Citation No. 3923999 is AFFIRMED and a civil penalty of $50.00 is ASSESSED.

4. Citation No. 4127301 is AFFIRMED and a civil penalty of $50.00 is ASSESSED.

5. Citation No. 4127302 is AFFIRMED and a civil penalty of $100.00 is ASSESSED.

6. Citation No. 3640554 is AFFIRMED and a civil penalty of $20.00 is ASSESSED.

John J. Morris
Administrative Law Judge

Distribution:

Jay Williamson, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212 (Certified Mail)

James A. Nelson, Esq., 205 Cowlitz, P.O. Box 878, Toledo, WA 98591 (Certified Mail)

ek