

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 6, 1997

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. CENT 96-91-M
Petitioner : A. C. No. 39-00170-05559
v. :
: Hobbs Potash Facility
NEW MEXICO POTASH CORPORATION, :
Respondent :

DECISION

Appearances: Daniel Curran, Esq., Office of the Solicitor,
U. S. Department of Labor, Dallas, Texas, for
the Secretary;
W. T. Martin, Jr., Esq., Carlsbad, New Mexico,
for the Respondent.

Before: Judge Barbour

This is a civil penalty proceeding brought by the Secretary of Labor (Secretary) against New Mexico Potash Corporation (New Mexico Potash or the company) pursuant to sections 105 and 110 (30 U.S.C. ' 815, 820) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. ' 801 et seq. (1994)). The Secretary seeks the assessment of aggregate civil penalties of \$19,000 for two alleged violations of mandatory safety standards found in Part 57 of the Secretary's safety and health standards for underground metal and nonmetal mines (30 U.S.C. Part 57).

The case arises out of a fatal accident that occurred on September 7, 1995, at the company's Hobbs Potash Facility, an underground potash mine, located in Lea County, New Mexico. The accident involved the electrocution of a miner who was trying to remove an energized power cable from an auxiliary fan. After the accident, the Secretary's Mine Safety and Health Administration (MSHA) issued to the company citations for the violations. The citations included findings that the violations were significant and substantial (S&S) contributions to mine safety hazards.

The company denied liability. It argued that the victim's death was caused by his own negligence, that no action by the company contributed to the accident, and that the company should

not be penalized for the victim's actions. In the company's view, the imposition of civil penalties would violate the company's constitutional due process rights (Tr. 10-11).

A hearing was conducted in Lovington, New Mexico, at which the parties presented oral testimony and documentary evidence.

THE ACCIDENT AND THE INVESTIGATIONS

On September 7, Michael Buffington, a 28 year old miner, was working underground at the mine. A shift change was in progress. The old crew had left the area where Buffington was located. A new crew was on its way to the area. Buffington and others were preparing the area for the new crew (Tr. 29).

Eugene Galvan, an underground maintenance mechanic at the mine, went to the area. Galvan needed to weld some equipment prior to the arrival of the new crew. Buffington was about to take a break for lunch. As Buffington started to walk toward the dinner hole, Galvan asked him to "get ... some power to the welder" (Tr. 27). Buffington indicated that he would, and Galvan turned to go to the welder. In order to energize the welder Buffington had to disconnect a power cable supplying electricity to the section's auxiliary fan and connect that cable to the welder.

The cable was approximately 175 feet long. It was energized and was carrying 480 volts of electricity (Tr. 58, 68). The cable was covered by a rubber outer jacket. Inside the jacket were four insulated conductors and one insulated ground wire (Tr. 50). The cable was attached to the fan at the nip. (A "nip" is defined as a "contact end of [a] cable" (U.S. Department of the Interior, A Dictionary of Mining, Mineral, and Related Terms (1968) at 750)).

Galvan was on his way to the welder when he heard Buffington yell. Galvan turned, and he saw that Buffington, who was wearing cotton gloves, was holding the cable with both hands (Tr. 28, 112). Buffington continued to yell, and Galvan realized that something was terribly wrong.

Galvan ran about 150 feet to the circuit breaker panel where he was joined by the section foreman, Lupe Rodriguez (Tr. 27). The men shut off the electricity to the cable and Buffington fell to the mine floor. Galvan and Rodriguez rushed to his side and administered cardiopulmonary resuscitation. A short time later, the rescue squad arrived and Buffington was taken to the hospital, where he was pronounced dead.

The Eddy County Sheriff's Office and MSHA were advised of the accident. Jim Estrada, a deputy sheriff, went to the mine to investigate, as did MSHA Inspector Henry Mall and MSHA Special Investigator Ronald Mesa.

Estrada arrived first. When he got to the accident site, Buffington's body had been removed. That aside, the site was as it had been at the time of the accident. Estrada viewed the area. He noted especially that the ground where the accident occurred as Amuddy@ (Tr. 21). Estrada then left the mine and went to examine Buffington's body. While viewing the body, Estrada noted that there were burn marks on Buffington's left palm. (Tr. 24; Exh. P-7).

Mall and Mesa reached the mine shortly after Estrada left. First, they discussed the situation with company officials. Then, they proceeded underground. They were accompanied by Curtis Davidson, the company's safety director (Tr. 47). The accident scene had been cordoned off.

Mall and Mesa inspected the area (Tr. 48, 87-88; Exh. P-9). They agreed with Estrada that the floor in the area was muddy (Tr. 81). In addition to the mud, Mall observed puddles of standing water (Tr. 81).

During the course of the inspection, Mall picked up and examined the cable. It was not scraped or worn. This indicated to Mall that the cable had not been in use for very long, perhaps 2 or 3 days at the most. Davidson agreed with this assessment (Tr. 70, 79-80, 144; Exh. R-2).

While looking closely at the cable, Mall found a small tear in the cable's outer jacket. The tear was located approximately 2 1/2 feet from the fan (Tr. 79, 88). The tear was about 1 1/2 inch long (Tr. 79). The tear exposed one of the cable's insulated power conductors for approximately 3/4 to 7/8 of an inch (Id.; see also Exh's P-10, P-11). Five or six strands of the conductor's internal cooper wires had broken through the insulation and also were exposed. (Tr. 48, 69).

Mandatory safety standard 30 C.F.R. ' 56.18002 requires a person designed by the operator to examine each working place at least once each shift for conditions that may adversely affect safety and to record the results of the examinations. Mall checked the report of the onshift examiner who inspected the area prior to the accident. Mall wanted to find out if the tear in the cable had been reported. It had not. Rather, the examiner reported that everything on the section was Aokay@ (Tr. 49).

Mall and Mesa took photographs of the accident site and the equipment that was involved in the accident. They also spoke with miners about what had happened (Tr. 49). Based upon their investigation, they concluded that when Buffington was asked to get power to the welder, he took a fatal procedural short cut. Instead of first disconnecting and locking out the power to the cable, Buffington picked up the energized cable and tried to pull or yank it out of the nip (Tr. 62-63). In the process, Buffington touched the exposed wires of the conductor (Tr. 63).

Mall also concluded the wet floor played a part in Buffington's death. In Mall's opinion, had the floor been dry, Buffington probably would have been severely shocked, but might not have been electrocuted (Tr. 81-82).

Mall and Mesa discovered they were not the only MSHA personnel to visit the area where the accident occurred. On September 7, shortly before the accident, another MSHA inspector, who was conducting a regular inspection at the mine, traveled through the area. The inspector was accompanied by Duane Morris, the company's underground safety supervisor (Tr. 143). Both men saw the cable, but the inspector issued no citations involving it.

Morris visited the area again after the accident. He believed that between the time he first saw the cable and the time Buffington picked it up, someone -- he did not know who -- moved the cable a short distance, perhaps 5 to 15 feet (Tr. 170-171).

Morris also testified that during the inspection, he and the MSHA inspector met Buffington. The inspector asked Buffington to tape a defective cable. (The defective cable was not the one that later was involved in the accident.) Morris and the inspector watched as Buffington followed all of the proper procedures. First, he deenergized the power to the cable. Next, he locked out the cable's circuit. Then, he applied the tape. There was no indication that just a short time later Buffington would fail to follow analogous procedures when he tried to disconnect the auxiliary fan's cable (Tr. 168).

Another person who investigated the accident and who visited the area where it occurred was Jerry Cline, a professional accident investigator hired by the company. When he came to the mine a few days after September 7, the area was still wet; or, as Cline put it, was still covered with a thick coating of mud (Tr. 215). Cline's view was that the wet floor probably enhanced contact between Buffington and the electrical current (Tr. 205).

Cline did not believe that wet conditions were hazardous in and of themselves, provided all equipment [was] up to snuff@ (Tr. 209-210). However, there were times when wet conditions required greater vigilance on an operator's part. Cline explained that a lot of water@ (Tr. 213) can cause the degradation of . . . cables,@ and therefore that an operator must be more attentive to the maintenance of equipment when working in such areas (Tr. 213-214). Nonetheless, in Cline's opinion, the moisture where Buffington was electrocuted was not extensive enough to warrant intensified precautions by the company (Tr. 215).

Cline agreed that when cables are moved in an underground mine, they are subject to a fairly abusive environment@ (Tr. 206). He also stated that in general a cable should be inspected during the course of a shift if it is going to be moved, or if work is going to be done on the equipment it services (Tr. 205-206). However, if the cable is moved 25 feet or less, as the auxiliary fan cable apparently was, Cline did not believe it needed to be examined unless there's something that happens during the move that gives . . . cause for concern@ (Tr. 207).

Finally, in addition to inspecting the accident site, Mall and Mesa reviewed the company's training procedures and work rules to determine if they contributed to the accident. The men concluded they did not. Mall and Mesa agreed that New Mexico Potash properly trained its employees, including Buffington. They also agreed that had Buffington followed the company's rules, the accident would not have happened because the rules required power to be deenergized at the terminal and the cable's circuits to be locked out (Tr. 59-60, 104).

THE CITATIONS

As a result of their investigation, Mall and Mesa each issued a citation to the company. Mall issued Citation No. 4330836, which charges a violation of 30 C.F.R. '57.12004. Among other things, the standard requires an operator to protect electrical conductors that are exposed to mechanical damage. Mall believed the tear in the cable jacket, the exposed conductor, and the bare conductor wires evidenced a lack of the protection required.

Mesa issued Citation No. 4447563, which charges a violation 30 C.F.R. ' 57.12014. Among other things, the standard requires a person moving an energized power cable to use insulated devices, unless other suitable means for moving the cable are provided. Mesa believed the company violated the standard when Buffington manually picked up the energized cable while wearing only cotton gloves (Tr. 97).

RESOLUTION OF THE ISSUES

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>	<u>Proposed Penalty</u>
4330836	57.12004	9/18/95	\$9,500

The citation states in part:

The 4/conductor type . . . 480 volt[,] 3 phase power cable was damaged exposing a bare copper conductor through the outer rubber covered jacket. A miner was electrocuted when he came in contact with the exposed bare copper conductor. The power cable was energized and was providing power to the face intake fan in area 289.

Section 57.12004 states in part:

Electrical conductors exposed to mechanical damage shall be protected.

THE VIOLATION

There is no doubt that the conditions alleged in the citation existed. The company does not dispute that the cable's jacket was torn, that an insulated conductor was exposed, and that strands of the conductor's copper wire extruded through the insulation (Tr. 48, 69). The cable was subject to mechanical damage in that it had to be moved from time to time and miners worked and operated equipment in its vicinity. Given the existence of the tear, the exposed conductor, and the bare copper wires, the cable and its conductors were not protected as required, and the cited standard was violated.

Although counsel for the company asserts the company is not culpable because the circumstances of the accident represent a clear . . . case . . . of unforeseen employee misconduct (Tr. 216), I find the argument inapposite to the issue of whether a violation of the cited standard occurred. The violation lies in the failure of the company, to protect adequately the cable's electrical conductors from damage. There is nothing in the record to indicate that Buffington's duties included protection of the cable's conductors or that Buffington was responsible for the failure to protect them. Rather, those duties lay with New Mexico Potash. Its failure to meet them establishes the violation.

S&S AND GRAVITY

A violation is properly designated S&S, if, based on 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 reasonable serious nature (Cement Division, National Gypsum Co., 3 FMSHRC 825 (April 1981)). There are four things the Secretary must prove to sustain an S&S finding:

- (1) the underlying violation of a mandatory safety standard;
- (2) a discrete safety hazard -- that is, a measure of danger to safety contributed to be 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 reasonable serious nature (*Mathies Coal Co.*, 6 FMSHRC 1,3-4 (January 1984); see also *Austin Power Co. v. Secretary*, 861, F.2d 99, 104-105 (5th Cir. 1988) (approving *Mathies* criteria).

Here, the Secretary has proven all four.

There was a violation of section 57.12007. The violation resulted in a discrete safety hazard. Failure to protect the conductors, meant that when the cable's outer jacket was torn and the conductor wires were exposed, miners working in the vicinity of the energized cable were subjected to the possibility of coming in contact with the live wires. Given the fact that the tear in the jacket was small, it was reasonably likely that miners would step on or near the cable and not realize that the conductor and conductor's wires were exposed. Further, if, like Buffington, they manually picked up the energized cable without

using a protective device it was reasonably likely they would come in contact with the conductor and its wires. In either situation, the miner involved was likely to be seriously injured or killed. In making this latter finding, I not only note that the cable was carrying 480 volts of electricity, but also that the area surrounding the cable was wet, a condition that Mall and Cline agreed enhanced the possibility of an electrocuted (Tr. 81-82, 205).

In addition to being S&S, the violation was very serious. It long has been held that the gravity of a violation is determined by analyzing the potential hazard to the safety of miners and the probability of the hazard occurring (*Robert G. Lawson Coal Co.*, 1 IBMA 115, 120 (May 1972)). The potential hazard was serious injury or death due to electrical shock. Because the failure to protect the conductors in the cable resulted in the exposure of an insulated conductor and of several bare wires, in a wet area, and in the presence of miners who worked in the area, it was likely that as mining continued a miner would come in contact with the exposed conductor and wires and suffer a severe shock injury or worse.

I am mindful the record established New Mexico Potash trained its miners, including Buffington, in the proper procedures for handling and moving electrical cables, and that if such procedures always were followed, the hazard, although not totally eliminated, would have been greatly obviated. However -- and as the history of enforcement of the Act consistently has shown -- miners do not always act as instructed. They do the unexpected. They manually pick up cables without first locking out and disconnecting their circuits, or they move energized cables without using approved protective devices or without wearing safety gloves. While the company's training and work rules certainly diminished the likelihood that an accident would occur, they did not eliminate it, and the hazard caused by the inadequately protected conductors was so great that even if Buffington had acted as trained, I would still find this a very serious violation.

NEGLIGENCE

Negligence is the failure to exercise the care required by the circumstances. Here, several factors called for heightened caution on the company's part. Witnesses for the Secretary and the company agreed that because the cable was used in a muddy and wet area, there was an increased hazard to miners from an electrical defect (Tr. 81-82). While it is true that the cable looked to be in good condition and had been in use underground

for only a short period of time -- 2 or 3 days, at most (Tr. 58, 70, 144, 155) -- this did not mean management could relax its vigilance against possible cable defects, especially when the wet conditions under which the cable was used increased the likelihood that such defects could be lethal.

Mall testified that when miners are assigned to work around a cable, management **Aneed[s] to check the work area@** (Tr. 75). There was agreement among the witnesses that, as a general rule, cables experience a great deal of stress when used underground. As Cline observed, when cables are moved, they are subject to **Aa fairly abusive environment@** (Tr. 206).

Morris saw the cable both before and after the accident and believed that the cable had been moved by as much as 15 feet prior to Buffington picking it up (Tr. 170-171). I credit this testimony. Although Cline did not think it necessary to examine a cable after such a short move, **Aunless . . . something . . . happens during the move that gives you cause for concern@** (Tr. 207), and while there is no evidence that **Asomething@** happened when the cable was moved before the accident, given the wet conditions, the generally **Aabusive environment@** to which the cable was subjected, and the extreme danger presented under such conditions when cable conductors are not adequately protected, I conclude that management should have checked for defects in the cable after it was moved and prior to assigning Buffington the task of connecting the cable to the welder. Failure to check the cable and to reinsulate adequately the conductor and wires represented a negligent failure to meet the standard of care required under the circumstances.

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>	<u>Proposed Penalty</u>
4447563	57.12014	9/8/95	\$9,500

The citation states in part:

A miner was fatally electrocuted when he . . . attempted to remove an energized 480 volt power cable from the face intake fan. The insulation had a break in it exposing the conductors. The miner made contact with the exposed conductors causing his electrocution.

The miner was not using any suitable protective devices when he handled the power cable.

Section 57.12014 states in part:

When . . . [power cables energized to potentials in excess of 150 volts] are moved manually, insulated hooks, tongs, ropes, or slings shall be used unless suitable protection for persons is provided by other means.

THE VIOLATION

The regulation is straight forward. It requires miners who move by hand energized power cables to use the devices specified, or to wear or otherwise to use suitable protection. The standard recognizes that handling a cable energized to a potential of more than 150 volts can be so dangerous that a miner must be protected from direct contact with the cable by placing an insulated barrier between the miner and the cable. This is in addition to the barrier that already is provided by the cable's interior insulation and its rubber jacket. The goal is to prevent the miner from being shocked, or at least to lessen the degree of any shock.

Buffington violated the standard. The record establishes that the cable Buffington manually moved was energized to 450 volts, and that he moved it without using the devices specified in the standard or without using other suitable protection.

In finding the violation, I recognize Mall testified that he did not believe Buffington was trying to ~~move~~ the cable when he picked it up (Tr. 60-64). However, Mall was using the word ~~move~~ in the sense of transporting the cable from one location to another and the regulation is not as restrictive in its use of the verb. While ~~move~~ means ~~to go . . . from one point or place to another,~~ it also means a change of position or posture (Webster's Third New International Dictionary 1479 (1986)). Even though Buffington was not trying to carry the cable to another location, he brought himself within the regulation's scope when he picked up the cable and manually moved it from the floor into his hands; in other words, when he changed the cable's position.

As Mesa persuasively testified, to comply with the standard Buffington either should have used ~~a small rope~~ to pull the cable or should have worn ~~a pair of hot gloves~~ (Tr. 111). Buffington did neither. The only barrier between

Buffington and the cable was his cotton gloves. The company does not assert that the gloves were Asuitable protection@ within the meaning of the standard, and clearly, they were not.

Buffington's actions were due solely to his own conduct. Had he acted in accordance with his training and with the company's work rules, the violation and the accident would not have occurred (see Tr. 59-60, 104, 163, 201-202). There is no evidence that Buffington's prior actions placed the company on notice that he might pick up the cable without first complying with company safety procedures or with the regulation. Indeed, I accept Morris' testimony that shortly before his electrocution, Buffington's actions in taping a cable were in complete accord with company safety procedures. Nor is there evidence Buffington was disciplined previously for failing to obey work rules. Therefore, here, unlike the previous violation, the question of the company's liability for a violation caused by its employee's unforeseen and unforeseeable misconduct is presented squarely.

The Commission long has held that under the Mine Act an operator is liable for the violations of its employees without regard to fault. It has based this conclusion on the wording of the Act and the act's legislative history (see *Asarco, Inc., Northwestern Mining Dept.*, 8 FMSHRC 1632, 1634-35 (November 1986), aff'd 868 F.2d 1195 (10th Cir. 1989) (and cases cited therein)). The Commission has stated that the employee's misconduct and the operator's lack of fault are factors to consider in assessing a civil penalty rather than factors having an impact on liability (*Asarco*, 8 FMSHRC at 1636).

New Mexico Potash is fully cognizant of this holding, but asserts that the Commission and the courts have yet to address whether implementation of liability without fault under the Mine Act deprives a company of its Fifth Amendment right to due process. Because New Mexico Potash believes it does, it suggests that I take a **A**very bold step . . . and give exactly that opinion@ (Tr. 222-223). (See *Kenny Richardson*, 3 FMSHRC 8, 21 (January 1981), aff'd 689 F.2d (6th Cir. 1982), cert. denied 461 U.S. 928 (1983) (Commission may resolve constitutional challenges raised against enforcement of the Act)).

I am respectful of the company's argument, but I decline the suggestion. The company's position is grounded in the general principle of law that there should be no individual liability for an act which ordinary human care and foresight can not guard against and that a consequent loss should rest where it chances to fall. However, above and beyond this principle lies the power of the legislature to enact laws for the general public welfare

and to impose obligations and responsibilities that would not otherwise exist. In such instances, the concept of constitutional due process requires that the means chosen be reasonably related to a legitimate end (*United States v. Jones*, 735 F.2d 785 (4th Cir. 1984), cert. denied 496 U.S. 918 (1984)).

Under the Mine Act, that Ameans@ is imposition of a civil penalty on the operator whenever there is a violation of the Act or its regulations. The Aend@ is Athe health and safety of the [the mining industry=s] most precious resource -- the miner@ (30 U.S.C. ' 801(2)), through lessening Adisruption[s] of production and the loss of income . . . as a result of . . . mine accidents@ (30 U.S.C. ' 801(d)). The end is accomplished by placing primary responsibility upon Aoperators . . . with the assistance of the miners@ to Aprevent the existence of . . . [unsafe and unhealthy] conditions and practices@ (30 U.S.C. ' 801(f)).

The drafters chose to retain in the Mine Act, the liability without fault structure of Mine Act=s immediate predecessor, the Coal Mine Health and Safety Act of 1969 (30 U.S.C. ' 801 et seq. (1976)) (*Western Fuels-Utah, Inc.*, 10 FMSHRC 256-260 (March 1988)). In requiring the operator to pay a civil penalty for each violation, the legislators expressed their belief that such penalties were necessary Ato effectively induce compliance@ (S. Rep. 181, 95th Cong. 1st Sess. at 16 (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 of 1977, at 604 (1978)).

While this assumption is perhaps debatable, it certainly is not unreasonable. A logical argument can be made that when an operator knows it will be liable for unanticipated employee negligence, it will go to additional lengths to try to reduce violations due to such negligence. For example, it will heighten scrutiny of its employees; or, it will intensify their training.

Therefore, arguments concerning the efficacy of liability without fault are for the legislature, not the Commission or the courts, to resolve. Hence, I conclude the Secretary is not barred constitutionally from seeking to impose a civil penalty on the company for Buffington=s violation of section 57.12014 and that the company is liable as charged.

S&S AND GRAVITY

All of the criteria set forth in *Mathies* (6 FMSHRC at 3-4) have been met. There was a violation of the cited standard. By

picking up and moving the cable without using the devices specified in the standard, or without using other suitable protection, Buffington subjected himself to the danger that a defect in the energized cable could injure or kill him. Moreover, there was a reasonable likelihood that an injury would result, given the fact that the cable was indeed damaged to the point that an insulated conductor and some of its bare wires were exposed. Finally, the likelihood that the injury would be reasonably serious was attested to by the fate that befell Buffington.

In addition to being S&S, the violation was very serious. Picking up a power cable without using the devices specified in the standard or without using other suitable protection was folly. The standard, which is designed to prevent exactly what happened, recognizes this, as do the company's safety procedures.

Given the conditions under which the violation occurred -- the wet floor and the exposed conductor and wires -- the tragedy that resulted was likely.

NEGLIGENCE

Mesa testified that he considered the fact that New Mexico Potash had a supervisor in the area as indicative that the company was negligent (Tr. 96). He amplified this testimony by stating that he believed the supervisor had the cable dragged into the area, that the supervisor knew there was going to be welding done and that the cable was going to be removed from the fan. Therefore, Mesa asked, "Why didn't the [supervisor] go back and kick the breaker?" (Tr. 109).

The issue, however, is whether the company was negligent in causing the alleged violation, and Mesa's testimony does not address how the failure of the company or its agents caused Buffington to manually move the cable without an approved device or other suitable protection.

As noted previously, there is no suggestion that the company's training program was defective or that New Mexico Potash should have known Buffington might act as he did. Supervisors can not reasonably be expected to monitor a miner's every move when there is no prior hint or suggestion his or her conduct may be in violation. For these reasons, I conclude that New Mexico Potash was not negligent.

OTHER CIVIL PENALTY CRITERIA
HISTORY OF PREVIOUS VIOLATIONS

In the 24 months prior to September 8, 1995, 39 violations cited at the mine were assessed by the Secretary and paid by the company. The Secretary did not take a position on whether the number of previous violations was small, medium, or large, given the size of the company (Tr. 17).

I find that the overall number is small. However, I note that of the 39 violations, 11 violations, or approximately 28 percent, were violations of mandatory electrical standards (Exh. P-1), and I conclude that although the number of previous violations is small, the percentage of electrical infractions warrants somewhat larger penalties than I might otherwise have assessed for the electrical violations here at issue.

BUSINESS SIZE

There was disagreement over the number of miners employed at the Hobbs facility. Mall testified that 330 miners were employed (Tr. 119, 56), and Davidson testified that the number was 307 (Tr. 119). While the exact number of employees obviously fluctuated, I find that more than 300 miners worked at the mine and that the company was large.

ABILITY TO CONTINUE IN BUSINESS

The company did not introduce evidence to show that the penalties assessed would adversely affect its ability to continue in business, and I find that they will not.

GOOD FAITH ABATEMENT

The company abated the violation of section 57.12004 by removing the defective cable from service within the time set, and it abated the violation of section 57.12104 by timely instructing its workers on the proper procedures for handling cables. The company's actions constituted good faith abatement.

CIVIL PEANTLY ASSESSMENTS

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>
4330836	57.12004	9/18/95

The violation was very serious and was caused by the company's negligence. Moreover, when combined with Buffington's violation of section 75.12014, the violation proved fatal to Buffington. In view of these factors, and given the company's large size, and its previous history of violations, a substantial penalty is warranted. I find that a civil penalty of \$9,000 is appropriate. I have mitigated the assessment to some extent to reflect the company's good faith abatement.

<u>Citation No.</u>	<u>30 C.F.R. section</u>	<u>Date</u>
4447563	57.12014	9/8/95

The violation was extremely serious. When combined with the violation of section 57.12004, the violation proved fatal to Buffington. In view of these factors, and given the company's large size, and its previous history of violations, a penalty like that assessed for the violation of section 57.12004 would have been appropriate. However, the company's total lack of culpability and its good faith abatement call for a significant mitigation of the penalty. I find that a civil penalty of \$1,500 is appropriate.

ORDER

New Mexico Potash **IS ORDERED** to pay a civil penalty of \$9,000 for the violation of section 57.12004 (Citation No. 4330836) and to pay a civil penalty of \$1,500 for the violation of section 57.12014 (Citation No. 447533). The payments are to be made to the Secretary within 30 days of the date of this decision, and upon their receipt, this proceeding **IS DISMISSED**.

David F. Barbour
Administrative Law Judge

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